

Indicators on Justice and Environment

Edition by

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**FARN**

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## List of Acronyms and Abbreviations

AMEAI	Asociación Marplatense de Estudios Ambientales (Association of Environmental Studies of Mar del Plata)
AUSA	Autopistas Urbanas Sociedad Anónima
CC	Civil Code
CABA	Autonomous City of Buenos Aires
CCA	Código Administrativo (Administrative Code - Province of Buenos Aires)
CCAyT	Código Administrativo Tributario (Administrative and Tax Code - City of Buenos Aires)
CN	Constitution Nacional
CNCP	National Court of Criminal Cassation
CNRT	Comisión Nacional de Regulación del Transporte (National Commission on Transport Regulation)
CONICET	Consejo Nacional de Investigaciones Científicas y Técnicas (National Scientific and Technical Research Council)
GAM	Gestión Asistida Multijurisdicción (Multijurisdictional Assisted Management Aires)
CPBA	Constitution de la Province of Buenos Aires
CPCCN	Código Procesal Civil and Commercial de la Nation
CPCCPBA	Código Procesal Civil and Commercial de la Provincia de Buenos Aires
CPPN	Código Procesal Penal de la Nation
CPPPBA	Código Procesal Penal de la Province of Buenos Aires
CSJN	Court Suprema de Justicia de la Nation
ECLAC	Economic Commission for Latin America and the Caribbean
EIA	Environmental Impact Assessment
FARN	Fundación Ambiente y Recursos Naturales
GCBA	Government of the City of Buenos Aires
IGJ	Inspección General de Justicia (General Inspectorate of Justice)
INECE	International Network for Environmental Compliance and Enforcement
INIDEP	Instituto de Investigación y Desarrollo Pesquero (Institute of Fishing Research and Development)
INTA	Instituto Nacional de Tecnología Agropecuaria (National Institute of Agricultural Technology)
INTI	Instituto Nacional de Tecnología Industrial (National Institute of Industrial Technology)
LGA	Ley General del Ambiente (General Law of the Environment)
PROJUM	Model Court Project
SAGPyA	Secretaría de Agricultura, Ganadería, Pesca y Alimentos de la Nación (Argentine Secretariat of Agriculture, Stockbreeding, Fishing and Food)
SCBA	Supreme Court of Buenos Aires
SENASA	Servicio Nacional de Sanidad y Calidad Agroalimentaria (National Food Safety and Quality Service)
SPA	Secretaría de Política Ambiental (Secretariat of Environmental Policy - Province of Buenos Aires)
UBA	Universidad de Buenos Aires
WRI	World Resources Institute

## 1. Introduction

Access to justice and environmental conflict management are fundamentally important topics in exercising the right to a healthy environment that is both adequate and suitable for human development.

In this study, we plan to analyze the right of access to justice, which arises as a key element in environmental governance and which we believe is much further reaching than Principle 10 of the Rio Declaration, which merely associates it with an individual's capacity to gain access to justice, i.e. the possibility of satisfying one of the requirements to becoming a party to a legal case, such as to sue or be sued<sup>1</sup>.

Our study incorporates a series of additional factors that we believe give overall meaning to the concept. They include equal access to proceedings, involving in addition to the aspects linked with legal standing those concerning production and offer of evidence, the scope of the decisions, adaptation of the justice system in this direction and the search for social and individually just solutions<sup>2</sup>.

Access to justice by citizens, either individually or in associations, in defence of the quality of the environment, is seen as an exercise of public participation which is vitally important in controlling the actions of public authorities or individuals that affect, or may affect, both the environment and the effective enforcement of environmental regulations.

Until the 1994 constitutional reform in Argentina, however, there was a considerable vacuum in national legislation on the jurisdictional protection of so-called diffuse and collective interests; the protection of the subjective rights or legitimate interests of the claimant justified access to justice. This conception was undoubtedly insufficient to cover those interests that clearly exceeded the sphere of the subject's purely individual interests. Protection of the environment, public health, urban aesthetics, historical heritage and consumers are examples of situations that go beyond the subjective dimension and enter an axiological plexus which concerns the whole community.

The reformed Constitution overcame these limitations in the Argentine legal system by recognizing the existence of "rights of collective incidence" and particularly the right to environmental protection.

These rights of collective incidence comprise a variety of diffuse interests that are not exclusive to any particular subject, but are scattered or spread among all the members of a community. So, any attack on the interests of an individual naturally extends to all the members of the group or category of persons, meaning that legal questions in environmental matters can only be addressed from a collective point of view.<sup>3</sup>

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<sup>1</sup> Principle 10 of the Rio Declaration: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

<sup>2</sup> See FARN, Di Paola, María Eugenia (2003), *Symposium of Judges and Prosecutors of Latin America, Environmental Compliance and Enforcement*. 23-24 September 2003, Buenos Aires, Argentina and Nàpoli, Andrés (2005), Working document on access to justice, FARN.

<sup>3</sup> Sabsay, Daniel A. (2003). *Constitución y ambiente en el marco del desarrollo sustentable*. Symposium of Judges and Prosecutors of Latin America. Buenos Aires, FARN, 2003.

Meanwhile, the very characteristics of environmental questions, the need to prevent the consequences before any damage occurs, or public interest that is compromised in environmental cases, demand very innovative responses from the legal system.

Therefore, over the last decade the work of judges has addressed these shortcomings, or in some cases absences, of administrative power in enforcing environmental regulations. For this reason, those who have been instrumental in developing innovations in the environmental field have been the judges.

Judges have taken innovative decisions in environmental matters that have influenced legislative changes in different aspects, especially concerning the question of environmental damage in the 2002 General Law on the Environment.

Such is the context of this investigation, which aims to identify and analyze the state of affairs and the implementation of the right of access to justice in environmental disputes, and to identify indicators to assist in evaluating enforcement, as well as in formulating a series of recommendations. The project involved the analysis of various legal sources, i.e. regulations, jurisprudence and environmental doctrine, along with interviews and field studies in the courts and offices of public prosecutors that committed themselves to the project by opening the doors of their respective institutions. At the end of the first study a workshop was organised to analyze the draft document containing the principal conclusions with the magistrates and prosecutors included in the project, other magistrates summoned to that effect and experts in the academic sector and civil society. A series of interesting and constructive conclusions and proposals emerged from the workshop as significant inputs, and they may be found in this publication.

The document begins by referring to the methodological criterion and the scope of the project, a specific description of the main legal environmental actions in the national legal system and in the jurisdictions covered by the investigation, i.e. the Province of Buenos Aires and the Autonomous City of Buenos Aires, a reference to the chosen courts and the respective organisation of Justice, and a detailed analysis of management indicators and the legal process in the cases chosen. Then come the conclusions of the review workshop and the final conclusions to this investigation.

We trust that this document will prove to be of use for magistrates and for the different sectors of our society in perfecting the management of environmental conflict management.

## 2. Methodology

An indicator is an evaluation and management tool which can be used to strengthen programmes and/or activities. We can think of it as a quantitative or qualitative measure that is used to reveal changes and simplify information on reality which can help to understand and appraise complex phenomena.<sup>4</sup>

When defining indicators on access to justice, we identify a direct relation with their finality, since they seek to evaluate the organisation of justice as well as the response of the judicial proceeding and its specific application in dealing with environmental disputes. These indicators will allow magistrates to prepare an analysis of performance, evaluating the effectiveness of the tools and strategies designed to achieve the proposed objectives and also to inform the community of them transparently.

It should be stressed that in order to develop the methodology for this investigation, several sources were considered on the subject of analysis, including the criterion used by the International Network of Environmental Compliance and Enforcement (INECE) and FARN, along with other national and Latin American organisations for the structural analysis of management in public bodies in the project which is part of the initiative on Environmental Compliance and Enforcement Indicators of the World Bank Institute, together with ECLAC.<sup>5</sup> Also considered were the indicators arising out of the Access Initiative, set up by FARN in Argentina on access to information and public participation in decision-making processes, whose research methodology for the most part based itself on others employed by the World Resources Institute (WRI)<sup>6</sup>. Finally, there is analysis of issues and problems linked to environmental legal proceedings included in the various declarations and conclusions that emerged as the result of the analysis made by magistrates in meetings, symposia and workshops specifically linked to the subject, such as the Declaration of Buenos Aires and the Declaration of Colonia.<sup>7</sup>

Bearing in mind the criteria considered and the finality of the project, we shall start with the hypothesis. The Judiciary has indicators on the access to justice and the environmental proceeding, which when systematised can optimise and contribute to overcoming obstacles in how justice functions in environmental conflicts.

These indicators include both those related to the structural management of courts, and those linked to environmental judicial proceedings.

The first group of indicators on the management of the courts responds to the INECE indicators on environmental compliance and enforcement, which pursues a logic related to the development and effect of the activities in connection with executing laws. It identifies indicators in the organisation of public bodies, analysing by means of input indicators the resources that serve as a base for the authority to carry out its functions and objectives. Then, by way of output indicators, it addresses data from the system that refer to the product of those activities, considering for example the number of environmental cases with the execution of a sentence. The classification also

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<sup>4</sup> Definition that takes as sources the *Forum of INECE indicators at: [www.inece.org](http://www.inece.org)*. Indicator definition by United Nations Population Fund and EEA glossary.

<sup>5</sup> For further information see [www.farn.org.ar/investigacion/enforcement/index.html](http://www.farn.org.ar/investigacion/enforcement/index.html)

<sup>6</sup> Petkova, Elena; Maurer, Crescencia; Henninger, Norbert and Irwin, Frances. Closing the Gap. Information, Participation and Justice in Decision-making for the Environment. World Resources Institute. Based on the findings of The Access Initiative. Washington DC. 2002 Nápoli, Andrés (ed) (2006) Acceso a la información y participación pública en materia ambiental: actualidad del principio 10 en la Argentina / Andrés Nápoli [et al.] .- Buenos Aires: FARN, 2006.

<sup>7</sup> For further information see [www.farn.org.ar](http://www.farn.org.ar)

establishes categories of outcome indicators, including immediate and intermediate outcome indicators on the short and medium-term effects of the output indicators, as well as the final outcome indicators that refer to quality of the environment.

The second group of indicators, i.e. those which are specifically linked to environmental legal actions and the different steps involved, is discussed with reference to selected environmental cases and the relevant elements identified in the proceeding. There is analysis of the different aspects linked to the field and type of action, their particular object, active and standing to be sued, preventive measures, evidence, the bodies involved and forms of intervention in the proceeding, the fees and costs, the grounds, effects and scope of the decision, time and the instances explored. The aim is to analyze trends, identify problem areas and aspects that need strengthening with a view to lead to securing an appropriate administration of justice in the matter.

The chart below presents the indicators mentioned:

### Assessment Charts on Management Indicators

INDICATOR	ASSESSMENT
<b>Staff</b>	Reveals the level of personnel in a court and/or office of public prosecutor in order to determine if it is the required number to carry out the work. It is defined not only by association with the actual number of persons in each unit, but also with the number of cases pending and the court hours.
<b>Training</b>	Serves to determine if courts and/or offices of public prosecutors have specific knowledge on environmental matters. If so, we believe that they will be in a better position to take appropriate measures, appraise the evidence produced and pass judgement.
<b>Budget</b>	Reveals the budgetary system of the chosen court and/or office of public prosecutor to help determine whether it has economic capacity to be able to afford the immediate spending this type of process may require.
<b>Number of general and environmental cases</b>	Indicates the workload of the court and/or office of public prosecutor in general and, in particular, how much of it is on environmental matters. The latter shows if effectively the claim is for this type of right on the understanding that they are of high complexity and demand greater effort by the judicial organ responsible.
<b>Equipment</b>	Used to determine if the courts and/or office of public prosecutors are materially equipped to perform their tasks, thus simplifying the procedure in cases over which they have jurisdiction.
<b>Registers and Statistics</b>	This indicator is particularly useful since those who use it are much better equipped to know the reality on which they must work. It also gives them an organisational system that may be beneficial in the performance of their tasks.
<b>Pro bono Legal Service</b>	Indicates the situation of an individual who lacks

	the means to finance a lawsuit of these characteristics and needs advice and backing to bring a case in environmental matters. This type of service gives access to justice to those who are in a position of weakness.
<b>Publicity of Case Law</b>	Reveals whether citizens have mechanisms of access to the jurisprudence of the courts that could serve as a basis for considering similar or analogous situations in cases in which the environment is compromised.

### Assessment Charts on Indicators on the Legal Proceeding

<b>INDICATOR</b>	<b>ASSESSMENT</b>
<b>Sphere of action</b>	This helps to know in which jurisdictions, of those studied, civil, criminal and/or administrative cases are heard, and whether there is a proliferation of certain cases in any particular jurisdiction.
<b>Type of environmental action</b>	Identifies the type of action chosen in environmental cases since our system establishes different types of actions for the defence of cases in which the environment is compromised.
<b>Particular object of the action</b>	Indicates the specific reason for the legal action, the subject of the claim, and the most common situations in which the environment is under threat.
<b>Standing to sue</b>	Identifies the plaintiffs in environmental proceedings and the interpretation of the judge in each case.
<b>Standing to be sued</b>	The opposite of the above, this indicator considers the defendants in this type of proceeding and raises the problems the plaintiff and/or the judge must face for reliable resolution.
<b>Precautionary measures</b>	Helps to identify if preventive measures are requested by the parties and to what degree, the judicial criterion for possible acceptance and, where appropriate, for ordering the measures deemed necessary.
<b>Evidence</b>	Beneficial in establishing the principal circumstances posed in this instance and the different problems in areas of the offer, production and formalities of the evidence, if any.
<b>Intervening bodies</b>	Useful in determining if technical and/or auxiliary bodies intervene in this type of proceeding, as a reflection of the level of complexity of the case.
<b>Forms of intervention</b>	This indicator serves to determine if other forms of intervention are used in the process authorized by the regulatory system to assist in the legal action.
<b>Fees and costs of the process</b>	Reveals the legal criterion used in regulating the fees and costs of proceedings, since it could be one of the main difficulties for individuals when bringing actions.
<b>Grounds for the decision</b>	Helps analyze if environmental regulations are being effectively applied in court and, if so, to know the interpretation given in each case in particular.
<b>Effects and scope of the decision</b>	Extremely important since it reflects the degree to which a decision has been observed, i.e. its

	compliance, and similarly shows the difficulties in putting into practice the judicial verdict.
<b>Time</b>	Determines how long it takes the court to hear a case and produce a decision in this type of process and if the request for justice has received a prompt response.
<b>Instances</b>	Reflects the path followed by the court case from its start until firm decision. Also shows the different interpretations that are possible in a particular dispute and the effects of lodging an appeal, since they are appeals on return or suspension, depending on the jurisdiction where the case is heard.
<b>Use of alternative methods</b>	Serves to determine if alternative means of conflict resolution are being used within the proceeding to simplify complex situations.

### **3. Scope of the project**

The scope of the project includes jurisdictions in both the Province and the City of Buenos Aires, as a paradigmatic reality in a metropolitan area that shares problems and issues of environmental concern. A field study was carried out in the city of La Plata, capital of the Province of Buenos Aires and seat of its Supreme Court of Justice. Consideration was also given to another city in the Province of Buenos Aires, Mar del Plata, since a combination of different elements make this one of the most important cities in the province.

The study focused on local and federal justice in these jurisdictions and special emphasis was placed on the choice of trial courts with important environmental cases and as far as possible with dissimilar comparative criteria, i.e. with different backgrounds in the aspects analyzed (e.g. legitimation, evidence, effects of the decision). Courts working on aspects related to the quality of its management, whether by quality certification programmes or by programmes promoted by the Ministry of Justice, were also taken into account.

The study into the appeals courts or chambers was made by following up appeals from the lower courts selected.

Finally, concerning the Argentine Supreme Court of Justice, the Supreme Court of the Province of Buenos Aires and the Superior Court of the Autonomous City of Buenos Aires, cases with original jurisdiction were analyzed, together with those that come from the trial courts as the result of an appeal.

In the jurisdictions analyzed, consideration was given to subjects related to environmental law. On one hand, civil law, since many cases that touched on aspects concerning environmental damage arose out of problems of civil liability. On the other, administrative jurisdiction, as a large part of environmental disputes include the state as a significant defendant. Criminal cases were also analyzed, the choice of which was based on joint work with offices of public prosecutors in each jurisdiction, bearing in mind the role of the Office of the Public Prosecutor.

As regards the cases considered and the time when they were brought, although At first the intention was to cover the period of 5 years prior to the start of the study in December 2004, but due to the importance of some legal cases brought before that time but in which a final decision is still pending, in some cases it was decided to extend the initial criterion. The study period ended in May 2005, and was then reviewed in the workshop held for that purpose.

## **5. Jurisdictions selected**

Below are various aspects related to the jurisdictions involved in this investigation with reference to their characteristics, the organisation of justice and the criteria used for the selection of the courts included in the study.

