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ACQUIRED ADMINISTRATIVE RIGHTS AND CHILEAN ENVIRONMENTAL ASSESSMENT

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ABSTRACT

This article examines the pronouncements regarding property rights in the environmental impact assessment regime in Chilean law to determine the protection of the activities authorized by the Public Administration. The analysis starts from the pronouncements of the Comptroller General of the Republic (administrative case law). The judgments of the courts of justice (judicial case law) are then examined. The contrast in the pronouncements of the two state bodies reveals relevant differences in the interpretation of the rights of the holders. In the Comptroller General of the Republic, the environmental impact assessment has created vested rights to a continuity of operation. As a result, certain economic activities cannot be evaluated environmentally, and the regime of others already evaluated cannot be subject to modification. Judgments of the courts of justice diverge from the criteria above by restrictive interpretations of the administrative rights that may be acquired by the holders of activities in this environmental protection instrument.

Keywords: acquired rights; environmental impact assessment; legal security.

DIREITOS ADMINISTRATIVOS ADQUIRIDOS E AVALIAÇÃO AMBIENTAL CHILENA

RESUMO

Este artigo examina os pronunciamentos relativos aos direitos adquiridos no regime de avaliação do impacto ambiental no direito chileno, com o intuito de determinar a estabilidade das atividades autorizadas pela administração pública. Para esses propósitos, analisam-se as Sentenças

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da Controladoria-Geral da República (jurisprudência administrativa) e, posteriormente, os acórdãos dos tribunais de justiça (jurisprudência judicial). O contraste entre os pronunciamentos dos dois gabinetes revela diferenças significativas na interpretação dos direitos dos titulares dessas atividades. A avaliação de impacto ambiental permitiu, no Gabinete da Controladoria-Geral da República, a criação de direitos adquiridos para a continuação do funcionamento. Como resultado, certas atividades não podem ser avaliadas ambientalmente, ao passo que o regime de outras já avaliadas não pode ser sujeito a modificações. Diferentes decisões judiciais revelam divergências com os critérios supramencionados, por meio de uma interpretação restritiva dos direitos administrativos adquiridos pelos titulares de atividades nesse instrumento de gestão ambiental.

Palavras-chave: *direitos adquiridos; avaliação do impacto ambiental; segurança jurídica; avaliação do impacto ambiental; segurança jurídica.*

INTRODUCTION

The notion of acquired right is common to different disciplines. In Chilean administrative law, its most evident manifestation is associated with the limits of the power to revoke administrative acts or, more precisely, with the impossibility of revising them based on their merits.[2] In the field of environmental protection (whose requirements sometimes seem to be part of the control of the merits of administrative acts), such acquisition is controversial. While it is necessary for activity holders to carry out works and projects, it may be necessary to modify the administrative titles that have been granted in case of changes in the environment or in the perception of risks.

Although this tension is present in various management instruments established in the Law on General Bases of the Environment – henceforth Law 19,300 –, the environmental impact assessment is among them and characterizes this problem in particular. Legally, this assessment corresponds to an administrative procedure that, as such, has the purpose of producing an environmental permit (*resolución de calificación ambiental* – RCA) (art. 18 of Law 19,880). On the one hand, the fact that it can be maintained over time is clearly relevant to the holder of the activity that needs to acquire such right. On the other, the need for it to be adaptable could be imperative for the administration, which could object to this acquisition.

This might explain the reason why acquired rights and environmental impact assessment reconcile conflicting purposes. According to Jean-Pierre Boivin, they would include, on one side, the protection to legally constituted situations and, on the other side, "the preservation of the public order, which justifies more general and immediate application of police laws" (BOIVIN, 2003, p. 50). In Chilean law, most of the time administrative case law resolved this contradiction in favor of the first mentioned objective. In judicial case law, valuation in this direction can be reversed.

In fact, Chilean administrative case law has progressively developed to protect rights of holders of activities that can affect the environment. By doing so, it developed criteria for application *in abstracto*. In

2 Art. 61, *a*, of Law 19,880. Without harm to an association, also common, between property right and this notion. Refer to: Guiloff (2018), Silva (1992) and Vergara (1991). However, assimilation of these categories is not unanimous. In favor of this identification: Fermandois (2015) and Fermandois (2005). Against: Fuentes (2012).

accordance with these criteria, a holder of such activities will have the right to continue operating, and, as a consequence, a modification to the regime of environmental impact assessment that can affect it would be inapplicable (1). This position, however, has been subject to variations in judicial case law. Chilean courts introduced certain limitations to these rights, establishing criteria for application *in concreto*, which may reverse the previous result (2).

