

Beatriz Silvia Mendoza and others v. National State of Argentina

Supreme Court of Argentina, July 8, 2008¹

Applicable Precepts and Facts:

1) That in light of the presentation . . . by sixteen people exercising their personal rights in their capacity as victims of the environmental contamination of the Matanza-Riachulo river basin, with some of them also exercising the rights of their minor children, in order to bring various allegations against the National State, the Province of Buenos Aires, the Government of the Autonomous City of Buenos Aires and the forty- four named businesses, this Court issued a judgment on June 20, 2006, . . . adopting several pronouncements. The pronouncements which are relevant to the present action include:

a) Declaring this Tribunal's lack of original jurisdiction with respect to the claim aimed at redressing damage caused to the individual plaintiff's assets as an indirect result of aggression towards the environment.

b) Accepting the filing of the matter governed by Article 117 of the National Constitution, which addresses pollution of inter-jurisdictional environmental resources, and accepting the National State and the Province of Buenos Aires as legally recognized parties to this matter. Under the terms governed by Articles 41 and 43 of the Fundamental Law² and Article 30 of Law 25.675, the National State and the Province of Buenos Aires have the duty to ensure the common use of the environment and the collective well-being shaped by the environment, an environmental stewardship pursued through prevention, restoration, and ultimately, through compensation for collective harm, according to Article 28 of Law 25.675 (considering paragraph 7).

¹ Available at <https://www.escri-net.org/caselaw/2011/mendoza-beatriz-silva-et-al-vs-state-argentina-et-al-damages-damages-resulting>. Translated by Michael Posner, Visitor at FARN from the Human Rights Program of Harvard Law School.

² [Section 41 of the Constitution of Argentina states:

“All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.

The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. . . .”]

c) Exercising this Tribunal's ordained faculty and legally recognized power to protect the general interest. To that end, this Court:

I. Requested from the defendant-businesses information relating to all waste thrown into the river; whether they have treatment systems for that waste; and if they have contracted insurance for their activities, as required by Article 22 of Law 25.675.

II. Ordered the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires, and the Federal Environmental Council (CoFeMa) to present an integrated plan which addresses the area's environmental situation, control over anthropogenic activities, an environmental impact study of the defendant-businesses, an environmental education program, and an environmental informational program. . . .

3) That . . . several organizations submitted a request for standing, citing constitutional and non-constitutional text in order to intervene as third-parties in accordance with Article 90 of the Civil and Commercial Procedural Code of the Nation (citing Articles 41 and 43 of the National Constitution and Article 30 of Law 25.675). They expressed that their objective was to ensure that the defendants carried out, among other mandates, the requisite actions for the immediate cessation of contaminating activity and the restoration from the collective environmental damage in the area of the Matanza-Riachuelo River Basin.

This tribunal, in its' pronouncement on August 30, 2006, granted in part the seven organization's petition for intervention as third-parties, admitting only the Environment and Natural Resource Foundation (FARN), Greenpeace Foundation Argentina, Center for Legal and Social Studies (CELS), and the Boca Neighborhood Association. The Court felt that these organization's structural objectives, as found in their respective organic statutes, made participation as third parties appropriate. In this sense, the justification for acceptance as third- parties was not based on the General Interest Framework or the ample connection with the fulfillment of the National Constitution and Argentine laws, but instead by considering the legitimate interests of these organizations in the preservation of a collective right such as the right to a healthy environment. . . .

4) That in a joint submission effectuated August 24, 2006, the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires and CoFeMa invoked their answer to the Tribunal's request from its' June 20th pronouncement. The submission noted a consensus between the three government jurisdictions regarding the structural dimension of the problem, the decision to join forces in order to reach a solution, and also noted in particular the significance that the National Government has given to the environmental problem. The Integral Plan for the Clean-up of the Matanza- Riachuelo River Basin also accompanied the submission. The parties described the principle features of the clean-up program, its institutional and political structure in regard to the clean-up itself, and the social aspect of the clean-up. They also exhibited the requested environmental impact evaluations, offered final considerations, and submitted complementary documentation. . . .