### **5.1. The City of Buenos Aires**

#### **5.1.1. Characteristics of the CABA**

In analysing access to justice in the City of Buenos Aires, we believe that it is necessary to consider certain significant aspects in this jurisdiction, such as its geographical position and its interrelation with other jurisdictions and with the international arena, its surface area and its population density.

The City of Buenos Aires covers an area of 202 square kilometres. It lies on the right bank of the River Plate and measures 60.5 kms in length (north–south 19.4 km., east–west 17.9 km.). It is located at latitude 34° 36' south, longitude 58° 26' west and at an altitude of 25m above sea level. In the north it borders on the District of Vicente López; in the south, on the District of Lomas de Zamora; in the east, the District of Avellaneda; and, in the west, the District of Tres de Febrero. In the north-west it borders on the District of General San Martín; in the north-east on the River Plate; in the south-west with the La Matanza and to the south-east with Lanús. The mean annual temperature is 18 degrees.

It has a population of approximately 3 million inhabitants, which gives a density of 15,201 inhabs/km<sup>2</sup>.<sup>8</sup> An extensive transport network connects it with both the interior and the exterior of the country, and together with Greater Buenos Aires, it has a population of over 10 million inhabitants.

Therefore, it is not only one of the most densely populated urban centres in the world but it is also a source of challenges considering the various problems that these facts and figures can bring to environmental issues.

An example: in the last half of the 20th century, building work took place in Buenos Aires regardless of the fact that the city was located in a region that was liable to flooding. The same thing happened with growth in the Metropolitan Area. Floods are now one of several problems the city faces, often producing a need to implement partial emergency solutions.

Exceptions to the chart of uses and the zonification of the Code of Urban Planning of the former MCBA are another far-reaching component with a negative contribution to planning and the territorial organisation of the City. Consequently a pre-existing problem remains in relation to that territorial organisation of the City of Buenos Aires and its Metropolitan Area.

We cannot ignore the fact that various characteristics of the city can be viewed in the light of experiences in other similar Latin American cities, where there are certain analogous situations. They include increased migration towards urban areas, their

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<sup>8</sup> Source: Dirección General de Estadísticas y Censos (G.C.B.A.) based on census details

rapid growth, a rise in sewage treatment, growth in public awareness on environmental issues in general and on the environmental impacts of the sewer system in particular, more environmental regulations, more frequent treatment of industrial liquid waste prior to its discharge into the sewage network, privatisation of water provision and of the sewage system and the subsequent cancellation of the concession, a tendency to implement systems of basin management, a greater degree of participation by social plaintiffs.

It should be mentioned that the City is the Federal Capital of the Argentine Republic, and for that reason aspects related to national and local justice coexist in the area, and are analyzed in the following section<sup>9</sup>.

### **5.1.2. The organisation of national justice**

Article 116 of the National Constitution establishes the composition of the Argentine Judicial Power, which comprises a Supreme Court of Justice and other lower courts that Congress may establish within the Nation. The provinces and the Autonomous City of Buenos Aires also have their own legal structure, in accordance with the provisions of articles 31 and 129 of the National Constitution.

So the Judiciary of the Argentine Republic comprises the Nacional Judicial Power, provincial judiciaries and the Judicial Power of the Autonomous City of Buenos Aires.

The Argentine Judicial Power is formed by the Argentine Supreme Court of Justice, the Council of Magistrates, the Judicial Impeachment Jury, Trial Courts and the Courts of Appeal. The Trial Courts and the Courts of Appeals are divided into federal and ordinary jurisdiction. Article 120 of the Constitution also establishes that the Office of the Public Prosecutor is an independent organ with functional autonomy and financial independence, whose function is to institute judicial proceedings in defence of the legality of the general interests of society, in coordination with the other authorities of the Republic. It consists of the Attorney General of the Nation and the General Counsel of the Nation and other members, as established by the law.

The Argentine Council of Magistrates is composed of 20 members: the President of the Argentine Supreme Court of Justice, four judges, eight legislators, four lawyers, one member of the Executive and two members of the academic and scientific fields. Among its functions is that of issuing regulations related with judicial organisation and all laws necessary to ensure the independence of judges and the effective justice service. It can also exercise disciplinary actions against the judges and carry out proceedings for his removal<sup>10</sup>.

Nationally, the Office of the Public Prosecutor is separated from the Judiciary. The reformed National Constitution of 1994 establishes in art. 120 that the Office is an independent organ with functional autonomy and financial independence, whose function is to institute judicial proceedings in defence of the legality of the general interests of society, in coordination with the other authorities of the Republic.

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<sup>9</sup> See: <http://www.farn.org.ar/docs/p07/publicaciones7-7.html>

<sup>10</sup> The reform of the Council of Magistrates was promoted by the Executive in 2004. Among other aspects it would reduce the number of members of the body, which could affect the reduction of pluralism and concentration of power in a single estate. This led to severe criticism by various plaintiffs from the political arena and from civil society. In this regard FARN and other organisations presented a letter to the President and the Argentine Minister of Justice and Human Rights expressing their rejection of the bill to reform the Council of Magistrates being discussed in the National Congress. It said that the reform should be as the result of further discussion and must clearly show that it contributes to its democratisation and transparency. Finally the bill was adopted by Law 26,080 published in the B.O. on 27/02/2006.

The Office of the Public Prosecutor comprises the Office of the Attorney General of the Nation and the Office of the National Counsel for the Defence. The Office of the Attorney General directs and coordinates the Offices of Public Prosecutors while the Office of the National Counsel for the Defence does likewise with the Official Defence Counsels. Both entities intervene in legal proceedings and their role in the criminal processes analyzed here is of vital importance. The Attorney General of the Nation has a double role since on one hand he is the Prosecutor in the Argentine Supreme Court of Justice, while on the other he represents the authority of the prosecutors.

### **5.1.3. The organisation of justice in the CABA**

As established in its local constitution, the Judicial Power of the Autonomous City of Buenos Aires is composed of the Superior Court of Justice, the Council of Magistrates, the courts established by the law and the Office of the Public Prosecutor.

However, today, and almost 10 years after adopting its Constitution, the Judiciaries of both the Nation and the City, made up of the Administrative and Tax, and Misdemeanours and Small Claims courts all coexist in the City, as a consequence of the fact that the ordinary jurisdictions of the Nacional Judicial Power located in the territory have still to be transferred to it. The procedure in civil cases, for example, corresponds to the national judicial system and not that of the City.

As regards the justice system of the City of Buenos Aires, the maximum local organ to have jurisdiction in judicial cases is the Superior Court of Justice, made up of five (5) members.

Finally, the constitution of the City of Buenos Aires states that the Office of the Public Prosecutor forms part of the Judiciary.

### **5.1.4. Selection of national and local courts and/or prosecutors' offices in CABA**

In this investigation specific work was done with the Ordinary Civil, Federal Criminal and Correctional Courts and the Administrative and Tax Courts of the City.

In Nacional Civil Justice, 110 trial courts operate: 86 are patrimony and 24 are family courts. The Appeals Court is composed of 13 courtrooms (from A to M). Civil justice was included in the study since in this jurisdiction various precedents have been set which, based on responsibility for the legal facts are important cases, after which case law was drawn up on questions of environmental damage and relevant legislation was sanctioned.

It should be stressed that at present and as a consequence of the transfer of cases from the former Municipality of the City of Buenos Aires and the current Government of the Autonomous City of Buenos Aires to the Administrative and Tax court, few a large cases in environmental matters are being handled by the jurisdiction.

In relation to the trial courts, work was done with Court N° 54 in the care of Dr. Ricardo Li Rosi, N° 94. in the care of Dr.Cecilia Y. Federico, and N° 100, in the care of Dr. Miguel A. Prada Errecart. The choice was due principally to the fact that the first of the courts, in accordance with a previous investigation, had a background in environmental cases. In Court 94, the criterion was due fundamentally to the fact that it was certifying ISO 9000 standards and it was deemed appropriate to analyze whether this sort of situation had any kind of implication in the indicators studied. The ISO 9000 standards

are a set of international rules and quality guidelines that seek to establish a management system to ensure continuous improvement in an organisation's management system<sup>11</sup>. Finally, regarding Court N° 100, it was thought most interesting to be able to study information from this court in view of the fact that here the case on hydrocarbon contamination "*Subterráneos de Buenos Aires Sociedad del Estado c/Propietario de Estación de Servicio Shell s/Daños y Perjuicios*" (*Subterráneos de Buenos Aires Sociedad del Estado vs Proprietor of Shell Service Station on Damages*) was in execution of judgement.

Attempts were also made to work with the Court of Appeals in the jurisdiction and in particular with Courtroom H (Court of Appeal in the Subterráneos case), and Courtroom I (Court of Appeal in the Opalinas Hurlingham case), but no positive response was received from the authorities.

In national criminal justice, the Criminal Justice of the Argentine Judicial Power is divided into the following jurisdictions: Federal Criminal, Juvenile, Examining, Economic Criminal and Correctional. In Federal Criminal jurisdiction 12 trial courts operate along with a National Appellate Court in Criminal and Correctional matters composed of two courtrooms, 6 courts for oral hearings and the Court of Criminal Cassation.

Initially work was done with the Office of Criminal Prosecutor N° 5 in the care of Dr. Horacio L. Comparatore, since according to the Statistics Office of the Argentine Attorney General, it is the only Prosecutor's Office to have referred a case for this type of crime in 2004. Also, work was done with the trial courts of the Federal Criminal and Correctional jurisdiction.

This jurisdiction was selected due to the number of precedents that could be studied as a consequence of the fact that jurisdiction in infringements of Law 24,051 had traditionally been federal—with few exceptions- and that until such time as the sanction of laws on minimum standards for environmental protection led to the majority of criminal cases in matters of hazardous waste being handled in this sphere<sup>12</sup>.

In accordance with regulations, the federal judge makes the preliminary investigation in offences committed on the high seas aboard national vessels; in Argentine waters, islands or ports; in the Federal Capital or in the provinces in violations of national laws; offences of any kind committed in places where the national government has exclusive jurisdiction except those which come under the ordinary jurisdiction of examining judges in the Capital. He also has sole jurisdiction in handling those cases mentioned.

Work was also done with Court N°3 in the care of Dr. Daniel E. Rafecas and with Court N°10 in the care of Dr. Julián D. Ercolini. The selection criterion for both courts was the spirit of cooperation and interest in the project shown by both magistrates.

Finally, the Administrative and Tax Court of the Judicial Power of the City is made up of twelve (12) trial courts and one Court of Appeals comprising two (2) courtrooms.

Work was done with Court N°1, in the care of Dr. Juan V. Cataldo and with Court N° 3, in the care of Dr. Guillermo F. Treacy. Efforts were made to work with Court N° 8 in the care of Dr. Osvaldo O. Otheguy and with N° 9 in the care of Dr. Alfredo A. Kersmman.

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<sup>11</sup> The basic standards of the ISO family in questions of quality management systems are: ISO 9000 on fundamentals and vocabulary; ISO 9001, on matters of requirements; ISO 9004, guidelines for performance improvements and, ISO 19.011, guidelines on environmental and quality auditing. Source: [www.iram.com.ar/](http://www.iram.com.ar/)

<sup>12</sup> See chapter on environmental criminal action

In the first case no positive response was received while in the second it was not possible to carry out the research work since the judge responsible was on leave.

The selection criterion for the courts was that they should have a broad vision of the various indicators in access to environmental justice, since cases in the matter had been heard according to the precedents studied in those courts. So information could be studied from the two courtrooms of the Court of Appeals in the jurisdiction and in the last instance of the Judicial Power in the City, i.e. the Superior Court of Justice since a positive response had been received by its magistrates on involvement in this project.

## **5.2. The Province of Buenos Aires**

### **5.2.1. Characteristics of the Province of Buenos Aires and the City of La Plata**

Just as in the case of the City of Buenos Aires, consideration was given to the special situation of this jurisdiction in relation to certain aspects of its context for this study on the right of access to environmental justice.

First and foremost, it should be stressed that the Province of Buenos Aires is economically the most important in the country, accounting for around 32% of total GDP<sup>13</sup>. Its socio-economic and cultural conditions will be relevant to an analysis of the different problems it faces.

The province measures 892 kilometres from north to south, and 600 kilometres east to west, covering 307,571 km<sup>2</sup>, or 8.2 % of the surface area of the country. It comprises 134 districts<sup>14</sup>.

Its population of 13,827,203 inhabitants<sup>15</sup> represents 38.13% of the total population of Argentina, giving a density of 45 inhabitants per km<sup>2</sup>. There are 11,400,404 people over 10 years of age (51.81% are female and 48.19% male), and of that total 11,219,947 are literate (98.417%), while 180,457 are illiterate.

Its capital is the City of La Plata, with 574,369 inhabitants and a population density of 620.3 inhabs./km<sup>2</sup>. According to the INDEC report of October 2002, 54.3% of the population of Greater Buenos Aires (city plus districts of Greater Buenos Aires) live below the poverty line, i.e. 6,300,000 inhabitants. However, there are glaring differences between the Capital and Greater Buenos Aires. While in the City of Buenos Aires the poverty index reaches 21.2%, in the districts of Greater Buenos Aires it affects 64.4% of the inhabitants. In October 2002, 24.7% of the population (2,800,000 persons) corresponding to 5.7% of the population of the City of Buenos Aires and 30.5% of the inhabitants of Greater Buenos Aires, were considered to be destitute, i.e. having insufficient income to acquire a basic basket of foodstuffs<sup>16</sup>. These figures are a reflection of unemployment rates in each district.

### **5.2.2. Organisation of Justice in the Province of Buenos Aires.**

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<sup>13</sup> There are no GDP estimates for the municipal district of Morón.

<sup>14</sup> Source [www.gba.gov.ar](http://www.gba.gov.ar)

<sup>15</sup> Data from the 2001 census, which gives 9.8% growth over the 1991 figures, when the population was 12,594,974 inhabitants. Although the total population of the country grew at a similar rate in the same period (11.2%), the density of the Rep. Argentina is much less than that of the province (13 inhabs/km<sup>2</sup>).

<sup>16</sup> See <https://www.caritas.org.ar/download/sit-eco-arg-junio2003.doc>

As established in the sixth section, art. 160, of the Provincial Constitution, *“the Judicial Power of the Province of Buenos Aires, will be executed by a Supreme Court of Justice, Courts of Appeal, Judges and any other Courts the law may establish”*.

The Organic Law of the Judiciary No. 5,827 regulates the various courts and jurisdictions in the province, their division into judicial departments, and the courts and functionaries corresponding to each one of them.

In total it comprises eighteen judicial departments, with their respective appeals courts, civil and commercial judges and other judicial organs, and the following judicial departments: Azul, Bahía Blanca, Dolores, General San Martín, Junín, La Matanza, La Plata, Lomas de Zamora, Mar del Plata, Mercedes, Morón, Necochea, Pergamino, Quilmes, San Isidro, San Nicolás de los Arroyos, Trenque Lauquen, Zárate-Campana.

In the Province there also exist Magistrates' Courts in those localities that are not centres of judicial departments and whose judges have the powers provided by law 5,827 and its modifying decrees. Among these, law 13,078 grants the Judges of the Peace powers that were exclusive to the Guarantee Judges, such as imposing measures of personal coercion –review and extension of arrest- and carry out acts or procedures that seek the incorporation of evidence into the criminal case, without suppressing or restricting their real jurisdiction<sup>17</sup>.

According to art. 1 of Law 5,827, the administration of justice in the Province is exercised by the Supreme Court of Justice; the Court of Criminal Cassation; the Courts of Appeal in Civil and Commercial matters, Guarantee courts in Criminal and in Administrative matters; Trial Court Judges in Civil and Commercial and in Administrative matters, Guarantee judges in Correctional matters and Execution judges in criminal matters; Criminal Courts; Administrative Courts; Labour Courts; Family Courts; Juvenile Courts, Justices of the Peace and the Notarial Court.

The Office of the Public Prosecutor is also an integral part of the Judiciary. In arts. 175, 176, 177, 182 and 189 the Constitution of the Province of Buenos Aires refers to the Office of the Public Prosecutor. These regulatory provisions are basically organizational and not functional. It was only with the passing of Law 12,061 that its framework of functional jurisdictions and of regulation of its organisation was established and the hierarchical principle of government was fixed<sup>18</sup>.

The Office of the Public Prosecutor is performed by the Attorney General of the Supreme Court of Justice, by the Deputy Attorney General of the Supreme Court of Justice, by Court Prosecutors, District Attorneys, Legal Advisors for the Handicapped, and Defence Attorneys for the Poor and Absentees and Associate Defence Attorneys for the Poor and Absentees.

### **5.2.3. Selection of the courts and/or prosecutors' offices in La Plata**

In order to make the corresponding investigation in the judicial department of La Plata, courts with involvement in environmental matters were considered.