1 RECOGNITION OF ACQUIRED RIGHTS IN ADMINISTRATIVE CASE LAW

Since the environmental impact assessment procedure has started, the Office of the Comptroller General of the Republic (*Oficina de la Contraloría General de la República* – CGR) had to interpret its provisions administratively. Indirectly, the interpretation of some of them meant assuring the right to continue the activities in the face of environmental impact assessment, in spite of the change in environmental circumstances. In deciding in this sense, the administrative case law established real acquired rights, understood as benefits for the maintenance of such works or activities. Within the scope of this instrument, they can be identified as rights to non-retroactivity (1.1) and to the environmental impact statement (1.2).

1.1 Right to non-retroactivity

The timely application of the provisions of Law 19,300 was not expressly resolved. In the environmental impact assessment, the absence of an express solution, added to the application of the general regime on the law retroactive effect, has led to the interpretation of its non-retroactivity. Although the degrees of non-retroactivity can be variable (VERDERA, 2006; MONTT, 2015) and have been questioned in this context (PRIEUR, 2016), the validity of a criterion that impedes the environmental assessment of activities implemented at the time this regime entered into force (April 3, 1997) is interpreted *in abstracto*. Implicitly, this interpretation gave rise to the right to non-assessment of the environmental impact, which benefits holders of regular activities undertook before that date (1.1.1). The CGR has progressively elaborated its recognition and, in particular, its acquisition and loss requirements (1.1.2).

1.1.1 The formulation of the right to non-retroactivity

Although Law 19,300 came into force in 1994, the environmental impact assessment procedure became applicable only after its implementation regulation was issued, on April 3, 1997 (the assessment of certain activities was anticipated by Ordinance No. 888 of 1993, MINSEGPRES). As of that date, the activities referred to in art. 10 were subject to this regime, without prejudice to the initial absence of specific sanctions for non-compliance (BASCUÑÁN, 2001). Neither Law 19,300 nor the regulation of environmental impact assessment, however, specified the applicability of this procedure in relation to activities previously authorized by the Administration.

Indeed, Law 19,300 addressed the effects at the time of the environmental impact assessment. Nevertheless, its implementation regulation limited to regulating the application of this procedure in relation to projects in process on the date such procedure entered into force. According to transitional art.1 of the regulation, "Those projects or activities whose environmental impact assessment is in progress on the date of entry into force of this Regulation shall continue to be processed in accordance with the procedure established in Law and in this Regulation" (CHILE, 1997).

The absence of specific provisions on this aspect meant that the applicability of the environmental impact assessment to projects already authorized by the administration was, strictly speaking, a problem of interpretation of the rules. Its first administrative reading would have its origin in Decree 25.768 of 1998. On the occasion of the review of the urban planning instruments, it was stated that, "as the regulatory plan procedure in question began four months before the entry into force of the provisions on environmental impact assessment, it was not subject to the requirements of the Law 19,300" (CHILE, 1998).

These aspects would be developed with the issuance of Ordinance 38.762 of 2000. Regarding the approval of hydroelectric projects, administrative case law will conclude that:

> Despite the new mentioned provisions of Law no. 19.300 shall apply from its entry into force, that is, on April 3, 1997, the actions and diligences initiated before that date, in accordance with the provisions of art. 24 of the Law on the Retroactive Effect of Laws, are not governed by this regulation, but by the precepts in force at the time of its beginning (CHILE, 2000).

Thus, activities prior to that date would be excluded from the environmental impact assessment (MONTENEGRO, 2009; ASTORGA, 2000; BÓRQUEZ, 1993), and different instruments would be applicable.

The CGR, by analogy, has interpreted favorably the applicability of art. 24 of the Law on the retroactive effect of laws on such activities. This provision does not regulate administrative procedures, such as environmental impact assessment, and it is applicable to legal proceedings. Discarding the application of other rules (such as article 9 of the Civil Code, which limits, in general terms, law retroactivity), the CGR equates the environmental assessment to an "action" or "diligence" that, through the application of that provision, would be governed by the legislation in force at the time of its beginning.

This administrative interpretation, favorable to the non-retroactivity of the environmental impact assessment, was not isolated. This can be seen in numerous decisions, such as Decrees 21.270 of 2001; 18.436 of 2003; 29.143 of 2006; 28.757 of 2007, and Law 66.261 of 2015. When resolving the application at the time of the environmental impact assessment, administrative case law developed, in all these cases, the non-retroactivity recognized in Decree 38.762 of 2000 (already announced in Decree 25.768 of 1998), which means a uniform administrative case law, without harm to the existence of requirements.