6) That on September 5, 2006 the Tribunal began the scheduled hearing. On that date the plaintiffs explained in detail the contents and justification for their claim. For his part, the Secretary of the Environment and Sustainable Development of the Nation, as the representative for the government defendants, presented in front of the Court regarding the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. The Secretary was subsequently questioned by the members of this Court about various aspects of the clean-up program. . . .

The hearing continued on September 12, on which date the businesses had an opportunity to address the Court, orally presenting their reports. The businesses were also questioned by the Tribunal. . . .

7) That through the pronouncement on February 6, 2007, with respect to the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin, this Court ordered the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires to inform the Court of all adopted and completed measures dealing with contamination prevention, restoration, and environmental auditing, as well as measures relating to the environmental impact assessments of the defendant businesses. Lastly, the Court requested information on actions taken related to the industrial sector, the local population, and health care and prevention. Towards that end, a new public hearing was scheduled for February 20, 2007. At that time, the Secretary of the Environment and Sustainable Development of the Nation presented the requested report, answered several requests made by this Court, and submitted accompanying documentation, as requested, in support of the various areas of the mandated clean-up plan.

8) That on February 23, 2007, the Tribunal, after emphasizing that at this stage of the proceeding it lacked the knowledge necessary to issue a ruling, and once again in accordance with its ordained faculties and powers, ordered the intervention of the University of Buenos Aires. Through the work of professors with backgrounds and expertise in the various relevant fields, the University would proceed to inform the Court of the feasibility of the Clean-Up Plan presented by the State authorities. . . .

10) That in view of the presentation by the University of Buenos Aires of the requested report, the Tribunal again utilized its powers recognized in Article 32 of Law 25.675 and in Article 36 of the Procedural Rules in order to convene a public hearing so that the parties and intervening third-parties could orally express their observations of the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. Parties were also to be able to express their observations on the report prepared by the University of Buenos Aires regarding the feasibility of the Clean-Up Plan, presenting evidence in an attempt to contest the scientific aspects of the decision.

11) That said hearing began on July 4, 2007, with an opportunity for the Secretary of the Environment and Sustainable Development of the Nation, acting as the representative for the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires, to conduct his exhibition. The Ombudsman of the Nation, the representatives of some non-governmental organizations intervening as interested third-parties, and representatives of those defendants which chose to participate in this public hearing also received an opportunity to speak. . . .

12) That on August 22, 2007, the Tribunal issued the decisions which are detailed below.

On the defense side, and based on the results of the public hearings and the report prepared by the University of Buenos Aires, the Court gave notice that in order to carry forward the prevention and restoration aspect of the case it was necessary to order the collection of precise, up-to-date, public, and accessible information. Towards that end the Court imposed on the River Basin Authority and the representative for the three State defendants the obligation to inform the Court of the condition of the water, the air, and the underground systems of the river basin. The Court also requested a list of the industries currently in the river basin which conducted potentially contaminating activities, with specific pollutant figures. The Court further requested the minutes from the meetings carried out by the River Basin Authority as well as information from their other activities, reports on population and industry movement from the basin, information on petrochemical projects in the Dock Sud region, utilization of green credits, garbage clean-up, cleaning of the river banks, current and future projects for the expansion of the potable water network, storm drains, sewage systems, progress updates on their projects, the feasibility of their deadlines, definitive costs, financing information for all of the projects, and any additional information on their emergency health plan. . . .

14) That the government defendants submitted the requested reports, which were then subsequently amplified by the River Basin Authority. . . .

By order of the Court, summaries from the plaintiffs and third parties as well particular defenses were ordered, along with the accompanying documentation for each one of the responses. . . .

Whereas:

15) The restoration from and the prevention of environmental harm requires the issuance of urgent, definitive, and effective decisions. In accordance with this principle, the present decision definitely resolves the specific claim regarding restoration and prevention that has gone through this urgent and autonomous process.

The decisive goal is forward-looking and fixes the general criteria required for effective compliance with the stated objective, while still respecting the methods for compliance, methods which are left to the discretionary scope of the administration. Thus, the obligation for compliance should aim at achieving results and meeting the presently described objectives, while leaving the specific procedures to carry out those objectives up to the administration's determination.

At the same time, given the definitive nature of this decision, the process of execution will be delegated to a federal court of first instance, in order to ensure swiftness of future court decisions as well as effective judicial control over compliance.