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<sup>17</sup> See [http://www.mjus.gba.gov.ar/legislacion/texto\\_justicia\\_de\\_paz.htm](http://www.mjus.gba.gov.ar/legislacion/texto_justicia_de_paz.htm)

<sup>18</sup> Conf. *Proceso Administrativo II- Revista de Derecho Público*, Rubinzal- Culzoni Editores (2003), Buenos Aires, article published by Andrieu, Mónica Graciela, *Las deudas jurídicas e institucionales de la Provincia de Buenos Aires*, p. 327.

For that reason the Civil and Commercial, Administrative and Federal courts (with multiple and criminal jurisdiction) were selected along with the uppermost court of the Province, the Supreme Court of Justice of Buenos Aires.

For the sake of order, the selection criterion for the courts in each jurisdiction will be set out separately.

The Civil and Commercial Court of the City of La Plata is composed of 23 Trial Courts. Courts N° 5 and 21 were selected for this investigation.

Regarding Civil and Commercial Court N° 5, in the care of Dr. Echeverría, the criterion for selection is exclusively related with the fact that it heard the first environmental case to become public knowledge "*Almada, Hugo N. c/COPETRO S.A. s/Indemnización por Daños y Perjuicios*" (*Almada, Hugo N. vs COPETRO S.A. on Compensation for Damages*). So far it is at the execution of judgement stage, having received verdicts from the trial court, the Supreme Court of Buenos Aires and the Argentine Supreme Court.

Civil and Commercial Court N° 21 is in the care of Dr. Iacomini, assistant lecturer on Natural Resources at La Plata University. We naturally believed he would be interested in environmental matters and, therefore, in participating in this project. In fact, in the court, cases of an environmental nature were identified, and cases of particular interest for the investigation were studied, e.g. "*Parodi, Angel y otro c/Martínez, Adolfo s/Ruidos Molestos*" (*Parodi, Angel et al vs Martínez, Adolfo on Irritating Noises*). Although the case was begun in 1991 and the verdict dates from 2000, we feel that it is important to bear it in mind since it reflects the criterion upheld by the Court on the prescription period for lodging the claim and the time it took to pass judgement (8 years). Moreover, in "*Salimbeni, Fernando Hugo y otro c/Municipalidad de Coronel Brandsen s/Daños y Perjuicios*" (*Salimbeni, Fernando Hugo et al vs Municipality of Coronel Brandsen on Damages*), even though no judgement has been passed, it is important to stress that it began in 1998 and the evidentiary term has still not expired.

The Civil and Commercial Court of the Judicial Department of La Plata is composed of the First Court of Appeal and the Second Court of Appeal, each divided into three courtrooms (I, II & III). Each Chamber has a single President and each of the courtrooms is made up of two judges.

Here a study was made of the case "*Almada, Hugo N. c/COPETRO S.A. s/Indemnización por Daños y Perjuicios*" of Courtroom I of the First Court of Appeal, currently in the care of Drs. Francisco Roncoroni and Carlos Alberto Pérez Crocco.

As to the Administrative Court of the Judicial Department of La Plata, it is worth stressing that it was only in December 2003 that trial courts N° 1 and 2 in administrative matters begin to function. As it is made up of only two courts (N° 1 in the care of Dr. Luis Federico Arias and N° 2 in the care of Dr. Cristina Logar) it was decided to study both.

These two courts began operations just over two years ago. Consequently, there was no opportunity to study cases with final judgement, with the exception of the rejections of protection. What could be studied were cases with decisions passed as a result of the preventive measures requested.

The Administrative Court of La Plata is a single chamber not divided into courtrooms<sup>19</sup>. It began to function in July 2004, and as a result, the interlocutory judgements in appealed in both courts had not yet been decided at the time of this study. However, the only two court resolutions in environmental cases were considered (one is being heard in Mar del Plata and the other in the jurisdiction of Quilmes).

In order to determine the existence of possible federal criminal cases on environmental matters, it was decided to go to the Office of the Public Prosecutor, due to the fact that the investigation of the cases is followed by the corresponding prosecutors' offices before being sent to the criminal courts. Dr. Franco was especially recommended for his background and experience.

In the first interview, the Federal Criminal Prosecutor, Dr. Franco revealed that he had assumed his charge only 6 months before and that so far no environmental cases had reached his hands. Consequently, it was decided to go directly to the federal criminal courts to carry on the investigation.

As regards federal justice, there are two courts with jurisdiction in criminal matters, Court N° 1, in the care of Dr. Blanco and Court N° 3, in the care of Dr. Corazza. Since the latter declined the invitation to participate in the project, we only have the information gathered in Court N° 1, where we were informed that there are practically no precedents in environmental cases, with the exception of that arising out of the collision involving a Shell vessel in Magdalena.

There are only two Federal Courts with multiple jurisdictions in La Plata (N° 2 and N° 4). It was decided to study Court N° 2 of Dr. Gabino Ziulu considering the number of cases related with the environment, as well as by virtue of his attitude of cooperation with this investigation.

When carrying out the investigation, which finished in 2005, the Federal Court with multiple jurisdiction was composed of three courtrooms: Courtroom I, integrated by Drs. Julio Víctor Reboledo, Alberto Ramón Durá and Sergio Oscar Dugo (†) (subrogee); Courtroom II, integrated by Drs. Román Julio Frondizi, Leopoldo Schiffrin and Sergio Oscar Dugo (†); and Courtroom III integrated by Drs. Carlos Alberto Vallefin, Carlos Alberto Nogueira and Antonio Pacilio.

A spokesperson for Dr. Sergio Oscar Dugo(†) did in fact reply to the Foundation's invitation to participate in the project.

Finally, the Supreme Court of Justice of the Province of Buenos Aires (henceforth SCBA) is the uppermost court in the Province of Buenos Aires entrusted with the control and enforcement of the Provincial Constitution. The SCBA is composed of nine (9) members and an Attorney General (cf. art. 27 of Law 5,827) and its powers are set out in art. 161 of the Provincial Constitution, and may be by appeal or are of original exclusive jurisdiction.

The Supreme Court of Buenos Aires is composed of nine Ministers, although at present one position is unoccupied. Considering the selection criterion for studying cases that have been brought to courts of appeal, it was decided to include the SCBA by reason of the case entitled "*Almada, Néstor c/Copetro S.A. s/Daños y Perjuicios*".

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<sup>19</sup> It has territorial jurisdiction of a regional nature in: La Plata, Quilmes, Lomas de Zamora, Mercedes Trenque Lauquen, Dolores, Azul, Mar del Plata, Necochea and Bahía Blanca.

Similarly, aspects related to the original jurisdiction of the court (in cases of competence between the public powers of the Province and those that arise between the courts of justice as a result of their respective jurisdiction) were considered.

### 5.3. The City of Mar del Plata

When analysing the characteristics of the City of Mar del Plata, it is necessary to consider certain statistical data on the people and the economy that make up the framework in which the right of access to justice and the enforcement of environmental regulations by magistrates can be exercised.

Indeed, housing conditions, access to sanitary services, cultural level and other data will be relevant variables in carrying out a study such as this. For that reason, we consider it pertinent to offer a brief analysis of official data from the 2001 National Census.

In the District of Gral. Pueyrredón there are 478,251 people aged over 10 (52.6% female, 47.4% male), of which 472,919 are literate (98.885 %) and 5,332 are illiterate.

In relation to the economic conditions that affect the enjoyment of rights –in particular those dealt with here- we can analyze the following variables: 10,393,156 people are aged 14 or older; the economically active population is 6,040,347 (58.11%), and the inactive is 4,352,809 (41.89%). Of the active population, a total of 191,742 (3.17%) work and receive a retirement pension, 344,323 (5.70%) work and study, and only 3,516,696 (58.22%) work. The unemployed<sup>20</sup> are those who only seek work (1,559,830; 25.83%), those who seek work and study (328,497; 5.44%), and those who seek work and receive a retirement pension (99,259; 1.64%). Meanwhile, the economically inactive population (4,352,809) can be divided into students (1,092,842), pensioners (1,182,478) and others (2,077,489).

As can be seen, especially from the high unemployment rate, the economic-labour factor is far from favourable in facilitating the right of access to justice. Although a suitable cultural level may help overcome economic conditions (as seems to be clear from the literacy level), we should not forget, for example, that a large amount of information - that could provide greater access to justice since the most well-informed citizen is the one who takes best advantage of such access – is at present found on internet, presupposing access to a computer and to the web. If the population lacks the financial resources to acquire those elements, access to information is limited thus hampering the suitability of the subject in his right to access.

Therefore, the lack of accessibility to the media, and the distance from the centres of information –implying costs of transfer and mobility-, plus the meagre salaries of the middle, lower middle and working classes, mean that the population has to choose between spending to be informed or covering basic individual or family needs.

A possible reflection at this point allows us to infer from the high literacy rate that illiteracy is not a relevant barrier for access to justice in the province, but it is highly demoralising and means that a citizen has to struggle daily with a multitude of bureaucratic and socioeconomic barriers, and also suffers the lack of comprehension

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<sup>20</sup> According to the official census, the high unemployment rate is due to the insensitivity of this source in recognizing those in unstable jobs as being in work, particularly at times of economic crisis such as that which accompanied the census.

and of justification behind the various requirements that prevent his entry into the legal system to modify such a reality so that he can live with dignity.

Such is the socioeconomic data and its potential links with the effective realisation of the right of access to justice.

### **5.3.1. The organisation of Justice and the selection of courts and/or prosecutors' offices in Mar del Plata**

We shall now describe the organisation of the different parts of the judiciary based in Mar del Plata, the Courts of Appeal in both federal and provincial jurisdictions, with special reference to those studied.

Regarding federal jurisdiction, in Mar del Plata we find an Appeals Chamber with multiple material jurisdiction (in all matters except electoral and social security) and with territorial jurisdiction in the districts of the Province of Buenos Aires of: Balcarce, General Alvarado, General Pueyrredón, Lobería, Mar Chiquita, Necochea, San Cayetano, Azul, Bolívar, General Alvear, General Lamadrid, Juárez, Laprida, Las Flores, Olavarría, Rauch, Roque Pérez, Saladillo, Tandil, Tapalqué and 25 de Mayo, Dolores, Tordillo, General Lavalle, Maipú, Ayacucho, Castelli, Chascomús, Pila, General Belgrano, General Madariaga, General Guido, and the Urban Municipalities of La Costa, Villa Gessel and Pinamar.

The new Federal Court of Necochea will now have jurisdiction over the Districts of Gonzalez Chavez and Tres Arroyos. It is the appeals court for the Federal Courts of Mar del Plata Nº 1, 2, 3 and 4, and the Federal Courts of Azul, Dolores and Necochea. Internally it is made up of three appellate judges: Drs Alejandro Tazza, Jorge Ferro and Graciela Arrola de Galandrini. The Court divides its work into three secretariats (civil and commercial, criminal and labour).

The Federal Court of Justice of Mar del Plata is composed of four federal trial courts. Court No. 1 with jurisdiction in criminal matters; Court No. 2 with civil and commercial, labour and fiscal jurisdiction; Court No. 3 with jurisdiction in criminal matters; and Court No. 4 with jurisdiction in civil and commercial matters and special laws.

Outside Mar del Plata, but linked to the appeals court, we also find the federal trial courts of Dolores and Azul.

In criminal matters we must consider the Federal Court of Oral Hearings with competence in criminal matters in the districts of the Province of Buenos Aires of Balcarce, General Alvarado, General Pueyrredón, Lobería, Mar Chiquita, Necochea, San Cayetano, Azul, Bolívar, General Alvear, General Lamadrid, Juárez, Laprida, Las Flores, Olavarría, Rauch, Roque Pérez, Saladillo, Tandil, Tapalqué, 25 de mayo, Dolores, Tordillo, General Lavalle, Maipú, Ayacucho, Castelli, Chascomús, Pila, General Belgrano, General Madariaga, General Guido, Urban Municipalities of La Costa, Villa Gessel and Pinamar, Necochea, González Chavez and Tres Arroyos. This is also the Court of Oral Hearings for the Federal Courts of Mar del Plata Nº 1 & 3 of Azul, Dolores and Necochea.

When evaluating the courts to be studied in the analysis of access indicators, the judges responsible for two federal trial courts, i.e. Federal Court Nº 2 in the care of Dr. Eduardo Pablo Jiménez, and Federal Court Nº 4 in the care of Dr. Alfredo López, were invited to take part in the project. The latter declined to participate so we were able to analyze the indicators only in the first of the cases: Federal Court Nº 2.

It is worth stressing that this Court was of interest for this investigation because it has multiple jurisdictions, i.e. over all matters except criminal and electoral cases. The follow-up made of the Court proved to be interesting since it is in the process of executing the PROJUM (Model Court) project. The Model Court Development Project - PROJUM- generally aims to design and put into operation a new model of court management and organisation that can improve levels of efficiency according to previously defined control indicators. It can also stimulate a process of judicial modernisation that will serve as a model to promote new experiences in the Judiciary as a whole<sup>21</sup>. The territorial jurisdiction of Federal Court N° 2 covers the districts of Balcarce, General Alvarado and General Pueyrredón, all in Buenos Aires Province.

As regards criminal cases, the Project prefers to analyze the federal prosecutors' offices, and not the Courts since, in view of the fact that prosecutors' offices investigate criminal cases, that would permit a more complete panorama of how many environmental criminal cases have been instituted, especially in light of the fact that many of them never receive judgement in the Courts. In the different federal prosecutors' offices of the National System of Mar del Plata, we selected N° 2 in the care of Dr. Peres, since it has dealt with various cases touching on environmental matters.

As to the Judicial Power of the Province of Buenos Aires, according to the Provincial Constitution and Law No. 5827 art. 14, the legal department of Mar del Plata has jurisdiction in the districts of Balcarce, General Alvarado, General Pueyrredón and Mar Chiquita. It is composed of two Courts of Appeals, one Civil and Commercial and another Criminal, a Family Court, three Labour Courts, Offices of Defence Counsel, Legal Advice Offices and 14 Civil and Commercial Courts. The Civil and Commercial Court is divided into 2 courtrooms.

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<sup>21</sup> The specific objectives of the PROJUM are:

- To construct a management development plan for the courts that will allow consistent improvement in performance.
- To develop a training and improvement plan of management skills of the personnel in courts to formulate and monitor the execution of the management development plan for courts.
- To incorporate new technologies both in equipment and in management and information systems and in the daily running of the courts.
- To contribute in the physical remodelling and restructuring of the courts to make them more efficient.
- To prepare a detailed design on structural and technological aspects of proceedings.
- To develop an automatised system for following up cases and providing information to interested parties, even at a distance, and develop the necessary training programmes for it to function correctly.
- To improve the filing and control systems for the movement of files and court registers.
- To design and develop an internal system of statistics as a tool for management and verification of progress in compliance with established indicators.
- To improve the levels of administrative coordination between the Courts and the Appeal Courts in relation to the planning of inputs and management of resources.
- To analyze and propose legal and administrative reforms needed for the adoption of the proposed model.
- To establish public information and reception of suggestions and complaints mechanisms to foster improvements in the quality of the service

In view of the very nature of the Project and the need to join forces between the different areas with jurisdiction in the sector, an **Executive Committee** was set up, comprising the National Secretary of Justice and Legislative Affairs, the Administrator General of the Supreme Court of Justice of the Nation, the President of the Administrative and Financial Committee of the Argentine Council of Magistrates and the Undersecretary of Interministerial Coordination of the Cabinet of Ministers, which is headed by a National Project Director, appointed from its members. The Project is managed by a Project Coordination Unit (UCP in Spanish), a branch of the Executive Committee and headed by an Executive Director, with the corresponding administrative support personnel (source [www.pjn.gov.ar](http://www.pjn.gov.ar))

In Civil and Commercial matters, initially we thought it relevant to follow up the indicators in Civil Courts N° 3, in the care of Dr. Aurelio Rago and N° 14, in the care of Dr. Fernando Méndez Acosta, but since the former declined to take part in the project, we extended the proposal to Civil Court N° 4, in the care of Dr. Ramiro Rosales Cuello who accepted. The choice was based on the fact that cases of environmental content had been tried in these courts.

In criminal matters we decided, for the same reasons given for Federal Justice, to follow up the cases instituted and investigated by the prosecutor's office. So, in the legal department of Mar del Plata we find Prosecutor's Office N° 11 with specific jurisdiction in environmental matters.

Jurisdiction in the administrative courts, as above, has only recently been implemented. In Mar del Plata, resolution 3034/03 allowed two trial courts to begin their functions: Administrative Court N° 1 in the care of Dr. Simón Francisco Isaac and Administrative Court N° 2 in the care of Dr. Adriana Mabél Sardo, both of which were studied in this investigation. The appeals court for these instances was at the time the Civil and Commercial Court of the legal department where the Courts are based. So, during the investigation the reader will find an analysis of the review of decisions handed down by the Civil Court but in administrative cases. They correspond to this transition period. Then with the establishment of the two Courts of Appeal in Administrative matters, the Appeals Court for the cases heard by these Courts it became the Court of Appeal in Administrative matters based in La Plata.