1.1.1 The requirements for the right to non-retroactivity

The right to non-retroactivity of the environmental impact assessment, recognized by administrative case law, does not allow concluding that every holder of a project or work described in art. 10 of Law 19,300 – which began before April 3, 1997 – benefits from it. It is also not possible to state that, once a non-retroactivity right has been acquired, its holder cannot lose it. Each of these matters was specified by the CGR, constituting requirements for the acquisition and preservation of this benefit. The matters have been progressively defined, forming a coherent regime.

The main provisions that determined the requirements for the acquisition and preservation of the right to no environmental assessment – due to non-retroactivity – have been its opening rules. Although this provision did not draw the attention of the doctrine regarding the general applicability of this regime, it favored the elaboration of case law on its temporal application. According to that provision: "The projects or

activities referred to in art. 10 can only be implemented or modified after an environmental impact assessment, in accordance with the provisions of this Law" (CHILE, 1994).

Originally, art. 8 and following of Law 19,300 allowed the interpretation that if an authorization request had been made at the time the environmental impact implementation regulation came into force (on April 3, 1997), it was insufficient to acquire such right. According to Decree 21.270 of 2001, the work should have been authorized before the applicability of the regime (which involves submitting the request and obtaining the decision), since "the principle of legality obliges the authority to submit to the law in force at the moment the petition shall be resolved" (CONTRALORÍA GENERAL DE LA REPÚBLICA, 2001).

Subsequently, the execution referred to in art. 8 of Law 19,300 would be separated from the mere regularity of the project already authorized by the administration. In addition to this formal condition, Decree 29.143 of 2006 would also impose a material requirement, since the holder should have carried out implementing acts (CONTRALORÍA GENERAL DE LA REPÚBLICA, 2006). This requirement, which at that date lacked legal sanctions if not complied with, was interpreted in accordance with art. 2, *b*, of the Regulation of the Environmental Impact Assessment System, which, for these purposes, was understood to define such execution as "the performance of works, actions or measures contained in a project or activity and the adoption of measures aimed at materializing one or more of its construction, implementation or operation phases" (CHILE, 1997).

Although these conditions have been formulated by administrative case law with a view to the past (applicable to activities prior to April 3, 1997, the date of entry into force of the environmental impact assessment procedure), they are applicable to any project that is included in the list of activities subject to said regime in the future, which, as mentioned in CGR Decree 12.659 of 2008, may vary, not only due to legal changes, but also to regulations, since the characteristics of such activities are specified in this way.

This importance also involves the requirements to preserve the right to no environmental assessment based on non-retroactivity. The forms of cutting a benefit were also defined by virtue of art. 8 of Law 19,300. In addition to requiring the work or project to be carried out, this provision incorporates significant changes to the activities. Although, according to CGR Decree 18.436 of 2003, such incorporation allows previous

modifications to benefit from the same non-retroactivity as the initial development of works or projects, this requirement also conditioned the validity of this non-retroactivity.

In fact, if the holder of an activity started before April 3, 1997modifies significantly the work in question, administrative case law interprets the loss of this right, as can be seen in Decree 66.261 of 2015 (CHILE, 2015). However, CGR's arguments did not establish limits for the activity assessment in such cases. Therefore, application of art. 11 of Law 19,300 to the beneficiaries of this right is a matter to be resolved, and, in the case of significant changes in the works, assessment of aspects that have already been authorized is not possible.

Nevertheless, administrative case law has not been indifferent to the Administration's freedom to resolve such subjection to environmental assessment. As it is known, in this case, the Environmental Assessment Service has a margin to assess the significant nature of the change, without prejudice to the fact that the interpretation of the RCAs also involves the intervention of the Superintendence of Environment (CARRASCO; HERRERA, 2014). The non-retroactivity of environmental impact assessment is subject to a strict regime, as the meaninglessness of changes made to projects prior to April 3, 1997 has to be particularly well-founded in the absence of any prior analysis (CHILE, 2005).[3] In relation to environmentally assessed activities, this certainly implies a more rigorous regime.

1.2 Right to the statement

A second variant of the acquired right is not associated with projects excluded from the environmental impact assessment (which may give rise to a non-assessment benefit, given their non-retroactivity), but integrated into it. However, unlike the previous case, the CGR lacked the same consistency in this area. After asserting the absence of any revision of

3 Subsequently, the application criteria were established by art. 2, *g* 2, of the Regulation of the Environmental Impact Assessment System. According to that provision: "For projects initiated before the entry into force of the environmental impact assessment system**",** the subjection to this system, as a modification result, will take place "if the sum of the parts, works or actions tending to intervene or complement the project or activity after the entry into force of this system that have not been environmentally qualified constitute a project or activity listed in art. 3 of this Regulation" (CHILE, 2012). Its infraction is currently covered by legislation as a criminal offence. According to art. 35, *b*, of the 2010 Law that creates the Superintendence of Environment, an infraction is "[the] development of projects and activities for which the law requires an RCA, without its existence" (CHILE, 2010). However, since the beginning of the regime, in 1997, the doctrine has interpreted the application of legal consequences to the environmental damage. Refer to: Femenías (2017).

the RCA, it maintained that they should be revised without distinction. A third position will distinguish that revision according to the means of assessment (1.2.1). Currently, this criterion allows discarding an acquired right to RCAs subject to environmental impact studies. Only declared activities would produce such effect (1.2.2).