However, as a consequence of the decision adopted, proceedings related to the indemnification for damages will continue to occur in front of this Court, since said damages do not deal with future action but rather with the attribution of liability stemming from past conduct.

The dictated sentence consists of a binding mandate on the defendants, with specific details that arise from the legal bases which follow and whose content has been determined by this Tribunal in exercise of powers deriving from the Constitution and the General Environmental Law. . . .

Regarding the Integral Plan for the Clean-up of the Matanza-Riachuelo River Basin presented by the defendants, various hearings have been convened which illustrate deficiencies that this Court must take into account. . . .

Moreover, effective implementation requires a program that fixes behavior defined with technical precision, the identification of a subject who is obligated to comply with the decision, the existence of objective indices that allow periodic control over the results, and ample participation in that control.

16) The River Basin Authority, created by Law 26.168, is obligated to carry out the program, and will assume the responsibility for any non-compliance or delays in carrying out the detailed objectives. The Authority must maintain members from the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires, to whom responsibility primarily corresponds for territorial settlement of the watershed region and to whom environmental obligations from the National Constitution, as well as more rigid local norms, apply. The responsibilities and obligations of these three entities have been recalled by this Court since its first intervention through the above-mentioned pronouncement on June 20, 2006.

17) The present decision mandates that the River Basin Authority complete the following program:

I) Objectives:

The program must pursue three simultaneous objectives, consisting of:

- 1) Improvement of the quality of life of the river basin inhabitants;
- 2) The environmental restoration of all of the river basin's components (water, air, and soil);
- 3) The prevention of reasonably foreseeable harm.

In order to measure the level of completion of these objectives the River Basin Authority must adopt one of the available international measurement systems and notify the relevant tribunal of their execution of this decision within 90 (ninety) business days. Failure to comply with this decision within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

II) Public Information:

Organize within 30 (thirty) business days a system of public information on the internet for the general public. The system must be clear, concentrated, and accessible, and it must contain all of the up-to-date facts, reports, lists, timelines, costs, etc., which were requested by the August 22, 2007 resolution.

Failure to comply with this order within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

III) Industrial Pollution:

- 1) Conduct inspections of all of the businesses currently in the Matanza-Riachuelo river basin within 30 (thirty) business days;
- 2) Identify those businesses deemed polluters through the issuance of a resolution from the River Basin Authority;
- 3) Mandate that all such businesses deemed polluters, who dump waste, discharges, or emissions into the river basin, must present to the relevant authority a treatment plan within 30 (thirty) business days from the date of notification via the issuance of a resolution by the River Basin Authority, as described above in (2);
- 4) Analyze and determine within 60 (sixty) business days the feasibility of the treatment plans referred to in (3), and where appropriate, approve said plans;
- 5) Order that the businesses whose treatment plans have not been submitted or approved – through a resolution from the River Basin Authority – cease in the spilling, emitting, or discharging into the river basin of any polluting substances. The promulgation of resolutions to that affect may not exceed the deadline of 180 (one hundred eighty) days from the present;
- 6) Adopt measures for partial or full closure and/or relocation. The River Basin Authority is empowered to extend the deadline or propose alternative measures when it is determined that the economic costs of treatment are unfeasible or when a grave social situation exists;
- 7) Notify the businesses of the existing lines of credit available to them for this purpose;
- 8) The public presentation, updated quarterly, of the condition of the water and underground systems, and the air quality of the river basin;
- 9) The public presentation, detailed and well-founded, of the industrial conversion and relocation project through the framework of the Agreement Act of the action plan, along with for environmental suitability of petrochemical activities in the

Dock Sud area, the businesses involved, the affected population, signed conventions, stages and deadlines for completion;

10) The public presentation of the progress and estimated timing of the planned initiatives of the Federal Subprogram Framework for the Urbanization of Villas and Squatter Settlements – Clean-Up of the Matanza- Riachuelo River Basin – Stage One, from November 21, 2006.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

IV) Clean-Up of Landfills:

Regarding the task of landfill clean-up from the Integral Plan, the River Bank Authority must:

- 1) Ensure within 6 (six) months the execution of the following:
 - a) The necessary measures to stop waste disposal into landfills which will be closed, whether they were legal or clandestine;
 - b) Measures for the implementation of the program submitted to this Court for the prevention of new open air landfills;
 - c) Measures to eradicate the homes near landfills and to subsequently prevent the construction of new homes along them.
- 2) Order the eradication, clean-up, and closure, within 1 (one) year, of all illegal landfills discovered by the River Basin Authority. . . .