#### **5.4. The Argentine Supreme Court of Justice**

The Argentine Supreme Court of Justice is the highest court within the legal system of the Argentine Republic. It is composed of nine (9) members, although there are at present two unfilled positions, and its competence is established by the National Constitution and by decree-law 1285/58, either by appeal or at the first. At present seven secretariats operate within the Court according to the subject and one secretariat of original proceedings. The Supreme Court is at the head of the legal system in Argentina and together with the Council of Magistrates is responsible for administering the Judiciary.

The investigation was carried out principally with the Secretariat of Original Proceedings. The selection criterion was based on two factors: the possibility of having decisions made by the highest court in all aspects linked with the judicial process, and, due to the fact that the cases that were being tried to which access was possible were in fact of great interest for this study. In one of them particularly the action was based on the General Law on the Environment. Now, regarding the jurisdiction of the Court by appeal, work was done on the judicial decisions handed down by the highest court in the cases studied and analyzed in this investigation that had been tried by this court.

## **Management Indicators**

### **l) Conclusions on management indicators in the City of Buenos Aires**

Based on the study of management indicators, it was observed that:

The indicator on the number of personnel in a judicial organisation must be evaluated together with the number of cases heard, the subject and the hourly burden. We believe it would be positive to be able to reinforce the personnel area in view of the increase in tasks and considering the complexity and dedication cases may require.

There is good reason to train personnel, who mostly follow courses voluntarily, and use the new technological tools in their offices. However, to date there has been no obligatory training in environmental law, which would be very positive considering the complexity of environmental cases.

As a conclusion in the matter of the budget it must be stressed that in general budget administration is in the hands of higher organs than the court or prosecutor's office, and organisations should request from them the relevant applications in cases of spending which exceeds the amount in petty cash. So we believe that this situation could make it difficult to resolve particularly urgent cases in which the courts and/or prosecutors' office involved need to make certain outlays.

The number of disputes in this matter is low, and they are mostly with the city's administrative courts and the federal criminal courts. However, all jurisdictions hear cases in this matter.

In general the technical and information means are available to perform tasks related to judicial activity. Nevertheless, there are differences of access to Internet, which in many cases is only accessible for functionaries and basically depends on the prosecutor's office studied.

All the jurisdictions analyzed here have systems of registers and statistics that allow for a greater comprehension of their activity, which are required principally by higher bodies. However, to date no differentiated categorisation of environmental files exists, except in criminal law.

Although in the majority of jurisdictions decisions are published on the web page, there are differences in access depending on the jurisdiction. In some cases particular details from files are needed, which makes access for the individual who is not party to the proceeding difficult.

In conclusion, therefore, different possibilities for a Pro bono Legal Service may be found in the legal system of the city, which would imply improved access to justice for the community. Nevertheless, besides NGOs, few bodies specifically specialise in environmental matters.

Finally, in relation to the publication of case law, there is a marked trend to allow access to judicial decisions by individuals, although the system still requires perfecting.

### **i) Conclusions on management indicators in the City of La Plata**

In relation to management indicators studied in the legal system in La Plata, we can conclude the following:

In the different organs, especially in the trial courts, there was a generalised demand for more legal personnel, since there are at present restrictions that affect efficiency, effectiveness and the speed of proceedings, so judicial processes tend to take longer.

A positive indicator was the desire of functionaries and judicial employees to receive training, with several of them engaging in academic and teaching activities. However, compulsory training is scarce in matters that are addressed very frequently, and practically nil in relation to environmental matters. Despite this, with the complexity of environmental cases, greater training is considered necessary.

As regards the budget indicator, it can be concluded that both the Civil and Commercial and the Administrative courts studied depend exclusively on the SCBA for inputs to allow the courts to function, some of which are basic, such as reams of paper, and for petty cash. This determines spending that must be made in cases of, for example, a verification or an ocular inspection in which the judicial functionary must intervene. They must therefore request from the parties an advance for expenses, which must be deposited by order of the judge in the case. In contrast, it was observed that the jurisdictions that depend on the Council of Magistrates have fewer problems in the provision of inputs for the court and in having petty cash (several of them are allocated a sum to administer quarterly).

Most of the courts studied -except the Federal Criminal Court- have incorporated information tools as stipulated by the Provincial or Nacional Judicial Power. The informatisation of the courts speeds up judicial processes and in some cases allows professionals to follow up cases.

So, in the majority of jurisdictions analyzed there are systems of registers and statistics that give a greater comprehension of their activity and that are requested mostly by higher organisms. However, in relation to the number of cases studied, since there is no codification of cases on environmental matters -excepting the federal criminal jurisdiction- it has been difficult to precisely determine the number of cases instituted and in process. Moreover, the low number of environmental cases promoted in proportion with the number existing in general, which do not even reach one per cent (1%) of the total, was clear to see.

As regards the Pro bono Legal Service offered in the City of La Plata, although there are public bodies that assist the citizen, in environmental cases in particular, this service is provided mostly free of charge through civil society or by lawyers working on cases of public interest.

Finally, in the indicator on publication of case law, there is an ever greater trend to publish jurisprudence from various jurisdictions in the Province of Buenos Aires. However, this trend must receive support to ensure its consolidation and perfection.

### **i) Conclusions on management indicators in Mar del Plata**

Based on the study made in Mar del Plata, we can offer the following conclusions.

From the interrelation between the data studied on personnel and number of cases, we were able to observe the magnitude of the work of the Judiciary. The report is encouraging. On one hand, it reveals the amount and importance of the work entrusted to the members of the Judiciary. We noted a considerable disproportion between the

low inputs, materials, personnel and the enormous task to be performed. Our first conclusion is that it is a colossal task<sup>22</sup>.

As regards training, there are different indicators in the area analyzed. On one hand, the largest is provided by Federal Court N° 2 that is part of the Model Court Programme (PROJUM), in which training involves not only activities involving the Judge, but all personnel. Courses on management, attending the public and computer studies are offered free of charge. Within the same court, we find more training activities, some in the Council of Magistrates and Functionaries of the Province of Buenos Aires, through the Judicial School.

At other levels the indicators are less significant. In some places the courses, despite being offered free of charge, are given in the City of Buenos Aires, complicating attendance by all personnel. There are various specific, but always voluntary, refresher courses, and without a structured balanced organisation. Each employee undertakes his training according to his expectations. In some places we observed that many court personnel actually give up their places so that other employees may attend (Provincial Civil Court) , or in some cases, they actually organise them.

The case of the Public Prosecutor's Office for environmental offences is unusual. Courses are given specifically in environmental affairs by the Office of the Attorney General and other spheres, but they are not compulsory for the personnel.

A negative aspect to this is that there is great dependence on the will of the magistrate or employee regarding training, and there is no complete organised training programme on environmental matters.

Despite this there are positive indicators related principally to the great effort magistrates make to ensure the members of their courts are permanently up to date. Many of the cases studied revealed to us that magistrates are those most concerned about getting members of their courts to engage in activities of this type.

In the field of the budget, and based on our studies, we can consider that the way in which the expenses of each court are financed, e.g. inputs, will find greater or fewer obstacles if the administration is centralised at higher levels. The federal court manages regional budgets in this area but in a highly centralised system.

In the province the system is even more centralised and bureaucratic, since it is an office of the Supreme Court of Justice of the Province of Buenos Aires in Mar del Plata, which is responsible for giving inputs to each court.

As we observed the system in budgetary matters in the Province of Buenos Aires is *very centralised* with almost inexistent intervention of the lower courts in preparing and executing it. This is a negative indicator because many of the other elements analyzed

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<sup>22</sup> There are notable examples: the Federal Court of Appeals has 39 full-time and 8 contracted employees, while the magnitude of the work is tremendous, considering the enormous physical area that comes under the jurisdiction of this Appeals Court. Another level that exemplifies this question is Federal Court N° 2 that processes approximately 50,000 cases and has 36 persons divided among three secretariats. In the Provincial Judicial Power we find a Civil and Commercial Court of Appeal with two courtrooms of 3 judges each and a secretary, an auxiliary attorney-at-law and 9 administrative employees (plus 2 itinerant secretaries) with an average monthly intake of 562 cases (281 per courtroom). In Civil and Commercial Court N° 4 which processes 19,106 cases there is a staff of 15 members, while Court 14 which processes 7,821 has 16 employees. Administrative Court 1 processes 1900 and has 6 permanent employees, while Court 2 has a staff of 11 persons and processes 1630. The same thing happens in the federal prosecutor's office (531 cases with 9 employees) and the provincial office (2137 cases for 11 employees).

depend on it. In order to improve the infrastructure of the courts the judges responsible must first pass through a maze which results in reforms that are never carried out, computers that are inadequate for the work that is done, employees with little training activity, etc. It is evident that this is also a key factor on the road to achieving an adequate level of access to justice.

Another very relevant indicator is the number of environmental cases in Mar del Plata, which do not exceed 1% of the total. As a complement to this point we must also take into account the importance and complexity of environmental cases.

In all cases we noted that despite the low number of environmental cases, they are generally of a level of complexity similar to the most conflictive cases tried in the different levels of the court.<sup>23</sup> There is a clear dichotomy, which on the one hand is reflected in a low number of cases, and therefore an insignificant number of citizens using justice to channel their grievances, and on the other, in cases of enormous complexity.<sup>24</sup>

As regards the classification of environmental cases in the offices receiving the claims, the indicator is univocal: there is no special category. In the receiver's office for provincial cases there is no category for the discrimination of environmental cases. This is a negative indicator, but basically reflects the problem that stems from the lack of a relevant number of environmental cases.

In the information system the highest indicator occurs in the case of Federal Court Nº 2 which has the PROJUM system. In the rest of the Federal system, the dichotomy is considerable. There is no informatised system in the Federal court. It is only via internet, on the National Judiciary web page, that one can access institutional information on the various levels. In the Provincial Judiciary the implementation of information is only partial. A system is still needed whereby all the members of the institution, both in the Chamber and in the courts, can come together in a single network. This is an intermediate point in the use of new technologies.

Another very relevant aspect of the institutional aspects that produce a benefit in the right of access to justice and especially in environmental questions is the availability and use of complementary mechanisms of non-private counselling, and a Pro bono Legal Service. In that regard, the investigation shows that the intervention of defence attorneys for the poor and the absent, the colleges of lawyers or other similar institutions have not been identified in the cases studied. What was observed in daily practice is a very strong presence of informal services, the most noteworthy being the legal advice offices of the non-governmental organisations (NGOs).

So, the intervention of the NGOs is vitally important because it brings in specialised professionals in the matter who can offer citizens the highest level of advice in their conflicts. This is the positive side of the indicator.

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<sup>23</sup> The 8 cases in Federal Court Nº 2 included a request to suspend a bidding process for a plot of land near a nature reserve, and an objection by protection of rights to regulations governing the emergency in the fisheries. In the province, in Court Nº 4 in the care of Dr. Rosales Cuello we find three environmental cases: one concerning an enormous pit containing waste in Miramar, a serious problem reflected in the media; another on coastal erosion which has caused considerable problems of landslides, and the third on the installation of an agrochemical deposit in a central location in a town of Buenos Aires Province, with health problems caused by dust.

<sup>24</sup> The complexity of some cases is enormous: it is sufficient to see the *Brisa Serrana vs Ashira* case we analyzed in UFI 11, which has more than 8 bodies but has not succeeded in joining the issue.

A negative indicator is the scant economic support lent to associations. The slight economic and organisational power of the NGOs we have just mentioned was reflected in the benefit of litigating without costs. Almost all these cases involved humble organisations that hardly receive sufficient income to ensure their day-to-day existence. Therefore it is recommended that the authorities or institutions to which this work is directed should begin to weigh up mechanisms to strengthen the access to justice for these small institutions, in order to ensure that the quality of the claims, which basically define the quality of the access, is in fact equivalent to the quality of the conflicts.

As to publishing case law, we can claim that in both the Federal and the Provincial Chamber, none of the resolutions is published. One can follow the cases in the Provincial Chamber but the citizen or professional can only access the text of the decisions in specialised journals. Neither on internet nor via a closed information system can the professional or the justiciable individual access the content of the decisions. Only abstracts are published from the JUBA system of summary proceedings and on the basis of copies in the libraries of the Law Courts and the College of Lawyers. This negatively affects the way in which information on cases of accessed, especially because the decisions of the highest courts are not known locally.

First of all, the question differs from jurisdiction to jurisdiction. In Federal Court N° 2 we find the PROJUM system with a high level of accessibility. The other federal level studied, Prosecutor's Office N° 2 in the care of Dr. Peres, revealed a level closer to that granted by the Federal Court, but more logically considering the investigative activity carried out by that court.

In the province the situation is different, since access to resolutions is possible from the case follow-up information system. This system, the Virtual Reception Desk (MEV in Spanish), is accessible by Internet. For some files, it requires registration of the user through the professional college, but it is still a system that facilitates access to information contained in the files of all the provincial legal departments.

The question is: can the resolution also be viewed by the future affected party? Let us take cases of preventive measures or of a factory inspection to prove the presence of pollutants in chimneys, for example. If the measure is published, the affected party may find out and "prepare" himself. This would be an obstacle to access to justice arising from the system itself. So, does access imply damage? Is it a negative indicator? The response of the MEV system is also highly satisfactory, because it allows each Court to block entry to the resolutions that should be reserved. So, in the case of preventive or evidentiary measures they are only available for those who review the case in the Court. This is a high indicator, since the system allows the Magistrate not to publish the rulings that are not.

#### **i) Conclusions on management indicators in the Secretariat of Original Proceedings of the Argentine Supreme Court of Justice**

In short we can conclude that at present the Secretariat of Original Proceedings of the Argentine Supreme Court of Justice needs to assign more staff as the work that is to be carried out, the number of cases and the type of matter require.

As regards staff training in environmental law, there is currently a need to offer compulsory courses on the specific curriculum. Although the percentage of cases is not high, it is tending to increase and the complexity and scope of the disputes that reach this instance make it necessary.

No problems were seen to exist over the economic means of the Secretariat derived from the way in which it operates.

As regards the number of cases in general, and in environmental matters in particular, the exact number of cases being tried could not specifically be known, although it appeared to be high. Five files were identified as being on environmental questions, which indicates that the number of files with environmental content is currently very low in comparison with those in other matters.

The Secretariat has the technical and technological means necessary to manage itself. However, if some kind of statistical classification were carried out with discrimination of environmental files within the Secretariat of Original Proceedings, the conformity of the statistics office of the Court would be required. The criterion should thus be applied not only to the original jurisdiction of the tribunal, but also to the remaining Secretariats of the Court where cases in the matter are tried.

According to the study, as mentioned, the Pro bono Legal Service in environmental matters is offered mainly by professionals who give advice of public interest, or by non-governmental organisations. However, on this point in particular there is a need to analyze what happens in the different jurisdictions of the country.

Finally, citizens may currently access relevant judicial decisions of the Court by means of the Internet services offered.

## Judicial Process Indicators

### **o) Conclusions on judicial process indicators in the CABA.**

From the above the following conclusions emerge:

It was observed that all of them have tried cases that compromise the environment, which goes to show how the matter can be included in different types of disputes, civil, criminal or administrative, and that involve not only the parties but society as a whole.

The legal action on the protection of rights is the means most used for defending questions that compromise the environment, with the exception of criminal law. The particular objects of the judicial actions are not unique and vary, ranging from the cessation of the harmful activity to the recomposition of the affected environment. The framework of criminal environmental actions is different. Here the object of the action is especially linked to the types considered under the Law on Hazardous Waste 24,051.

Standing to sue in this kind of dispute is broad, going beyond the field of the “affected individual”, in a national action on the protection of environmental rights, but popular action in the environmental protection action of the City of Buenos Aires may lead to the intervention of non-governmental organisations.

We observed how the Ombudsman is recognised as complainant in a case on matters of hazardous waste, while the fundamental role of the Office of the Public Prosecutor is also recognized in criminal environmental proceedings.

In general the defendants in this kind of question were seen to be both the State, corporations and individuals, considering the typical characteristics of each jurisdiction, and the fact that in many cases there are serious difficulties in precisely determining the responsible party.

The cases with most requests for preventive measures are those that are tried by the local administrative and tax court. In general environmental principles have been admitted in their resolution.

It can be concluded from the above that evidence in the environmental lawsuit is very broad and complex, and given its importance the difficulties that may arise concerning its production for different reasons, including economic ones, may be an insuperable obstacle for the development of the environmental proceeding.