1.2.1 The legal ratification of revision jurisdiction

The enforceability of an environmental impact assessment is not only associated with substantive requirements. It is also linked to the rules of the environmental impact assessment procedure. Under Law 19,300, projects requiring such processing did not follow a formula. In art. 11 of Law 19,300, the legislator only specified the effects, characteristics or circumstances associated with these projects. If a project included in the list of art. 10 of Law 19,300 generates one or more of them, it have to be subject to an appealed administrative procedure, in aspects related both to citizen participation and to processing time, also modifying its challenge regime.

The fact that it is an appealed procedure has attracted a greater attention from the doctrine with regard to the protection to its holders' rights. It is evident that, at the time the environmental impact assessment came into force (April 3, 1997), said protection was associated with the absence, at that time, of an express competence of the Administration to review its acts. Although administrative case law recognized such power – such as: CGR Decree 23.518 of 1993 –, this contributed to integrate the RCA into the regime of intangibility of private property – art. 19, No. 24 of the Constitution (FERMANDOIS, 2005).

Within the scope of the environmental impact assessment, this effect is associated with the maintenance of certain exercise conditions. This had favorable consequences for the licensee protection. The RCA could not be modified by the Administration. This was the conclusion of Decree 52.241 of 2002, in which administrative case law recalled that "the power to modify the RCA in the face of unforeseen environmental impacts was not granted either to CONAMA or to the Regional Environment Commissions" (CHILE, 2002).

Shortly after, however, the body reconsidered this criterion (ALBURQUENQUE, 2005). Such reconsideration appeared to be influenced by the imminent entry into force of Law 19,880 of 2003, which

establishes the Basis of Administrative Procedures. It is known that said legislation granted the Administration the power to review its acts, whether based on legality or merit (arts. 53 and 61 of Law 19,880, respectively). The reassessment of the merits of these RCAs was implicit in CGR Decree 20.477 of 2003, stating that such acts would have to be modified if the project was decoupled from its monitoring plan.

Legally, however, this form of review could not be assimilated to the administration's powers when exercising invalidation or revocation powers, which were already legally recognized. Said review did not imply an initial illegality of the RCA, thus separating it from its invalidation. And while it implied a reassessment of the merits, it was far from being repealed, as it did not involve an abnormal extinction. The figure only seemed close to an extraordinary revision based on an evident error (art. 60 of Law 19,880). However, it could be exercised *ex officio* and without being subject to the one-year period required by law.

After a while and with certain variations, this revision jurisdiction would be established in Law 20.417 of 2010, which introduced art. 25 *quinquies* to Law 19,300. From the entry into force of this provision, the Administration can exceptionally revise the RCAs, if "when the project was developed, the variables assessed and contemplated in the monitoring plan in which the conditions or measures were established varied substantially in relation to what was projected or were not verified, all with the objective of adopting the necessary measures to correct such situations" (CHILE, 2010).

Currently, the administration has an exceptional review jurisdiction, thus complementing its invalidation and revocation powers. While the case law has not determined its temporal scope of application (in order to specify whether it only applies to projects authorized after their incorporation into the law, or also to those approved before), the CGR specified its material application. The interest in this determination is that, in doing so, administrative case law excluded projects subject to a statement regime, thus establishing a new acquired right.

1.2.2 Case law constraint of revision jurisdiction

The imprecision of the environmental impact assessment regime and its modifications led to limitations in the protection to the rights acquired by the holders of the RCA. Administrative case law, first, and the introduction

of art. 25 *quinquies* by Law 20.417 later allowed these acts to be revised, at least in exceptional circumstances. Although a revision in this sense does not always imply appealing the initial conditions of operation (the holder can also request its exercise), it can be verified *ex officio* or at the request of third parties.

The legal amendment that introduced the exceptional revision of the RCA, however, did not clearly specify its scope of application. In principle, art. 25 *quinquies* of Law 19,300 seems to be limited to projects assessed by means of environmental impact studies, requiring that project variables be dissociated from the monitoring plan (aspects that, in general, imply the elaboration of that study). Nevertheless, this restriction was not present in the position of administrative case law, which established the revision of such decisions without distinguishing the means of assessment.