V) Cleaning the Riverbanks:

Regarding the task of cleaning the riverbanks under the Integral Clean-Up Plan, the River Basin Authority must inform in a public manner, with details and well-founded support, the following:

- 1) The finalization of the rodent control, clean-up, and weeding phase of the four individual sectors from the Integral Clean-Up Plan, including deadlines and pertinent budgets;
- 2) The progress of the public works project to transform the river bank into public parks, in accordance with the provisions of the Integral Clean-Up Plan, including deadlines and pertinent budgets.

VI) Expansion of the potable water network:

Regarding the task of expanding the potable water network addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the plan headed by Water and Sanitation Argentina (AySA) and the National Organization for Sanitary Hydraulic Works (Enohsa) for the expansion of water catchments, treatment, and distribution. . . .

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

VII) Storm Drainage:

Regarding the task of storm drainage addressed in the Integral Clean- Up Plan, the River Bank Authority must publicly inform, in a detailed and well-supported manner, on the plan for storm drainage works, with particular emphasis on projects that must be completed in 2007, on projects currently being carried out, and on the commencement of works for the expansion of the storm drainage network in the period 2008-2015. In all cases, compliance deadlines and the pertinent budgets must be included.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

VIII) Sewage Sanitation:

Regarding the task of sewage sanitation addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the expansion projects headed by Water and Sanitation Argentina (AySA). . . .

IX) Emergency Health Plan:

. . . [T]he River Basin Authority is required to do the following:

- 1) Within 90 (ninety) days create a socio-demographic map and conduct investigations into environmental risk factors for the purpose of:
 - a) Determining the at-risk population;
 - b) Developing a diagnostic database for all diseases in order to aid the determination of pathogens produced by air, soil, and water pollution, along with other pathogens which are not dependent on those factors. Also develop a system for tracking the detected cases in order to verify the prevalence and survival of those pathogens;
 - c) Developing a publicly accessible Registry Information System Database of the pathogens detected in the river basin;

d) Specifying the epidemiological surveillance measures taken in the emergency zone.

2) Upon completion of the requirements in (1), the River Basin Authority must, within (60) sixty days, elaborate and put into effect specific health programs to meet the needs of the river basin population.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

18) Beyond the provisions from Law 26.168 and the constitutional norms which apply to each jurisdiction, this Tribunal considers transparency when dealing with government management of public resources to be of the utmost institutional importance. To that end, an authority must be responsible for this transparency. Thus, the Auditor General of the Nation will monitor the allocation of funds and all Plan-related budget implementation. . . .

Notwithstanding the above, the judge in charge of program execution may submit any questions related to budget control and execution to the River Basin Authority. The River Basin Authority must respond in a detailed manner within 10 (ten) business days. Also, if any of the subjects who are entitled to observe the information exercise that right, the River Basin Authority must hold a public hearing in its' headquarters within 10 (ten) business days, during which the Authority must explain any non-conformance.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

19) It is equally as important to strengthen citizen participation in the monitoring of completion of the program described above.

Said control must be organized through the appointment of a coordinator who is capable of receiving citizen suggestions and of relaying to citizens the proper processes.

To that end, in recognition of their full functional autonomy of not receiving instructions from any other State power, the designation of citizen monitoring coordinator must lie with the Ombudsman of the Nation. The Ombudsman will form a collegiate body with the representatives of the non-governmental organizations who intervened in the cause as third-parties, coordinating these NGO's operations and distributing tasks to them. Tasks should include the reception of updated information and the formulation of concrete plans to present to the River Basin Authority in order to better achieve the mandated goals, and tasks should be guided by the criteria of equality, specialization, reasonableness, and effectiveness.

20) Since the nature and content of this decision is a final declaration over the restoration and prevention issue, a prudent consideration in anticipation of the various circumstances which may arise from the present mandates is demanded.

At this juncture, the Tribunal must make a decision which is the result of carefully balancing two circumstances.