The number of participants with intervention in this type of proceeding is not restricted to the plaintiff and the defendant. Other public bodies and institutions may also be involved and contribute to the development of the proceeding, generally in relation to the probatory stage.

Although different forms of intervention by the Ombudsman, civil society, and third parties have been studied, it still remains for the figure of the *amicus curiae* to be used to a greater extent.

The criterion for imposing fees in this kind of process varies, with private individuals having a greater incentive to litigate in local administrative and tax courts considering that, according to the Constitution of the CABA, protection is free.

On the merits of the decisions, there is a marked trend by the courts and/or prosecutor’s offices to incorporate environmental principles in their final resolutions.

It is thus clear that there are serious problems in putting into practice the final decisions of the judicature. This implies that there is a need to review the functioning of the system because, although progress has been made in settling this kind of disputes, demands for redress should be analyzed in the execution of environmental decisions.

Both the trial courts and the higher courts intervene in the settlement of disputes that involve competition, legitimation, preventive measures, decisions and their execution.

The cases studied generally require time periods which varying according to the type of proceeding analyzed, with greater speed being observed in actions on protection. However, aspects linked to jurisdiction are serious obstacles for smooth development of processes in different areas.

The complexity of the decisions, the needs concerning personnel in the courts and the specificity of the subject are elements that sometimes act in detriment of the agility of the decision-making process in environmental jurisdictional decisions.

Finally, there were few cases in which use was made of the means of dispute settlement available to the judicature for this type of disputes. Nevertheless, these mechanisms were used to improve development of the process.

#### **o) Conclusions on judicial process indicators in La Plata:**

From studying judicial process indicators in La Plata, we can draw the following conclusions.

In the specific case of civil and commercial jurisdiction there is a predominance of civil claims based on sections 2,618 and 1,113 of the Civil Code requiring compensation for damages. In administrative jurisdiction there are more environmental cases although it is a very recent jurisdiction. In the federal court of multiple jurisdiction, there is greater diversity in the object of the environmental processes either through protection orders, merely declarative actions or cessation.

In federal criminal jurisdiction there was scant reception of environmental cases on infringements of Law No. 24,051 on hazardous waste. We were only able to access one environmental criminal case of public knowledge entitled "*B/T ESTRELLA PAMPEANA –Bandera liberiana- y B/M SEA PARANA- Bandera alemana- s/Colisión y posterior derrame de hidrocarburo Km. 93- Canal intermedio*" (*B/T ESTRELLA PAMPEANA –Liberian flag- and B/M SEA PARANA- German flag- on Collision and subsequent leak of hydrocarbon Km. 93- Intermediate channel*), being tried in Federal Correctional Court N° 1.

However, when instituting environmental processes, there appears to be a predominance of the action of protection.

On standing to sue, in the cases studied in the Civil and Commercial trial courts, the demand was instituted in general by individuals and also by corporations. In the case of individuals, and given the characteristics of the actions in the sphere of the classic right to claim damages in the Civil Code, these are persons who presented claims because they felt affected by damage caused to the environment.

In the SCBA a broad trend was observed in the admission of standing to sue, with support from third parties. In administrative jurisdiction, the plaintiffs in the cases

studied are in general corporations in private law, except for two cases in which the plaintiff was a city council and an individual. In federal courts with multiple and criminal jurisdiction, broad reception of this rule was also observed by municipalities, civil associations, private companies and individuals.

This phenomenon of broad reception in all jurisdictions is repeated with standing to be sued, i.e. as regards defendants, who were in general corporations in private law, city councils and the Province of Buenos Aires (through the SPA, State Treasury or Water Authority), with the exception of federal criminal jurisdiction in which the accused were individuals.

Despite the amplitude shown in legitimation, the asymmetry of the existing parties cannot be ignored, since defendants generally identified in them are companies with greater resources for defending themselves, while the weakest parties are the plaintiffs.

But the star of this study was the preventive measure. In general, preventive measures were requested to complement the principal subject of the case when instituting a claim, requesting either cessation or an injunction until such time as the basic question has been decided. Therefore, our study in all jurisdictions reflects broad reception by the judge in issuing these preventive measures. Meanwhile, in administrative courts there is a predominance of “medidas autosatisfactivas”. Finally, the courts have requested a promissory oath as a counter-precaution, except in cases with original jurisdiction in the SCBA, in which a sum of money has been requested as bond.<sup>25</sup>

Passing to the instruments of evidence in the various cases, in Civil and Commercial jurisdiction the excess passage of time in producing the totality of the evidence could be seen as a negative indicator. However, this is related to the type of ordinary process in which deadlines are longer and more benevolent than in other types of processes.

The most commonly used evidence was found to be confessional, testimonial, informative or documentary, testimonies of expert medical witnesses, judgements by scientific research organisms and judicial acknowledgements.

Similarly, difficulties were observed in the production of certain evidence due to the cost involved. This is the case of specialised technical experts' reports, in which the expert or centre requested an advance but the party claimed not to have funds for such purposes.

In administrative jurisdiction, documentary and informative evidence is the most commonly used, as it is a shorter type of process with a lower degree of evidentiary amplitude.

In federal courts of multiple jurisdiction, the most commonly used instruments of evidence were documentary, informative or by inspection, and to a lesser extent reports from technical bodies. Finally, for the case studied in federal correctional jurisdiction, the Argentine Naval Coastguard was mainly responsible for investigating the evidence, since it was a question of boarding a vessel.

As regards intervention bodies in the proceeding, in environmental cases it is vital to have the active participation of organisms that assist in understanding multidisciplinary processes and merely acquaint the magistrate with the technical aspects involved. In general the intervention of entities such as the University of La Plata, Comisión de

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<sup>25</sup> \$30,000 in “Eco-system c/Pcia. de Buenos Aires p/Medida Cautelar Autónoma” on the preliminary injunction and \$200,000 in the same case regarding the preventive measure.

Investigaciones Científicas (Scientific Research Committee), the CIMA and the Argentine Naval Coastguard was observed in the different processes.

Concerning the forms of intervention in the process, it should be stressed that in none of the cases studied was the use of the figure of *Amicus Curiae* observed. This shows up the need for mechanisms to be implemented to ease incorporation by civil society and private individuals on the benefits that it can achieve for the common good.

As a general conclusion on the fees and costs of the process, in Civil and Commercial matters, in general the court applies the objective principle of defeat. In administrative matters, the principle is that they should be borne by the sued party, unless the defeated party acted rashly or with malice. This complicates access to justice because the private individuals suffering the damage must pay the costs of the evidence and the fees of its attorneys.

Lastly, in federal jurisdiction, although no cases in which final judgements have been issued were studied, there was resolution of requests for preventive measures in which decisions were issued on imposing fees, either by applying them to the defeated party or by deferring them until such time as a final judgement is handed down.

Very few cases were studied in the various jurisdictions that received final judgement, either because they were recently instituted cases, which were in the middle of the evidentiary stage, or because they were denied protection.

Broad reception of the principles of the General Law on the Environment was also observed, not only in the judgements issued, but also in the preventive measures, especially on the Principle of Prevention and Precaution.

Similarly, follow-up by the judicature of the environmental decisions or preventive measures issued was observed, and in some cases it was requested that the defendants submit progress reports to the court on a fortnightly or a monthly basis.

As to the effect of the decision, it was observed that in one case there was an express reference to the *erga omnes* effect of a decision in environmental matters. The appeals court bases its decision on art. 33, second paragraph of Law 25,675 and extends the effects of the preventive measure, issued by reason of the rise in the water table in the Municipal District of Quilmes, to the remaining districts of Greater Buenos Aires affected and the State.

It was only in Civil and Commercial courts in which the duration of the process until final judgement could be observed. The excessive length of time from the moment the action was filed until the issuing of the final judgement was apparent. As in the case of the production of the evidence, this is related with the type of action instituted -an ordinary proceeding- in which periods are longer and more benevolent than in other processes.

Conciliatory agreements were reached in several hearings. They were issued by the judicature in the administrative and federal court of multiple jurisdictions.

## **o) Conclusions on the judicial process indicators in Mar del Plata**

In accordance with the indicators discussed we can draw the following conclusions.

The cases of more typical proceedings of environmental content, e.g. the protection of rights or civil actions, were observed in the investigation. They were analyzed earlier in the report in order to provide the reader with a summary of the relevant regulations. In many cases grievances of environmental content arose and these are laid out in cases that bear no direct relation with environmental questions.<sup>26</sup>

As regards the *in limine* denials in cases of protection of rights, it was in the administrative courts that we observed the greatest number of this type of resolutions. This means in some cases the expression of a restricted doctrine of the constitutional process of protection of rights. We must not forget that the doctrine says that the faculty of the magistrates must be exercised in extreme cases and is of a restricted character. Now, if we make a comparison with other processes we have studied in this investigation, the modality of not granting access for constitutional processes has brought with it in practice in the majority of cases a problem for disputes to reach opportune solutions. However, although some environmental cases or protection of rights have been thrown out of Administrative Court No. 1, the adoption of the form of reconversion as a mode of access to justice is positive.

Regarding the type of environmental action, the question is subtly different but no less interesting. It is a matter of analyzing whether use has been made of the different modalities on environmental actions available in the different legal processes monitored. Here the indicators are again high because besides the typical actions on protection of rights, we found protection of rights against individuals, i.e. extraordinary summary proceedings, and ordinary processes on recomposition of environmental damage.<sup>27</sup> It is thus particularly interesting to enquire into the particular object of the action. In each of the cases we came up against very varied elements, in which we found themes such as refuse tips, coastal erosion, mining, fishing and biodiversity.

In standing to sue, there are examples in Mar del Plata of different modalities of legitimation, with a clear trend to broad admissibility.<sup>28</sup> We found no cases in which the judges decided that persons had no legitimation to file claims for the common environmental good. Although litigation by persons and non-governmental organisations was clearly observed, no actions brought by state organs, such as the Ombudsman, were studied.

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<sup>26</sup> We found that Federal Court N° 2 has the highest indicators. There we observed cases that did not have the typical environmental profile, but which had contents tangentially related to them. However, since the link was indirect, the magistrate intervened on the basis of environmental principles.

We have news of cases in which actions by the judge at his own initiative were reoriented, and filed in environmental law, or others in which the action was rejected on grounds of its environmental content brought by the defendant. The clearest example is *Ramaschi* in which a protection of rights is presented to authorise fishing and to declare the unconstitutionality of the regulations on the fishing emergency. The Judge rejects the action and declares the Nation's regulations to protect the fishing ground in the Argentine Sea constitutional, with merits in principles of environmental law. The basis for this type of procedural activities was the active role of the magistrate, in favour of the environment and with the new scope posed by article 32 LGA.

<sup>27</sup> A very interesting case is *Brisa vs Municipalidad*, where in an action on protection of rights the Court on its own initiative introduces elements of recomposition not by legal action but by a legal mandate to do.

<sup>28</sup> The most significant indicator was found in the decision in the *Yane vs Municipalidad* case in Provincial Court N° 4. Let us recall that the *ob iter dictum* of the decision lays out the thesis of very broad legal standing in the environmental protection of rights (every inhabitant) from the third paragraph of article 30 LGA. It is also made clear that it agrees with article 41 since "it is part of a society in which it is a commitment of all the inhabitants to look after the preservation of the environment and public health." In the *Carrizo María Ester* case legal standing is more interesting because the person initiates the demand as an individual on individual damages from coastal erosion, but also from collective damage. The Court has indicated the procedure. As for associations, there are several cases in which claims have been accepted: *Fundación Reserva Natural Puerto (J2)*, and the cases in which *Brisa Serrana* litigates (*J 4, J 14, UFI 11*), or the *Sociedad de Fomento Cariló (CA2)*

Law 25,675, says the decision, regulates article 43 on the environmental protection of rights. Another relevant indicator is the Cámara Federal resolution in the criminal case 'Yane on denunciation,' in which the individual is recognised as having legitimation to act as complainant. In this context the entry of an individual not affected by the offence is permitted, but it is interpreted that as an inhabitant of the contaminated place the person has a collective injury that allows him to enter the criminal proceeding by offering up evidence. The protection of environmental rights also appears but brought by residents affected by the site for final waste disposal for Mar del Plata. Here we also see that individual grievances are filed out of interest in the defence of the environment (cases *Suelos Ecológicos S.A.* and *Establecimiento Rancho B. SACIA* in the CA).

In standing to be sued, we find very different cases, including varied defendants in different situations, in which they directly or indirectly fulfil environmental roles. Most defendants are usually municipal administrations on lack of compliance with the regulations<sup>29</sup> or directly due to the damage caused by its activities<sup>30</sup>. There are also cases in which companies are sued, such as those causing pollution, the state, in its provincial or municipal administration, anyone who omits respective policing powers, and insurance companies, which endorse the activity of the defendant.<sup>31</sup>

In relation to preventive measures, we find important precedents in the cases studied in Mar del Plata. In the Provincial Civil and Commercial Court, Courtroom 2, there is a set of very relevant precedents regarding the granting of preliminary measures in order to avoid environmental damage and oppose by protection when faced with the problem posed.<sup>32</sup> Another interesting element to consider is that the preventive measures issued by the Court were given in appeals on the reversal or confirmation of trial court rejections. This is interesting since on one hand while first of all the request for rapid protection of the law is denied at the request of the individual requesting access, the Court acts as review body and not only revokes the resolution attacked, but also issues the measure of protection and prevention resolving in brief with certain urgency the conflict when it is seen to exist.<sup>33</sup>

In some cases the protection of the environment occurred with denial of the requested preventive measures. In this the doctrine of the Federal Court was of interest in

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<sup>29</sup> They are the cases of Yane vs Municipality in Court N° 4.

<sup>30</sup> Yane on denunciation on hazardous waste Federal Prosecutor's Office N° 2

<sup>31</sup> We observed a positive indicator in the *Brisa Serrana vs Ashira* case analyzed in the framework of UFI 11). Due to the nature of the conflict and the proceeding –a lawsuit on environmental damage in which those directly or indirectly involved in the occurrence of alterations must be sued- an interesting list of parties appears: those who could be the direct damager (company), for omission of environmental policing powers (provincial and municipal administrations), and the Insurance Company.

<sup>32</sup> The highest "symptoms" appear in the "*Brisa Serrana vs Ashira*" case, in which we observed the granting of a combined preventive measure: the formation of a committee of experts (three specialists from the official list) to make an extraordinary summary analysis of the possible damage and to propose solutions; and the demand that the defendant present the authorising environmental impact statement, under penalty of suspension of the activity.

<sup>33</sup> This seems to be a very positive indicator, since a judicial instance appears giving suitable and effective access, with a strong commitment on protection of the basic right. It also ensures the justiciable individual that a solution to the conflict will be generated by the second instance, avoiding repetitions in decisions on prevention which otherwise should return to the instance of origin to be issued, which could produce problems since the judge himself who refused to grant the measure must now give it but without guidelines on what contents must be contained in it. This could lead to "more restricted" prevention measures than sought by the criterion of the appeals court. It might mean that after issuing, the citizen may request that they be revoked because they are weak on protection, and so on. Therefore, with the issuing of preventive measures from the review body this is simplified. The procedure simply requires that the lower instance execute the decisions of the Court. It also means that trial court judges will have no problems or arguments for delaying execution.

rejecting these measures, based on the principle of prevention, when a study of regulations on the fisheries emergency was requested.<sup>34</sup>

Other relevant indicators in preventive measures granted by the provincial trial courts in Civil and Commercial matters were presented, in some cases considering besides the measures requested others that the magistrate deemed necessary in the light of environmental protection.<sup>35</sup>

The adverse indicators appear in provincial administrative justice, where we found a restricted doctrine in relation to the granting of preventive measures. We found for example that in both Courts the preventive measure was denied in cases of potential contamination by waste, and in one case of coastal erosion, with the risk of a house collapsing because of the encroaching sea. In almost all cases the grounds for the refusal was the lack of danger in the delay, or the presumption of legitimacy of the acts of the state, two classic elements of the preventive proceedings system which should perhaps be reread in the current environmental preventive proceedings, especially in serious and novel conflicts. Another criterion underpinning access to justice is the worsening in the requirements for granting preventive measures in the administrative courts.

We came across an interesting situation in Federal Court N° 2 in the *Fundación Reserva Puerto* case, in which prevention is rejected but the protection of the right appears effectively and opportunely, given the speed with which the basic decision is reached.

In contrast, in provincial cases, on suffering a significant delay in procedure, not having a preventive measure in many cases implies the refusal of effective access to justice, which would only be formal.

In relation to the evidence, we found significant indicators in one court, in which we saw that evidence had been reordered, even involving the removal of superfluous evidence, with consent of the parties, and the ordering of measures at its own initiative.<sup>36</sup>

We found negative indicators in the same court in cases dating from before those mentioned in which evidentiary formalities led to the fall of instruments of evidence that could be viewed as substantial by some of the parties<sup>37</sup>

As regards novel instruments of evidence, we see how some forms have been used with the intervention of state organisms and university research groups.