That is why the position followed by the CGR can be remarkable. Aware of the different administrative interpretations of the scope of art. 25 *quinquies* of Law 19,300, the CGR will limit that revision to projects assessed by means of environmental impact studies for two reasons. The first is the fact that the monitoring plans required by this provision have been integrated, in such studies, only by art. 12, *f*, of Law 19,300 and, likewise, by art. 18 of the Supreme Decree No. 40 of 2013, which approves the Regulation of the Environmental Impact Assessment System. The second is the exceptional qualification of the regime, which would imply a restrictive interpretation (CHILE, 2013b).

Although this position can be questioned, given the characteristics of certain projects approved by means of an environmental impact statement (which may require, like those subject to studies, a plan for monitoring environmental variables), the CGR retained said interpretation of art. 25 *quinquies* of Law 19,300. In fact, after meeting requests for reconsideration of Decree 34.811 of 2017, Decree 3.727 of 2019 confirmed the applicability of the exceptional revision for projects assessed by means of impact studies, excluding those declared, reiterating its arguments (CHILE, 2019).

Thus, the importance of CGR Decree 34.811 of 2017 has been to divide the patrimonial protection to the various holders of RCAs. The approval of such RCAs by means of a statement prevents any revision, even if the projected environmental variables have undergone significant changes in relation to the initial statement. However, holders of RCAs approved by means of environmental impact studies may have them revised in the same case, which could be questioned based on the equality between them.

In the case of other hypotheses of administrative revisions, the two titles would be strictly assimilated. These revision scenarios were listed in CGR Decree 52.241 of 2002, which considers invalidation and significant modification to the work as grounds for the loss of rights established in an RCA. As the invalidation does not take effect two years after the issuance of the act (art. 53 of Law n. 19.880), it can be concluded that, beyond this period, any holder of an activity that has not undergone significant changes will have the acquired right to continue its activity, provided that it has been subject to an impact statement.

Thus, it is possible to observe how, in the environmental impact assessment procedure, the protection to administrative rights works with a variable geometry. The intangibility of an acquired right would only exist in favor of the holders that started their works before April 3, 1997 (or before the activity was incorporated into the regime by legal or regulatory changes), due to the non-retroactivity of the environmental impact assessment, as well as those that, subject to an impact assessment, have obtained an RCA by means of a statement since any modification or alteration to the environment will be impracticable for them.

This interpretation, though, is far from being reiterated in judicial case law.

2 LIMITATION TO ACQUIRED RIGHTS IN JUDICIAL CASE LAW

The scheme of acquired rights in the environmental impact assessment, developed by administrative case law, differs from the treatment of judicial case law with regard to the powers of the holders of activities subject to this regime. Although the courts implicitly tend to interpret the applicable provisions in a manner similar to that of the CGR, this interpretation lacks the same uniformity as in administrative case law. This allowed certain decisions to reject intangibility *in abstracto* of the rights to non-retroactivity and to the environmental impact statement, in favor of an assessment *in concreto*, in the face of the production of environmental damages (2.1) and impacts (2.2).

2.1 Limitation to acquired rights due to environmental damage

Environmental damage is decoupled from environmental impact. The difference between these notions is, in principle, quantitative. As the

judgment of the Court of Appeals of Santiago – normative 9.052-2001 – would resolve in due course, environmental damage assumes an exorbitant significance for such impacts However, the distinction between such concepts is also qualitative. Unlike the environmental impact, damages of the same nature imply an element of illegality inherent in the conduct (FEMENÍAS, 2017). This probably explains the position of the courts when faced with damage caused by holders of administrative authorizations in environmental matters. In the environmental impact assessment, judicial case law admits that the generation of such consequences can lead to the loss of the right to non-retroactivity (2.1.1) and to the statement (2.1.2), as previously analyzed.

2.1.1 Loss of the right to non-retroactivity

When specifying the regime of the right to non-retroactivity of the environmental impact assessment, the CGR identified only two hypotheses of non-application: absence of material development of the authorized project at the time the processing of the assessment procedure is required (one situation that, strictly speaking, prevents the right from being acquired by the holder of the RCA, thus differentiating it from the expiry regime applicable to all holders of RCAs) and the case of a significant modification to the same project. While the first of these principles appears to be the beginning of the activity, the second requires further assessment.

Thus, it can be seen that, in the face of these hypotheses, the behavior of the holder of a work or project is of little or no interest in relation to the damages that it can cause. Whether or not the holder complies with the applicable provisions, they will continue to benefit from an exemption from the application of the environmental impact assessment procedure. It is in this area that judicial case law introduced a modification to the regime of the acquired right to non-retroactivity that could make it possible to complement the list of cases of non-application in administrative case law.