The first – which has been sufficiently identified and emphasized by the June 20, 2006 pronouncement on this matter in order to justify the dismissal of the claims for individual damages . . . – is that this Court must maintain rationality in the cases it hears and decides, so as not to overstep the responsible exercise of the power granted to it by the Supreme Law, which grants this Court jurisdiction as final interpreter, as the last guardian of people’s highest rights, and as a participant in the republican form of government.

The other circumstance stems from the institutional requirement that the decisions of this Court are loyally respected, and is mentioned because of the acknowledged power of the River Basin Authority. Any frustration of the constitutional jurisdiction exercised through this pronouncement, whether by the River Basin Authority or any other subject reached by this decision, including national and local authorities, the judiciary, or administrative agencies, must be avoided. In the well-known precedent P.95.XXXIX Ponce, Carlos Alberto v/ San Luis, Province, from February 24, 2005 (Decision: 328:175), through rulings issued in the first instance, it was established that this Tribunal must judge whether their decisions have been followed, and if not, the Court must take all the necessary steps to ensure strict compliance with its decisions. This includes dismantling the consequences stemming from any local authority’s pronouncements which were intended to neutralize, paralyze, or ignore, in whole or in part, mandates issued by this Court.

These considerations, along with the need to preserve a significant level of immediacy of judicial decisions, lead this Tribunal to consider it appropriate and competent to issue this decision according to the terms of Article 499 of the Civil Procedure and Commercial Code of the Nation. It is also appropriate for a federal judge of first instance with jurisdiction over the river bank territory to address the further questions that arise from this case. Considering the jurisdiction addressed by Article 3 of Law 25.519, the report submitted by the Secretary of General Administration regarding human resources, and the decisive fact of its recent inception (2/2006), intervention is granted to the Federal Court of First Instance of Quilmes.

21) In addition to timely enforcement of the decision, the Federal Court of First Instance of Quilmes will also conduct judicial review of contested promulgations by the River Basin Authority (Articles 18 and 109 of the National Constitution). This jurisdiction which will be exclusive in order to ensure uniformity and consistency in the interpretation of questions that arise, as opposed to opening up heterogeneous or even contradictory criteria that might result from review by different judges of first instance. . . .

process with the constitutional principle that speed must prevail in resolving these conflicts. Moreover, in order to make the procedural rules clear, it is appropriate to eliminate intervention by any other judiciary, so that decisions by the magistrate whose intervention has been ordered will be considered equivalent to pronouncements by the superior tribunal for this matter. Thus, challenges brought in front of this Court will not have to first pass through any intermediate court. The delegated tribunal will also have the necessary power to determine the value of the daily fines stemming from non-completion of deadlines. Fines should be of a sufficient quantity

in order to deter reticent conduct. Also, the tribunal will be able to order investigations into any crimes that result from non-completion of the judicial mandates in the present decision. . . .

Therefore it is resolved:

1. The verdict is issued with respect to the claims aimed at environmental restoration and prevention.
2. To order the River Basin Authority, created by Law 26.168, to complete the program established by this decision.
3. To provide that the National State, the Province of Buenos Aires, and the Autonomous City of Buenos are equally and concurrently responsible for the implementation of said program.
4. To establish that the Auditor General of the National will monitor the allocation of funds and the budget implementation related to the Integral Clean-Up Plan.
5. To enable citizen participation in the monitoring of the Clean-Up Plan and the present program.
6. To entrust the Ombudsman of the Nation with the coordination of said citizen participation, through the formation of a collegiate group whose members will consist of representatives from the non-governmental organizations who participated as third parties in this action.
7. To confer to the Federal Judge of First Instance of Quilmes jurisdiction to hear all questions related to the implementation of this pronouncement and for the review of final decisions made by the River Basin Authority, according to the jurisdictional reach established above in (20) and (21).
8. To order the joinder of all proceedings and current litigation, where appropriate, according to the pronouncement in (22).
9. To maintain in front of this Court aspects of this cause relating to restitution for collective damage.
10. To order the sending of accurate copies, both paper and electronic, of all relevant materials to the Federal Court of Quilmes, so that the judges will have at their disposal all of the pertinent documentation to handle arising questions.
11. To postpone the pronouncement on costs until the sentence for the claim still pending in front of this court is issued.