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<sup>34</sup> The refusal by using the precautionary principle is particularly interesting and a very positive indicator (*Simbad and Ramaschi cases*).

<sup>35</sup> Another very interesting and positive indicator is the material preventive measure issued in Court N° 14 on environmental mining in the case *Brisa Serrana vs Municipality*. There the basic demand was made – the suspension of municipal activity at a pit that had no DIA – as an initial measure. At the same time that suspension was granted the erection of a wire fence was also ordered and, (another very positive indicator) when the file was entered in the Appeals court, on the court's initiative an order was added to clean the site where refuse had been observed. Now the same indicator was seen in the case of Court N° 4, entitled *Yane vs Municipality*, in which in a **medida autosatisfactiva** the suspension of activities was ordered at a pit close to the sea where earth was extracted for streets and roads, based on the lack of environmental protection measures. However, the prevention measure coincided with the Basic grievance.

<sup>36</sup> In Provincial Civil and Commercial Court N° 4. Also in a case studied from that Court an interesting form of carrying out legal activism was observed (*Yane vs Municipality*) when the Judge provided a review of the actual situation to check if the legal decision was being enforced.

<sup>37</sup> *Brisa Serrana vs Agronomía Santini*.

The greatest indicator appears in the Provincial Prosecutor's Office for Environmental Offences N° 11, where we found reports from a series of very relevant bodies: CONICET, universities, INTA, etc. These interventions are fundamental in securing high-level technical evidence to vouch for alterations to the environment that are always difficult to prove. The organic specialisation of this public prosecutor's office has been very relevant particularly when research tasks reinforce the prevention of environmental disputes. Having a thematic public prosecutor's office dedicated to investigating offences against the environment is a very positive "organic" indicator. It also facilitates access to evidentiary and investigative modalities that would otherwise not have occurred. We observed the intervention of independent organs and a list of bodies to which to resort in each type of contamination. The procedure is thus quicker and more streamlined.

As to the organisms that can intervene in the process we found precedents in which the intervention of the Office of the Public Prosecutor was requested in a case of a civil nature.<sup>38</sup> In addition, within the Office of the Public Prosecutor, orders were made to the effect that intervention in the case should be through the Unidad Fiscal Especializada (Specialised Prosecutor's Unit). This is another very relevant indicator. The intervention of the Prosecutor's Office on Environmental Crime in civil cases of environmental damage means that the Attorney General, who on other occasions summoned the Prosecutor with jurisdiction in civil matters, has prioritised the intervention of the Specialised Public Prosecutor in environmental matters over civil matters.

Interventions por vía de adhesión are another relevant indicator.<sup>39</sup> In various cases we observed the intervention of bodies such as the Expert Investigations Office of the Supreme Court of the Province of Buenos Aires. We should recall that in the ICARDA vs Nalco case, predominance was given to interventions by that body over the *ordinary experts' reports*. We said when mentioning the ruling that as far as the Court of Appeals was concerned it was an *extraordinary experts' report*<sup>40</sup>. The Expert Investigations Office of the SCBA has intervened in many of the UFI 11 cases and in the Brisa Serrana vs Ashira case. In some cases we observed the intervention of other bodies, such as Border Police and Coastguard in cases of fisheries, while in others we observed the intervention of geological experts.

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<sup>38</sup> We found the most relevant indicator in the Brisa Serrana vs Ashira case in the Provincial Civil Court of Appeal Courtroom 2 where intervention was given to the Public Prosecutor's Office, which accepted that form of intervention through the Attorney General. This is extremely important.

<sup>39</sup> In the *Fundación Reserva Natural Puerto* file, we saw how civil associations and groups appear providing evidence on the presence of birds in the site which is object of the ruling.

<sup>40</sup> In analysing the decision, the way in which the ruling of the Directorate General of the Experts' Investigations Office of the Department of La Plata is analyzed deserves to be mentioned. It is subject to doctrine emerging from the Medical Forensic Corps, an entity of the CSJN, which has led case law to grant it supremacy, even above the opinions of court appointed experts. We are thus faced with evidence valued according to the entity that issues it. The Court raises this report to the status of *extraordinary experts' report* since the ruling is issued by the Experts' Investigations Office within the SCJBA. This is very significant because it places the technical activity of this body above those issued by the experts from the official list. Does this mean that we have a system of degrees between reports, a rating system of rulings based on jurisprudence in which primacy is given to rulings issued by certain bodies in detriment to those issued by others? It is worth recalling a point we cannot afford to overlook: the only competent body to appraise evidence, raise its status or give it a different value and prepare procedural rules – if this is indeed what is happening here – is the National Congress and each provincial legislature in legal proceedings in their respective jurisdictions (José Alberto Esain, Note on the ruling Icardi c/Nalco, published in the journal *Doctrina Judicial* under the title "El daño ecológico leve y las pruebas científicas tasadas").

However, when seeking examples of different forms of intervention in the process, we found just one case being tried by Federal Court N° 2 which, on entering the Federal Court of Appeal, received support from several non-governmental organisations to back the presentation by the plaintiff in the process.<sup>41</sup> Perhaps the most negative thing was the fact that those presentations were not reflected in the decision of the Court of Appeal and the majority of votes (Drs. Ferro and Arrola de Galandrini) which in resolving the appeal in fact neither rejected nor considered those offers of support but simply ignored them. The lack of merit for the treatment of this very relevant mechanism of public participation, especially by such important institutions is particularly negative.

No independent parties were seen to contribute their vision of the problem or conflict. There is no *amicus curiae* in the material studied. So this is where we must consider the difference between support and *amicus curiae*, since we could conclude that we are at a point of incipient participation by third parties in the process, although this has not yet been consolidated with more forceful and committed presentations.

As regards the fees and costs of the process, we found several different forms of dealing with the imposition of fees. In some cases of negative indicators, we found fees imposed por el orden causado in assumptions in which the plaintiff's claim was sustained.<sup>42</sup>

We also found assumptions in decisions sustaining grievances, resulting in the convicted party being liable for the payment of fees; and of cases in which the demand for environmental protection is rejected but the fees are to be paid by the orden causado, an interesting modality for assumptions of very dubious conflictivity.

A particularly interesting indicator that is relevant to access to justice for citizens is the possibility of granting the benefit of litigating without cost for civil associations. This mechanism allows corporations lacking the means to enter their claims in defence of the environment, and have their cases heard in an instance where otherwise it would be impossible.<sup>43</sup> In many cases this benefit was granted as an extension of that awarded in other cases.<sup>44</sup> This is a very positive indicator since it allows savings to be made in evidentiary activity. To grant the benefit to corporations the most common evidence is the experts' accountancy report that includes attested copies of the company's accounts. It would be a procedural and jurisdictional waste if in each case of environmental grievances with the same parties (plaintiffs and defendants), the same evidence is produced with the same results. For that reason the measure to use the procedural code and the mechanism of extending the benefit has also led to a rapid and economical response with a guarantee of defence.

Regarding the grounds for the decision, we find very interesting indicators when studying the National Constitution, the General Law on the Environment and its

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<sup>41</sup> In the *Fundación Reserva Natural Puerto* file, the adhesions came from institutions with considerable experience, such as Americaves, Wetlands International.

<sup>42</sup> As in the Provincial Trial Court in Civil and Commercial Matters N° 14 (*Brisa Serrana vs Municipality of Balcarce*)

<sup>43</sup> This indicator was checked in the Provincial Trial Court in Civil and Commercial Matters N° 4.

<sup>44</sup> We checked this with two different modalities: on one hand in several cases of the Provincial Trial Court in Civil and Commercial Matters N° 4 we checked the extension with the intervention of the same parties (*Yane case*) in which the right to defence was protected since the same parties intervened in both processes. In other cases it was more complex because between one file and another there were differences in who in fact intervened. It occurred with the benefit granted in the Provincial Trial Court in Civil and Commercial Matters N° 4, which we later observed in the same court N° 14 through the mechanism of the extension. Despite the parties being different, with transfer prior to the resolution the Magistrate ensured the right to defence.

principles, provincial environmental regulations and also international regulations on the environment and human rights.<sup>45</sup>

We find negative indicators in administrative justice in a restrictive doctrine on the appropriateness of the process for protection of rights as the suitable channel. This is in fact a negative indicator since it involves a reduction in the cases and possibilities of modifying the conflict through one of the most important constitutional processes.

Practically no mention is made of the extended effects of the decision. Neither have cases been found in which there has been debate on exceptions of *res iudicata*. This has perhaps removed the possibility of settling conflicts in this question.

We only found cases of more advanced conceptions in some of the decisions on fisheries in which direct mention was made of the *erga omnes* effects when the national regulations on the fisheries emergency were confirmed, and protection was given to marine resources, rejecting a request to lift the fishing ban imposed by the State.<sup>46</sup>

As a positive indicator in decision execution mechanisms, we observed an interesting example in an action on protection of rights where *a posteriori* of the decision an ocular inspection was ordered to determine actual enforcement of the decision.<sup>47</sup>

A negative element in the context of the execution of measures and resolutions was in cases of execution of preventive measures of the Court of Appeals by the trial courts. We observed a backlog in the execution of measures in the provincial civil court. We have already said that the Court of Appeals readily accepted the principle of access to justice, and it has even granted preventive measures itself. The drawback is that those resolutions must then be executed by the trial court judges. This is where the negative element appears since we have witnessed how excellent decisions of the appeals court end up being seriously delayed in execution by the trial court judges.<sup>48</sup>

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<sup>45</sup> Among federal cases we cannot fail to recall that quotes from the LGA appeared only days after sanction in judgements of the Court Prosecutor's Office (*Fundación Reserva Natural Puerto*). The quote and use of environmental principles were significant in the case of fisheries (*Ramaschi and Simbad*, in Court N° 2). We also observed another very interesting indicator when provincial environmental regulations were used on discovering a legal grey area on the question of environmental impact assessments (*Fundación Reserva Natural Puerto*).

In the same Federal court, in the *Cabrera* case we found enforcement of the principle of cooperation of art. 4 LGA in securing the evacuation of ships in the Port of Mar del Plata.

In the province we found very significant indicators: in Courtroom 2 of the Civil Court we found cases in which use was made of the principles when they only appeared in international instruments, or provincial rules, but without rules on national minimum standards (*Brisa Serrana vs Ashira*). This is a very positive indicator. We then observed quotes and use of instruments of the new laws on many occasions, as in the case *Yane vs Municipalidad* in Civil Court N° 4.

Another positive indicator from courtroom 2 of the provincial court is the clear and forceful use of prevention and precautionary principles in another type of decision. There are extremely interesting resolutions here, because some assume the validity of the principle from international and provincial rules (relationship between DIA and art. 23 provincial law 11,723), in preference to the new general law on the environment. In other more recent cases, the appeals court assumes these principles from the new rules such as the LGA, together with the criterion of prevention.

<sup>46</sup> Simbad Case in Federal Court N° 2

<sup>47</sup> Provincial Trial Court in Civil and Commercial Matters N° 4.

<sup>48</sup> One particular file received favourable judgement and protection from the trial court after a few months, but then it took a year for it to enter the appeals court. In this particular case there was no urgency because protection had already been granted, and as a consequence the delay at the review stage was not significant. However, what if protection had been pending? If protection of the right had required an urgent appeals court decision, or if we consider the defendant's right to be promptly informed of the judicial response, the delay could mean that any solution would extend beyond the deadline. In later cases, the protection of the right was an ineffective remedy. We believe that this indicator on the time it takes to receive an appeals court decision in federal courts is an obstacle to effective access to justice.

In federal and provincial trial courts there is less delay. Although this is not a positive indicator, it must be mentioned because we have found cases in which decisions were issued in just over ten days.<sup>49</sup>

One of the most relevant elements in this regard, and one that has conspired against granting protection in time, concerns the incidental problems of each jurisdiction. We see them in the criminal proceedings instituted in the province on hazardous waste. We studied two federal cases that suffered enormous delays and that only finally entered the provincial courts in early May 2006. Delays were also observed in carrying out public hearings evacuation de vistas de Fiscales and in collecting scientific evidence.

#### **h. Conclusions of the study made in the Secretariat of Original Proceedings of the Argentine Supreme Court of Justice**

As a conclusion to the above we can say that the matter brought to these instances poses disputes of great technical complexity which could compromise the environment of a large percentage of the population. Due to the very characteristics of the access to this type of original instance of the Court, the jurisdiction is strictly governed by the National Constitution itself that determines it in two types of cases: those in which a province is party and, those concerning ambassadors, ministers and foreign consuls, pursuant to art.117 of the NC.

Art. 24 of decree-law N° 1285/58 states that there will be original proceedings of the Court in all affairs between two or more provinces; in civil cases between a province and citizens who are foreign subjects and, in cases between a province and a foreign state. Given these conditions, it can then be evaluated if the plaintiffs and defendants are legitimated in the case in question. Finally, we believe that although from our study we can determine trends by analysing the vote of the Court in relation to its first decision enforcing the LGA in the case of the *Cuenca Neuquina*, this analysis made in a Secretariat of the CSJN represents a considerable drawback in the study of this question in the Supreme Court. We thus understand that it is an inducement to make a future analysis of the different secretariats of the CSJN in greater depth and scope, in order to consider a greater number of cases in which to identify indicators and also consider possible trends.

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<sup>49</sup> In the Provincial Trial Court in Civil and Commercial Matters N° 14, in the *Brisa Serrana vs Municipalidad* case we saw very short periods for reaching very well grounded decisions.

## **General conclusions**

### **1. Aspects arising out of the investigation**

As a first conclusion we have the confirmation of the hypothesis posed in the methodology of the investigation, where we asserted that the Judiciary has information and a series of indicators on access to justice and the environmental proceeding, whose systematisation can optimise and contribute to overcoming obstacles in the functioning of justice in the treatment of environmental conflictivity. It will be necessary to ponder aspects on the generation of new indicators in the light of existing information, i.e. by processing the information in possession of the Courts.

We observed the formal aspects of the question, discussing it in the regulations applicable to the disputes analyzed here. To that end Chapter 4 is designed specifically to deal with the legislation that governs the management of environmental conflictivity, from the substantive and procedural point of view. Chapter 5 is dedicated specifically to presenting the justice system in the jurisdictions included in the investigation along with the selection criterion for each court.

There follows an explanation of management indicators, with discussion of the criteria used in analysing the organisation, development and effects of the activities carried out. There is analysis of indicators on: personnel, training, budget, number of cases in general and environmental cases in particular, equipment, technical teams, registers and statistics and publication of jurisprudence. After specifically discussing each indicator in the development concerning each jurisdiction studied, specific conclusions are presented in each of the chapters.

The second group of indicators includes those linked specifically to environmental proceedings and the different steps, taking selected environmental cases and the relevant elements identified in relation to the process into account. There is analysis of the jurisdiction and type of action, its particular object, active and standing to be sued, preventive measures, the evidence, the organisations and forms of intervention in the process, costs and fees, the foundations, effects and reaches of the decision, the time and the instances explored. Just as with management indicators, the conclusions from each study follow the presentation of each jurisdiction. The conclusions from the workshop held to review the preliminary document of this investigation appear prior to the general conclusions. Those reflections are fundamental in formulating these conclusions which consider the opinions of the magistrates involved and of the experts who have been able to offer their criticisms of this investigation, thus enriching it with their alternative points of view.

Consequently, on the basis of the regulatory analysis, the methodological documentary study, the progressive study made with the investigation team, the field work carried out in each jurisdiction, and the workshop of review experts and magistrates, we can make the following precise conclusions on justice and environment indicators.

### **2. Indicators on court management**

#### *a) Staff*

The courts are obviously the basic institutional space engaged in the protection of the rights established in the National Constitution and the international treaties our country has signed. We understand that there is a direct relationship between the solidity of the legal system and the quality of democracy. For that reason the state must make the

greatest efforts to guarantee sufficient personnel in accordance with the scope of the undertaking to be carried out by the organs entrusted with administering justice<sup>50</sup>. Just as with any public or private corporation, its activity and production, i.e. the quality of the elements presented as a final outcome, will largely depend on the quantity of employees, in other words the staff. In order to assess this element it must be seen in the context of the size of the activity to be carried out and the time given over to it.

Although different types of conclusions can be drawn from the study on the question of staff, depending on the situation of the different jurisdictions and courts, there is a common denominator, which is that the relationship between the number of cases, the court staff, and the judicial timetable assigned is unequal. The report is therefore encouraging in that it presents the enormous task the Judiciary must face daily, but the need arises from the different experiences studied to establish guidelines to harmonise these concepts and thus help overcome existing practical problems.