Although its application is exceptional, the court case law has not ignored the loss of the right to non-retroactivity in the environmental impact assessment as a result of the production of certain environmental damages. This was the case of the Normative Supreme Court Judgment 10200-2006, decided on the occasion of a claim for compensation for environmental damage. The controversy is related to the activity of an aggregate processing and classification unit, whose reception, in 1991, preceded the environmental impact assessment.

Indeed, even though the activity in question was received six years before the environmental impact assessment to come into force (April 3, 1997) and was invoked in support for the defendant's defense, the Supreme Court in this case would confirm the submission of the activity to the assessment procedure, in accordance with Judgment 10.200-2006 of the Court of Appeals. And, although such a case law criterion could be associated with the failure to comply with a specific regulation in the generation of the damage itself, the judgment would suggest that the application of the regulation would not prevent that effect.

Thus, it can be observed that the contrast between judicial and administrative case law in this regard is significant. In affirming a constitutional interpretation of the legal provisions applicable to environmental impact assessment, the Santiago Court of Appeals, ratifying the decision of the first instance, rejected any right to non-retroactivity in this instrument, stating that "the rule contained in art. 9 of the Civil Code cannot be considered violated, since the appellant develops, while the aforementioned law [19.300] is in force, the activities that are affected by the environmental assessment system" (CHILE, 2008).

This extension, likely to affect the non-retroactivity of the environmental impact assessment, is due, in principle, to the lack of specificity of the corrective measures applicable in the environmental liability regime. Art. 2, *s*, of Law 19,300 limits to stating the objectives of such measures (in terms of achieving the environment restoration, or one or more of its components, to a similar quality or the restoration of its basic properties), granting a wide judicial revision to determine its application, provided that the elements of that liability are accredited.

Interpreted in this way, protection to the continuity of authorized activities before the entry into force of the environmental impact assessment can only be understood as covering the difficulty that could be involved in proving the different elements of this environmental damage regime. Without prejudice to the fact that arts. 3 and 51 of Law 19,300 opt for a subjective model of liability, which requires proof of the fault or intent of the holder of the activity, art. 2, *e*, and this legislation also requires an exorbitant element for non-contractual civil liability, namely: the significant nature of the damage caused to the environment.

Finally, it should be noted that case law in this regard can only be explained by the temporal extension of liability for environmental damage. Unlike the environmental impact assessment procedure, the liability

regime of sections 51 and following of Law 19,300 was not conditioned to the commencement of activities on a certain date. As it applies without distinction in time, its rules apply to activities authorized before the entry into force of the environmental impact assessment. As it will be seen, this situation also affects operators of activities subject to this regime through an environmental impact assessment statement.

2.1.2 Loss of the right to the statement

The application of liability for environmental damages over time not only made it possible to affect operators of activities initiated before the environmental impact assessment, but also led to changes in the regime of activities subject to the statement procedure by means of the impact statement. As we have seen, according to the CGR, these RCAs enjoy greater stability than the projects assessed through impact studies, as any exceptional revision is prevented, not being applicable when the environmental variables are modified.

The questioning then is about what happens if, despite the intangibility of such decisions in this case, the project holder causes environmental damage, respecting the conditions imposed by the Administration.[4] In general terms, it is known that the doctrine did not opt for a single solution in these cases. While some authors interpret no liability of the holder (RODRÍGUEZ, 2010), others conclude that compliance with the regulation does not exclude their non-contractual liability (ALESSANDRI, 2005; VALENZUELA, 1996); an interpretation that, in the field of environmental liability, has been affirmed by case law (in this sense, refer to: Supreme Court Judgment, normative 396-2009).

In the environmental impact assessment, the Chilean Environmental Courts have also been favorable to this interpretation, having affirmed the revision of all RCAs, without distinction as to the means of assessment. This was the interpretation of the judgement of the Third Environmental Court normative D-16-2016. Even if the case has been closed due to lack of legitimacy to sue, it will be considered that "the Court is fully empowered to order the relevant and necessary measures to obtain such exemption, which can certainly include the end of a project" (CHILE, 2017) (without conditioning its validity to the infraction of the regulations).

4 If these conditions are not met, however, an administrative sanction procedure will be carried out, under the competence of the Superintendence of the Environment, which may imply, among other administrative sanctions, revocation of the RCA, in accordance with the general rules.

It cannot be ignored that this reading implies certain constraints. The power to order temporary and definitive closures in liability claims for environmental damage was previously established in Law 19,300 (whose section 57 empowered the courts to impose such measures *ex officio* in addition to ordering remediation). However, its legal amendment in 2010 revoked these judicial powers in environmental liability claims, and Law 20.600 did not reincorporate them (they are currently exercised by the Administration in accordance with article 38, *c*, of the Law that creates the Superintendence of the Environment).

Therefore, the issue will be associated with the extent of the Environmental Courts' power to resolve such claims. The solutions adopted in relation to corrective measures do not seem possible to dissociate from certain limitations in the field of illegality claims (which corresponds to the action foreseen to contest the RCAs). Probably the most important of these is the prohibition against replacing the discretionary content of administrative acts in substitution (section 30, item 2 of Law 20,600). Without prejudice to the powers that these courts exercise in the face of environmental impacts, this limitation in the face of claims could be affected by the absence of a content of the remedies for damages.

2.2 Limitation to acquired rights due to environmental impacts

The judicial interpretation of the generation of environmental impacts, with respect to holders of environmental administrative authorizations, differs from that already analyzed in the case of damage to the environment. The courts did not explicitly qualify these impacts as cases of loss of acquired rights due to the environmental impact assessment. This circumstance, however, does not prevent such beneficiaries from seeing their activities become more precarious. Before the holders of the right to non-retroactivity and to the statement, this is implicitly what happens in the case of the extension of submissions (2.2.1) and answers (2.2.2) in this regime.

2.2.1 Extension of submission

Traditionally, the submission of activities to environmental impact assessment has been interpreted under a closed list system. Accordingly,

only the activities described in art. 10 of Law 19,300 would be subject to its provisions. Any other work or project, however polluting it may be, would not be likely to be integrated, and other instruments would have to be applied (FERNÁNDEZ, 2001; BERMÚDEZ, 2007; ASTORGA, 2017). The doctrine only questioned this scheme based on a voluntary submission to that procedure, as it is incompatible with a closed list (GUZMÁN, 2012; in contraposition, refer to: SKEWES, 2017).

The unanimous nature of this position could, in principle, contrast with the provisions of Law 19,300. Although its section 10 (which includes activities subject to the environmental impact assessment regime) lacks an enumeration that allows the express inclusion of other works, nothing is said about its exhaustive nature, or the other provisions applicable to the procedure in question. In fact, the mere incorporation of activities subject to this assessment in other legislation (without being reiterated in the list of Law 19,300) could very well give rise to a different reading (such as: art. 10, item II, of Law 19,473, on Hunting).

That reading was formulated by the Superior Courts of Justice's case law in different degrees. A first opening of the list of activities subject to environmental impact assessment was the extensive interpretation of the works or activities described in art. 10 of Law 19,300. This reasoning is present in judgments related to activities carried out in areas placed under official protection (HUNTER, 2012). A second opening of the list of works and projects went further. By discarding the exhaustive nature of the activities listed in that provision, it also integrated several other activities.

This was the position followed by the Supreme Court in the Altos de Puyai case (refer to, among others, normative 15499-2018). On that occasion, the highest court shall state that:

> Projects or activities likely to have an environmental impact are not just those listed in art. 10 of Law no. 19.300 and in art. 3 of the Environmental Impact Assessment System Regulation. These provisions only indicate those where it is mandatory for the developer to submit them to the environmental impact assessment system, but do not exclude the possibility that other projects may also be assessed.

When abandoning the closed list regime, until then supported by the doctrine, a list of activities is replaced by an identification of effects, characteristics or circumstances as a supplementary criterion to determine the subjection of activities to this environmental management instrument (which will correspond to those referred to in article 11 of Law 19,300).

Although the authors have adopted both favorable (MORAGA, 2019) and critical (BERTAZZO, 2018) positions on this case law criterion, such assessments are often made in relation to future activities. While such assessments are reasonable (especially given the uncertainty of change), the greatest impact appears to be on holders exempt from such assessment, as acquired rights are clouded by the non-retroactivity of its regime.

Indeed, the non-retroactivity of the environmental impact assessment presupposes the agreement of two connecting conditions. The first is of a material nature (the activity has to be included in the list of projects and works subject to the environmental impact assessment of article 10 of Law 19,300). The second is of a temporary nature (that application begins before the regime takes effect). The criterion upheld by the Supreme Court in the Altos de Puyai judgment affects the first of these conditions, making a closed list inapplicable. If such a list does not exist, it is not possible to determine the beneficiary of the non-retroactivity of this regime, which, according to this case law, has to be determined based on art. 11 of Law 19,300.