### *b) Training*

As regards training we should recall that, in the words of Eduardo Pablo Jiménez, the legal system is operational and promoted by a multiplicity of operators, some of whom are judges. And as such, their specific role is to administer justice, regardless of the matter they are required to explore in order to accomplish their mission, and this is where they have to comply with the rules of their profession. As Ricardo Li Rosi explains, this means that the judge must know the tools he has at his disposal, identify them and know how to use them, in the context of a framework of proceedings previously defined by the law<sup>51</sup>.

So, the indicator on training and formation of the legal operator is vitally important. This was made clear in the various seminars and workshops held with the magistrates who shared with us their experiences on issues of justice and environment. The dynamism inherent in analysing environmental conflicts entails a constant need for them to refresh their knowledge, their interpretation of it and the enforcement of it.

The *space and time dynamic*<sup>52</sup> conditions knowledge in the field of environmental law, since one of the characteristics of this discipline is its dependence on technical details. Scientific progress obliges those who work in the area to constantly investigate the new elements being embraced by experts. There is an overriding need to constantly renew knowledge, because what were ideal theories a few years ago are not so today. For example, a certain species at a certain time was perhaps not invasive, or was in no danger of becoming extinct, but over time it has become so; or a certain population which seemed to be in danger of extinction may now have recovered.

All this means that the permanent intervention of training is essential in operators intervening in the decision-making process in the subject.

Another element that clearly conspires against assimilation of environmental knowledge is the *dispersion of knowledge* and the isolated progress made in different

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<sup>50</sup> Document *Una Corte para la democracia*, prepared by the Asociación por los Derechos Civiles, the Centro de Estudios Legales y Sociales (CELS), Fundación Poder Ciudadano, Fundación Ambiente y Recursos Naturales (FARN), the Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP) and the Unión de Usuarios y Consumidores, BsAs, 2002.

<sup>51</sup> Eduardo Pablo Jiménez, Los magistrados judiciales concebidos como nuevos articuladores del sistema jurídico, in *Revista Jurídica de Buenos Aires*, Environmental Law, Coordinator Daniel Sabsay, Ed, Lexis Nexis, 2005, p71.

<sup>52</sup> We understand the spatial dynamic concept on the basis that in different places in the world the same input does not have the same effects and must be dealt with differently, and the time dynamic on the basis that at different times the same activity or input gives different responses to the rest of the system.

nodes of the system. Let us see how this element works in two areas: legal and technical. In the former, we know that although our national system does not lend weight to the *stare decisis* system, the precedents are fundamental because, as the Court has said on many an occasion, in order to waive a decision the lower court must provide new elements. This means that decisions taken by the highest Court are only partially binding. Therefore, decisions that offer a clear legal doctrine, from the highest to the lowest levels are essential if we are to know the situation of access to justice throughout the country. Now this has not occurred, and in fact a totally different panorama can be observed. If one considers decisions in environmental matters, the majority were issued at a lower level, i.e. trial court and Court of Appeal, but few transcendental resolutions have come from the Argentine High Court. Legal precedents in environmental matters are hard to obtain, and are generally systematised by the doctrine. This makes discussion and training on the subject even more pressing. In the technical field, we observed the same problem: knowledge here is dispersed, beyond the reach of the legal operator and even of many technical operators who cooperate with the Judge. Therefore, we understand that permanent training on elements of reality is urgently needed.

This indicator is essential to know the exact level of staff in a court. Daily legal work requires more than one specialisation, and can often render the capacity provided by the qualification insufficient. It is obvious that a court or public prosecutor's office that has human resources with greater technical training will be better placed to provide suitable measures, and assess any evidence produced if it has highly trained personnel.

Training in general is voluntary. There are areas in which it is offered, such as: the Council of Magistrates and the National Law School, Council of Magistrates of the City of Buenos Aires, Institute of Legal Studies of the Supreme Court of the Province of Buenos Aires and Office of Attorney General on Formation, Training and Superior Studies of the Argentine Attorney General's Office. Although the National Law School offers courses on the environment, the subject is yet to appear on the curriculum of these bodies. However, courses on the subject are run by the Argentine Attorney General's Office. A number of magistrates have made a special effort to offer their personnel training on certain subjects. Nevertheless, due to the complexity of environmental cases, greater training in that regard is seen as necessary along with the need to incorporate an interdisciplinary and compulsory subject into the training curriculum of judges and prosecutors.

### *c) Budget*

Another vital element is the budgetary question. We know that many of the indicators that make up this investigation in part owe their best or worst development to material questions. So it is important to analyze the form and size of the budget in order to understand the degree of involvement this indicator has on the form of access to justice in environmental questions.

The budget is determined by the Legislative branch and is then administered in the Judiciary. At national level, the Argentine Supreme Court of Justice administers its own budget, while the Argentine Council of Magistrates administers the budget of the lower federal and ordinary courts. In the City of Buenos Aires, the scheme is similar with the functions of the Superior Court of Justice and the Council of Magistrates of the City of Buenos Aires. In the Office of the National Public Prosecutor, it is the Attorney General that administers its budget nationally, while in the Autonomous City of Buenos Aires it is the Council of Magistrates, since the Office of the Public Prosecutor forms part of the local Judicial Power. The situation is different in the Supreme Court of the Province of

Buenos Aires in which the tasks are centralised, even the work of administering the budget of the Office of the Public Prosecutor of the Province of Buenos Aires.

The highest degree of centralisation is clearly found in the Province of Buenos Aires, in which the court or office of public prosecutor depends almost exclusively on the higher courts for most of its spending. This situation contrasts with the form of administration of the federal and ordinary courts that depend on the Argentine Council of Magistrates, which present fewer practical problems in the matter. The panorama in the area of local justice and the Office of the Public Prosecutor of the Autonomous City of Buenos Aires is a similar one.

#### *d) The number of cases in general and environmental cases*

The number of cases is a very relevant detail to be considered together with other indicators. It is fundamental that while checking the number of cases brought, we should also bear in mind the aspects studied on the staff available to analyze the number of persons attending to such cases.

The relationship between the number of cases tried and the number in environmental matters reveals that generally 1% or less are environmental cases. However, as stated above, this type of case is of high complexity and demands more time from the legal body responsible.

#### *e) Information systems*

Most courts have a type of information system that speeds up their internal work, and makes follow-up by the professional and individuals easier. The quality of the information system varies in accordance with the different areas studied. For example, the PROJUM experience shows marked progress in the subject. The Administrative Court of the CABA and the information system of the National Court of Appeal in Civil Matters are other examples to consider. In the Province of Buenos Aires the Lex Doctor system is most commonly used, and there is a pilot experiment called GAM (*Gestión Asistida Multifuero, Multijurisdictional Assisted Management*) that plans to incorporate the remaining jurisdictions. However, there are organs in which this type of information tool has not been incorporated. Similarly it is necessary to state that not all the courts and offices of public prosecutors studied have access to broadband, and this can in some cases complicate the use of the benefits offered by these systems.

#### *f) Registers and statistics*

The statistics calculated by each tribunal are in general those established and requested by the higher organs. So, any change to be instituted in systematising indicators must have the support and the decision of those organs.

It has also been observed that in general there is no codified distinction of claims on environmental themes, with the exception of the denunciations presented on environmental offences as defined in National Justice in Federal Criminal and Correctional Matters, and locally in the Legal Department of Mar del Plata, Province of Buenos Aires, as a result of the existence of a thematic public prosecutor's office.

#### *h) Pro bono Legal Service*

In the Pro bono Legal Services studied, several possibilities were identified both in the official and in the non-governmental orbit. Nevertheless, it was clear that civil society organisations play a predominant role in providing legal advice in environmental cases.

The role of non-governmental organisations in this aspect has been vital. Accompanying a clear specialisation of lawyers who sponsor cases in these spheres, with the scant economic support received by these organisations, it is fundamental that aspects related to fees and costs of the process should not prove to hinder broad access to jurisdiction.

### *i) Publication of Case law*

Regarding the form in which decisions are published, another right comes into play that is closely related to access to justice: the *right of access to information* and the *right to information*. On this point we prepared reports in the stages prior to this project<sup>53</sup>. It was perhaps on analysing this indicator that we noticed we were dealing with the immediate applicability of the right to information and the right of access to information but as necessary inputs in achieving an adequate management of access to justice. On the basis of a correct and adequate access to documentation generated in the legal process, the citizen and the professional can then improve the suitability of access to justice in environmental matters for the citizen.

The study on access to case law in the various organs revealed the existence of web sites in the higher courts on which the complete rulings are published in some cases, or the summary proceedings in others (e.g. CSJN, SCBA, Superior Court of Justice CABA). There are also specific courts that publish the relevant decisions (e.g. Federal Court of Appeals of La Plata, Courtroom II). Other courts and jurisdictions have their own web sites with access to rulings by the case follow-up system. However, in several cases the systems studied can deny access to decisions that should be reserved.

The system must of course be continually perfected in order to ensure ever greater access to information case law stemming from the legal decisions on the environment in the various jurisdictions.

## **3. Judicial process indicators**

Environmental cases are always assumptions that do not admit delays and are not subject to the vicissitudes of the long slow legal process. The environment and its protection do not admit delays either. The sensitive nature of this asset and the possibility of the slightest negative stimulus causing it irreparable damage present us with an object of protection that alone, and as a general rule, must establish urgent instruments of guardianship of rapid application<sup>54</sup>.

On this point procedural law must be more decisive in taking the assumption of new forms to ensure that solutions are not delayed over time in such a way that they lead to the actual extinction of rights as a result of bureaucratic slowness in administering justice. This is where procedural law is in a period of change. New procedural figures

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<sup>53</sup> See FARN Nápoli, Andrés (Ed) (2006) Acceso a la información y participación pública ambiental en materia ambiental, actualidad del principio 10 en la Argentina. FARN, AMEAI and CEDHA.

<sup>54</sup> Jorge Peyrano, *La tutela del medio ambiente a través de la medida autosatisfactiva*, JA no. 6121 ofl 23.12.1998, p.6/7.

or new ways of thinking that offer quick solutions for clear problems are being born to accompany new principles such as *opportunity*, or *opportune jurisdiction*.

### **a) The environmental action: sphere, type and object**

We observed that in the cases studied the legal cases directly or indirectly compromising the environment are included in various types of disputes and therefore are treated in different jurisdictions, whether civil, criminal or administrative. They may also involve federal or local jurisdiction.

As to the type of action, there is a marked inclination to use “*Amparo*” (*a kind of an umbrella injunction*)<sup>55</sup> as the legal tool in environmental proceedings, especially due to the importance of the time factor in reaching a solution. In the City of Buenos Aires the use of the protection of rights is also determined by the fact that it is free of charge. Generally, “*Amparo*” and other actions, with the exception of those presented in criminal jurisdiction, are accompanied by a request for material precautionary measures that largely coincide with the principal grievance. Consequently, once granted they can act as a *pivot* for settlement between the parties.

Nevertheless, it should be stressed that in the study in the administrative court of Mar del Plata, a clear trend was observed towards the *in limine* rejection of the action on protection of rights, with a restricted concept of its admissibility. In some cases the magistrate proposed that the action on protection of rights be reconverted to an administrative one. As expressed in chapter 4.1.2. On the protection of environmental rights, there has been broad development of case law and doctrine supporting this type of action as the most suitable and expeditious means to secure protection of the environment.

Other tools of access to justice in environmental matters are available but are less used. Such is the case of the action on environmental damage in the General Law of the Environment or of the actions of protection and reparation in the General Law of the Environment of the Province of Buenos Aires.

The particular objects of the actions vary, ranging from the cessation of harmful activity to the recomposition of the environment. The environmental criminal actions studied are different and are generally found under the criminal sections of Law 24,051.

### **b) Standing to sue**

In discussing the formal aspects of this subject we mentioned that levels of legitimation can occur either in the individual or in the organic aspect. For the former, we spoke of different forms in comparative and local law, and we praised the current trend to fostering increased intervention of citizens in the environmental process. The National Constitution and the laws recognise legitimation in claiming collective rights to groups of associated persons, what we can term *private organic empowerment*. For the constituent and the legislator these corporations represent that sphere of interests and are seen to take on a sort of representation of those social groups. The same thing happens with *public organic empowerment*, assumptions in which the legitimated

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<sup>55</sup> Amparo is a kind of an umbrella injunction created in Mexico in the middle of XIX century. In Argentina, it was built by judges in 1957 with the leading case “Siri” and in 1958 with the leading case “Kot”. Since 1994 it is recognized as a collective action to protect environmental rights.

person are regulated state entities with legal standing to exercise actions in defence of rights of collective incidence.

In standing to sue in legal processes that are not criminal, one can speak of a broad inclination of magistrates. In actions of protection of rights both nationally and in the Province of Buenos Aires, the notion of affected party has been linked to that of resident, but there is also a clear acceptance of the legal standing of the associations that seek environmental protection, in some cases requiring inscription formalities, but not in other cases. The same trend can be witnessed in actions of recomposition due to environmental damage, even in those prior to the sanctioning of the General Law of the Environment.

Given the characteristics of the action of protection of rights as a popular action, which can be brought by any inhabitant or corporation defending collective interests, there is clearly a broad trend in that direction within the City of Buenos Aires.

Despite the classification of crimes of public action in environmental matters, for which any citizen may make a denunciation, it is important to consider in which circumstances the figure of complainant may be admitted in a criminal proceeding. A certain case was studied in which the Ombudsman of the City of Buenos Aires was recognised as having the character of complainant. Also, in a case in Mar del Plata an individual with a collective grievance who appeared as a resident of a contaminated place was recognised as being the complainant.<sup>56</sup> It is important to mention that the Procedural Criminal Code of the Province of Buenos Aires recognises the figure of diffuse victims, which gives rise to environmental protection associations actively intervening in the process.

### **c) The intervention of the Office of the Attorney General in the proceeding**

The Office of the Attorney General is of great significance in criminal law and is a necessary part of any proceeding of this kind. However, its particularities differ as we analyze national jurisdiction and that of the Province of Buenos Aires. While in provincial courts the investigation is the responsibility of the Office of the Public prosecutor, nationally it is the responsibility of the Examining Judge, who could delegate it to the Office of the Attorney General.

Despite the considerations given to matters of standing to sue in the civil, administrative and criminal courts, it is wise to bear in mind a recommendation that emerged from the workshop of experts held as part of the project on cases that are not criminal. Although an important role exists for citizens and non-governmental organisations that not only file actions but also institute proceedings, in some cases this does not happen and cases could be halted. This is when intervention by the Office of the Attorney General in its capacity as representative of the public interest is recommendable to guarantee the finalisation of cases regardless of the circumstantial interest of the party.

It is also important to bear in mind that the Office of the Public Prosecutor intervenes in environmental questions, not only instituting criminal action, but also pronouncing judgement on jurisdiction in federal and national cases. This situation does not occur in other jurisdictions or subjects. So, bearing in mind the conclusions of the workshop of experts, it would be extremely positive to foster intervention of this organ in environmental cases in other jurisdictions because of the collective interests to

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<sup>56</sup> See Yane s/denuncia

safeguard, taking shared experience in the subject, particularly in Brazil, as an example.<sup>57</sup>

#### **d) Standing to be sued**

As regards standing to be sued, situations were identified in which the multiplicity of defendants act in detriment of the speeding-up of the process. A clear example was that of the *Asociación de Superficiaarios vs YPF* of original jurisdiction of the CSJN, in which a great deal of time was spent in notifying all the co-defendants of the claim.

Similarly, in many cases there are clear asymmetries between the plaintiffs and the defendants as to access to appeals that can contribute to the adequate development of a lawsuit.

Standing to be sued in the specific case of criminal liability contained in law 24,051 on hazardous waste extends not only to the individual accused, but also to the directors of the corporation who might have intervened in the punishable act.<sup>58</sup> This reveals a clear trend to broaden the criteria of liability in criminal matters and has been studied not only in regulatory analysis but also in the cases identified.

#### **e) Precautionary measures**

We are aware of the importance of precautionary measures in environmental law. A list of those used will be fundamental because for each case tried different typologies may be suitable. We should recall that there are such measures that depend on the principal object of the proceeding for instrumentation, and others that are independent. In this respect Jorge L. Kielmanovich maintains that *“the instrumentation of the preventive proceeding is instrumentation as regards another proceeding of knowledge or execution or even an extra-administrative proceeding”*. This means that the classic precautionary measure is characterized as being subordinated to a principal proceeding on which it depends. The finality of the classic preventive proceeding consists in ensuring the practical efficacy of the decision in a certain proceeding. However, the author explains that the note that distinguishes the precautionary measure from the *“medida autosatisfactiva”* (a measure which is itself the beginning and the end of the interest) is exactly that instrumentality and provisionality of the first, characters that are absent in the second whose favorable conclusion is sufficient for development and consummation<sup>59</sup>.