Certainly this effect could be limited if non-retroactivity were interpreted as favoring only activities prior to April 3, 1997. However, this right is only associated with an original non-retroactivity, which dates back to the time when the environmental impact assessment began to work. There is also another derived right that looks at the future, benefiting any project that is currently being carried out and that can be included in the regime tomorrow. If such works cannot be identified, it is also not possible to prove that they predate their listing. This assessment may be necessary, because this list would not prevent other works from being included. In such cases, the extent of actions that third parties may file against holders of acquired rights certainly contributes to the extent of such enforcement.

2.2.2 The extent of challenges

In contrast to the situation described above, which refers to holders of activities exempt from environmental impact assessment due to non-retroactivity, judicial case law did not restrict directly the rights acquired by holders of activities subject to such regime. As already indicated, according to administrative case law, such licensees are those related to activities subject to the statement (as long as the period of invalidation has elapsed and the project has not been significantly modified), given the

inapplicability, in their respect, of the exceptional regime of revision of art. 25 *quinquies* of Law 19,300.

The rights-creating nature of decisions issued after processing an environmental impact statement procedure, however, means that the right contained in RCAs could be effectively acquired by the holder. And for that to happen, the time limits for the challenges have to pass. It is with respect to this requirement that projects assessed through an environmental impact statement retain a degree of uncertainty about the effective nature of that right. This uncertainty arises in relation both to the term for filing such claims and in to the time of commencement.

The short period of time expressly provided for in Law 20.600 – which creates the Environmental Courts – to file claims against environmental qualification resolutions is well known. Whoever is actively entitled to present the claim have, in principle, to file it within thirty days of notification of the act (art. 17, No. 5 and 6, of Law 20.600 of 2012; art. 20 of Law 19,300 of 1994). However, it is also known that those deadlines were only expressly established in relation to the owner of the activity and to those that intervened in the environmental impact assessment procedure (relative third parties), without any reference to the action that have to be proposed, in such cases, in relation to those that, being affected by those decisions, did not intervene in it (absolute third parties), which gave rise to the difficulty of specifying this regime of challenge (HARRIS, 2020).

In fact, it is well known that the period of thirty days was not the only criterion stated by the case law to exercise an allegation of illegality on the part of those that are absolute third parties, in the face of the issuance of an RCA. In addition, case law has stated a period of two years, in accordance with the general rules of administrative invalidation (PHILLIPS, 2021). Although this last extent favors the protection to third parties in the environmental impact assessment procedure, it weakens the right of the project holder, whose act can be contested years after it was granted.

A similar limitation does not occur in relation to the deadline for the challenge itself, but in relation to when it should start running. As the final acts of projects subject to an environmental impact statement imply limits on publicity formalities (being excluded, as a general rule, from citizen participation procedures, which aggravates the notification and publication regime), the case law that requires publication of certain separable acts in the Official Gazette, such as the construction permit, without which this term would be prevented from running, may be applicable (Supreme Court Judgment, normative 3918-2012).

Far from what one might think, this criterion was maintained in the case law – for example: Supreme Court decisions, normative 19234-2019 and prot 47610-2016. Transferred to the field of environmental impact assessment, its application could lead to the precariousness of the rights of holders of RCAs. In fact, if the objection deadlines cannot be computed, the permanent challenge of the construction permit will ultimately affect the holders of an environmental impact statement, notwithstanding the intangibility of their acquired rights, as the CGR interpreted it.

CONCLUSIONS

In Chilean legislation, administrative case law has acquired rights that are widely recognized in environmental impact assessment. In fact, the Office of the Comptroller General of the Republic formulated this interpretation in two ways. The first arises as a result of the favorable interpretation of the non-retroactivity of art. 8 and following of Law 19,300, establishing an acquired right to non-retroactivity, which benefits any activity carried out before April 3, 1997, which can continue to operate, without the modification to the environment or its risks being contrary to it. The second originates from the restrictive interpretation of art. 25 *quinquies* of Law 19,300, which empowers the administration to revise the RCAs in an exceptional manner. As administrative case law only applies this rule to projects approved by means of environmental impact studies, it gave rise to an acquired right to the statement that, as in the previous case, would in principle prevent a revision of its content.

Each of these rights admits a different interpretation in judicial case law. The main divergence occurs if the holders of the aforementioned activities cause environmental damage. This hypothesis was recognized by the courts as a case of loss of the right to non-retroactivity, subjecting the projects to an environmental impact assessment, despite having been carried out before April 3, 1997. At the same time, judicial case law also allows stating that such damages may result in the loss of the right to the statement. A second divergence with administrative case law is observed in relation to the generation of certain environmental impacts. Firstly, because the case law in favor of opening the list of projects in art. 10 of Law 19,300 makes the right to non-retroactivity impracticable. Second, because the position in favor of a two-year period to exercise environmental invalidation, in conjunction with the requirement to publish

certain building permits, undermines the security of environmental impact statements.

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