In *“medidas autosatisfactivas”* on the other hand the petition is no longer subordinated to the fate of a principal grievance, because it is *ipso facto* a principal grievance. Hence they are denominated material preventive processes because the principal petition is

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<sup>57</sup> The necessary intervention of the Public Prosecutor in the conflicts on assets of collective incidence recognises Brazilian comparative law 7341 of 1985 as a precedent. It deals with “public civil action on liability for harm caused to the environment.” It affords greater security in cases since the collective good will now be safeguarded by the legal activism of citizens, and an extra-power organ that cooperates with parties in pursuing those ends. See Brañes. Op. Cit and Capelli, Silvia.

<sup>58</sup> Art. 55. Whoever uses the waste referred to in the present law to poison, adulterate or contaminate in a for which is harmful for health, e soil, water, air or the environment in general shall receive the same penalties as established in section 200 of the Penal Code. If the act is followed by the death of any person, the penalty shall be from ten (10) to twenty-five (25) years of confinement or prison.

Art. 57. When any of the facts provided for in the two previous articles may have occurred at the decision of a corporation, the penalty will be applied to directors, managers, statutory auditors, members of the watchdog committee, administrators, agents or, company representatives who might have intervened in the punishable act, without prejudice to the remaining criminal liabilities that could exist.

<sup>59</sup> Kielmanovich Jorge L. *Tutela urgente y cautelar*, JA 6.12.99 no. 6171, p. 6/12.

contained within its object. This means that a favourable conclusion does not correspond with the conclusion of a classic preventive measure, but that it will be a definitive resolution, the decision that could put an end to the proceeding, since acceptance of the *autosatisfactiva* makes the subsequent procedure of the hypothetical principal procedure unnecessary, because it is in fact the basic material petition<sup>60</sup>.

The list of possibilities within the different preventive measures is varied. It is clear that today *medidas autosatisfactivas* are at the forefront and that especially in environmental matters they have won a place due to their enormous use in achieving effective protection of the right. This alerts us to the importance of this indicator, since in many cases the granting or not of suitable preventive measures may mean the possibility that access to judicial protection would become ineffective.

In other assumptions, and in the form of a preventive measure, the legal system has generated the conformation of an investigative organ to carry out measures that end up being mistaken for a preventive measure and a system of stockpiling and production of anticipated evidence. The first experience occurred in the "*Almada vs Copetro*" case, in which the effects of the burning of coke on residents of the outskirts of the city of La Plata were investigated, a case that is included in this investigation. The solution adopted on that opportunity spread like wildfire and was rapidly adopted in other cases.

It should be pointed out that clearly preventive and "*medidas autosatisfactivas*" were of great importance in this study. A clear inclination for acceptance was observed, either by the exemption from offering security or with the mere counter-security of the promissory oath, despite the request for security in property in certain cases.

The costs of security in property of this type may often prevent the taking of basic evidentiary measures in the proceeding. We believe it is necessary to bear in mind the admission of the promissory oath, as stipulated in the Argentine Code of Civil and Commercial Proceedings. Otherwise, this requirement would act as a true obstacle to any person or NGO requesting this type of measures.<sup>61</sup>

Another aspect that was stressed in the Workshop of Experts held within the framework of this investigation is on the importance of safeguarding the right to defence of the other party in the request for "*medidas autosatisfactivas*".

## **f) Evidence and bodies intervening in the process**

We know that gathering evidence in environmental prosecutions is one of the most important activities. An outstanding principle in this area of law is the dependence on scientific data. Similarly, in the development of this investigation the bodies with intervention in the process as a result of their close relation to the evidentiary stage are also included under this subheading.

In matters of the offer, production and processing of evidence there is amplitude in reception and a will by magistrates to promote other instruments of evidence, such as judicial acknowledgement, and to hold hearings to unify criteria, to concentrate and economise evidence and provide guidelines.

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<sup>60</sup> José Alberto Esain, "Evaluación de impacto ambiental y medida autosatisfactiva; dos vectores de la tutela ambiental preventiva" in the joint book entitled "*Derecho Ambiental*" (su actualidad de cara al tercer milenio) Eduardo Pablo Jiménez (coordinator), Ediar, Buenos Aires, 2004.

<sup>61</sup> See Declaration of Buenos Aires (2003) Latin American Symposium of Judges and Prosecutors. Environmental Compliance and Enforcement. FARN, UNEP and the World Bank Institute.

As regards experts' evidence, different realities have been studied in the courts. In general there are experts whose professional incumbency may include environmental themes. However, in some cases, the complexity of the subject exceeds professional specialisation and resources, with the magistrate having to resort to public bodies such as universities, specialised technological institutes or hospitals. In other areas, such as Mar del Plata, committees of experts or individuals are designated from the official list, even in cases of anticipated evidentiary measures. Another case is that of legal aid provided by experts in the Province of Buenos Aires who generally act jointly with the experts in issuing their own judgements.

The high cost of the evidence can be an obstacle in the process. In such a situation the role of the public bodies mentioned above becomes especially important. There is considerable need to secure a greater use of mechanisms present in the General Law of the Environment, such as the recognition of the rulings issued by public bodies in relation to environmental damage, which have the evidentiary force of experts' reports.

Evidentiary measures in criminal matters are ordered by the intervening judge on his own initiative or at the request of the prosecutor or complainant. They are financed by the state generally using the mechanisms employed by the security forces (Federal Police, National Border Police and Coastguard and, where appropriate, the Judicial Morgue which depends on the CSJN).

Considering the importance of the evidence in the environmental process, various aspects arose in the workshop of experts that need to be highlighted below:

A proposal was made to create a channel for collaboration between those jurisdictions in which there is no conflict, but the same material object. It could use evidence provided by experts and communication between judges seeking to innovate and not waste resources, since it would involve analyzes of the same de facto situations. Interinstitutional agreements could be signed to allow better evidentiary capabilities between those with the greatest possibilities.

There are also problems of duplication of evidence that are similar to the question of jurisdictions of various courts in a single dispute.

In cases with environmental content one of the most important questions is scientific evidence. However, one of the most frequent problems in this type of process is that experts are not sufficiently specialised to work on the subject. It is thought that from the courts of appeal that supervise the trial courts, and from the courts themselves, stricter requirements in the selection of the experts should be demanded. There is a Legal Aid Office, but it has been left incomplete. Different specialists are still needed in each case and Judges will need to request specific specialists, not just any expert.

Access to information must be improved. Information on questions such as what was the state of the space prior to contamination should be accessible to the investigating judges, and judges should demand such information from those who have the obligation to produce it. In order to improve the system one of the key elements should be to go to the enforcement authorities (e.g. Environment and Sustainable Development Secretariat) for further information in general, and for information on what type of sampling to do. The signing of agreements with state bodies and the formalisation of the proceeding to have them will be required. Today the information is subject to goodwill, and is solved by personal contact with the bodies - a very negative situation.

Data bases, or an index of the units of generation of scientific information, should be

available, since this would assist in the production of information and would give greater amplitude of knowledge. Having information is basic and would be of great help in creating units of production of scientific evidence.

Support bodies such as the security forces and the judicial morgue must know of the urgency in resolving environmental analyzes, and the judges must demand it from them, along with urgency in intervention. If not, all efforts are soon rendered pointless as certain samples are no longer valid after 24 or 48 hrs. The vision of the security forces must be improved.

There are insufficient resources, such as technical means to decide the question of experts' reports. This aspect can be linked to delays in investigating environmental cases and the problem of proving the damage in achieving resolution.

As to the support of magistrates, the existence of technical teams in the National Judiciary itself, such as the National Judicial Morgue, has been considered. In the Province of Buenos Aires, the existence of the Directorate General of Expert Legal Aid of the SCBA has been observed with interest.

Regarding the official bodies that also cooperate with the Judicial Power and the Office of the Attorney General, consideration was given to the Argentine Federal Police, Aeronautical Police, National Border Police, Argentine Coastguard and the Fire Brigade (laboratories, assistance centres, among others). Local security forces also interact with the courts and the offices of public prosecutors studied.

The study made in the Provincial Public Prosecutor's Office on Environmental Offences in the Province of Buenos Aires No. 11 revealed that there is a high degree of interaction with specialised bodies and that thanks to its organic speciality, it can capitalise on investigative tasks in the prevention of environmental conflicts.

It is therefore necessary to stress that in the workshop of magistrates and experts held as a result of this investigation, the recommendation to create an environmental Investigations Unit within the Office of the National Attorney General emerged as a specific proposal. It was thought that this body could offer the sort of help to prosecutors that does not exist in the federal sphere and that is necessary in themes touching on environmental offences.

### **g) Forms of intervention in the process**

The specialised doctrine discusses the development of collective conflicts<sup>62</sup>.

When a conflict is taken to court, we can no longer think of classic intervention by the disputing parties. There are many parties with interest in participating in the management and environmental dispute settlement process, either in administration or in justice, and we were able to observe in the study that new forms of intervention in the proceeding are vital for securing suitable access to jurisdiction.

According to Eduardo Jiménez, it is possible to assess the immense power that citizens, often accompanied by various civil society organizations, can wield in

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<sup>62</sup> In order to strengthen the idea of collective conflict and its application in environmental matters, see García Minella, Gabriela; *Sistema de derechos humanos y conflictividad social, el artículo 75 inc. 22 de la Constitución Nacional concebido como herramienta eficaz para gestionar en forma garantista la conflictividad social*, ED 22.2.2005, pp.9-10.

monitoring such a process, a circumstance that often strengthens the call for the creation of an independent Judiciary<sup>63</sup>.

A form of expression of this is the recent reception by our Highest Court of the figure of the *amicus curiae* in the legal process in national courts. Of course among the requirements these presentations involve their form and character. They are characteristics that may be presented in cases of public interest, by persons with an interest in offering an opinion or with technical solvency, but without a link with the parties that have decided to take the case to legal conflict. In these elements the character of the *friend of the court* is clear.

Now, the figure of the *companion* who presents an *adhesion* is different. It is someone who only expresses "support" for the presentation of one of the parties in the conflict. The adhesions must of course be in favour of the party who represents the defence of collective interests or assets, since if it was a party that enters the lawsuit in defence of individual assets the adhesion would be of a greater participative nature than corporative support in favour of collective individual interests. Another difference is the lack of opinion in the figure voicing the adhesion, who may be trained to give an opinion but does not do so.

Various forms of intervention in the process have been studied, that may not be used profusely but are interesting tools to bear in mind. Examples are: adhesions by private individuals and civil society organisations, judicial hearings with affected neighbours, summons to interested third parties. As to the *amicus curiae*, despite its consideration in an agreement of the highest court, examples could not be studied in the areas analyzed in these terms. However, one case of *amicus fori* was studied in National Justice in Civil Matters.<sup>64</sup>

#### **g) Fees and costs of the process**

The economic aspects of the process are fundamental, not only regarding the final resolution as to costs, but also in relation to the costs of production of the evidence that can affect the development of an egalitarian process in the matter. Many of the conclusions concerning the evidence and the importance of seeking more economical ways for its production contemplate the need to overcome the asymmetries that can appear in questions of costs of the process. Similarly, the aspects we have stressed in relation to the promissory oath are particularly relevant.

As to the costs of the process, in general the objective principle of defeat rules, in accordance with the National Civil and Commercial Procedural Code. Despite that, in National Justice and Justice in the City of Buenos Aires there have been decisions in which it was decided to impose legal costs to be borne by the party incurring the expense. In the particular case of the administrative court of the Province of Buenos Aires, the general principle of such legal costs rules as established in Law 13,101. This principle is an obstacle for the institution of collective demands. In contrast, we find the collective protection of rights recognised in the Constitution of the Autonomous City of Buenos Aires, in which the plaintiff is exempt from the payment of costs.

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<sup>63</sup> Eduardo Pablo Jiménez, Los magistrados judiciales concebidos como nuevos articuladores del sistema jurídico, in Revista Jurídica de Buenos Aires, Environmental Law, Coordinator Daniel Sabsay, Ed, Lexis Nexis, 2005, pp. 80.

<sup>64</sup> See Dalbón on publicity transport in the National Trial Court in Civil and Commercial Matters No. 54

## **h) The decision, its merits, times and scope**

Kelsen says that from a dynamic point of view, the individual regulation created by the legal decision is one stage in a process that starts from the days of the first Constitution, continues with legislation and customs and ends with legal decisions<sup>65</sup>. In this line of thought, the merits of the decision are a substantial element in recognizing the use of new tools of access to environmental justice. Knowing the merits is key to knowing the reasonability of the legal act.

The decisions studied have in many cases taken the Nacional Constitution and local constitutions into account in the right to a healthy environment and their obligation to preserve in the interests of achieving sustainable development. They based their decisions on relevant international treaties and specific environmental regulations. The principles included in the General Law on the Environment are particularly important.

Decisions in environmental matters present clear difficulties as regards the complexity of the subject and also in effective compliance. This is often due to the fact that the judge must deal with a decision that is still technically difficult to determine as the best alternative for the cessation of pollution or the recomposition of the environment. Even so, the cost of effective compliance is often very high and includes various plaintiffs. In this context, since the sanction of the General Law on the Environment tools are available to make compliance with and follow-up of the decisions more effective.

In several cases there have been incidents in the execution of a decision that include groups of experts. In other cases, there have been incidents in the execution of preventive measures at the request of the court itself<sup>66</sup>. Similarly, the judicature has requested that defendants submit progress reports with the intervention of the parties and technicians assigned to the Court on a fortnightly or monthly basis, giving an account of their effective compliance with the preventive measures decreed.<sup>67</sup>

There are also examples of requests for reports from the Ombudsman to follow up compliance with decisions. In some cases a daily fine was imposed for failure to comply with the execution of the decision.

The time factor also appears as a substantial element in environmental matters, since an appropriate solution to the conflict depends on it. From the study it emerges that different characterisations exist as to the time that elapses from filing the demand to final decision, which varies by reason of the different types of action, either on protection of rights, or on civil and administrative matters. We cannot deny that the quantity of instances visited in resolving the actions affected the delay in treating the different questions. The conflicts in jurisdictional competence actually caused a significant backlog in many cases.

In criminal matters, cases generally begin with police prevention and it is the Office of the Public Prosecutor that is under the obligation to institute the process. Similarly, the

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<sup>65</sup> Hans Kelsen, *Teoría General del Derecho y del Estado*, Translation by Eduardo García Maynez, Editorial Imprenta Universitaria, Mexico, 1958, pp. 159.

<sup>66</sup> See "Municipalidad de Berazategui c/Aguas Argentinas S.A. s/Ordinario" /Municipality of Berazategui vs, Aguas Argentinas S.A. on Ordinary Proceedings) being tried by Federal Court Nº 4 of La Plata, where the Federal Court of the Legal Department of La Plata requested its formation.

<sup>67</sup> See "Asociación para la protección del Medio Ambiente y Educación Ecológica "18 de octubre" c/Aguas Argentinas S.A y otros s/Amparo ("18 October" Association for the Protection of the Environment and Ecological Education vs Aguas Argentina et al on Protection Measure); "Asociación Coordinadora de Usuarios, Consumidores y Contribuyentes- EDESUR s/Cese de obra de cableado y traslado de Subestación Transformadora" (Association of Users, Consumers and Taxpayers vs EDESUR on Cessation of Cabling Work and Transfer of Transformer Substation).

question of defining jurisdiction is especially important due to the dissimilar case law of the Argentine Supreme Court of Justice and of the National Court of Criminal Cassation, which is often a delaying factor in the process.

Concerning the manner in which appeals are granted, according to the study made, the devolutive or suspensive effect of an appeal can, in either case, entail a modification in conditions of access to environmental jurisdiction.

As to the effect of the decision and its characterisation as *erga omnes*, although it is not explicitly posed, there are precedents in which the decision of the magistrate exceeds the specific question posed between the parties, and goes so far as to create mandates that tend to wider-reaching protection of the environment. However, the existence of an explicit reference to this characteristic recognised in the General Law on the Environment has in some cases been identified<sup>68</sup>.

Several cases were studied in which the process ended with conciliation hearings, either in trial courts or in higher courts.

They are of interest in reaching participative solutions with the intervention of more persons than those who are party to the proceeding. Also, mechanisms of this kind were considered for the development of the evidentiary stage.

### **Final conclusions**

We trust that this research project will be a useful tool for judges and prosecutors in their daily management of environmental conflicts. We believe that it is essential that magistrates should have access to different networks of a technical, academic and interdisciplinary nature to support their work.

We also trust that on the basis of the various themes and aspects identified ever more profound work can take place on designing and perfecting a system of indicators on access and environmental compliance and enforcement in the Justice system in our country.

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<sup>68</sup> This particular case could be observed in "Asociación para la Protección del Medio Ambiente y Educación Ecológica "18 de octubre" c/Aguas Argentinas y otros s/Amparo", in which the Appeals Court refers expressly to art. 33, second paragraph of law 25,675 and extends the effects of the decision to the remaining districts of Greater Buenos Aires affected and the State (the latter in its capacity as grantor of the public drinking water and sewers service and as control authority of the Environmental Water Management System).