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**KEY ELEMENTS ON ACCESS TO JUSTICE FOR  
THE REGIONAL AGREEMENT**

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# Key elements



- WIDE CONCEPT OF ACCESS TO JUSTICE
- SPECIFICITIES OF THE ENVIRONMENTAL PROCESS
- AUTONOMOUS AND SPECIALIZED BODIES
- COST
- PREVENTIVE NATURE, EFFECTIVENESS AND FREE OF CHARGE
- BROAD LEGAL STANDING WITH COLLECTIVE ACTIONS
- HIERARCHY BETWEEN OBLIGATIONS
- BURDEN OF PROOF
- HERMENEUTICAL INTERPRETATION CRITERION – *IN DUBIO PRO NATURA*

# Access to justice



- **Art. 9°, 1.** adoption of a broad concept of justice=  
**access to a judicial order**
- **Access to justice is more than access to the Judiciary**
  - It is a fundamental right and guarantee to access all legitimate means – **judicial and non-judicial, national or international** – to safeguard individual and collective rights, widely considered.
- **There are no rights without effectiveness** – adequate, sufficient, free and effective mechanisms
  - Reasonable duration of the process
  - Free of charge
  - Right an adequate result
  - Right to interpretation in accordance with constitutions



- **Judicial means:**

- Ensure access – free of charge and with adequate means
- Participation in crafting the decision
- Timely result

- **Non-judicial means**

- Access to the Public Prosecutor's Office, Public Defenders, lawyers and consensus mechanisms such as arbitration, mediation and conciliation

# Specificities of the environmental process



- Procedures have to be adequate to deal with environmental matters
- Classic adversarial process is insufficient: private matters, based on individualistic and economic issues, with compensation interests
- The environmental process deals with major, structural litigation, that impacts the future generations. They are rights of collective interest (diffuse, collective and individually homogeneous)
- Decisions on environmental matters resolve matters of general nature, with effects that surpass the parties involved in the process
- There are typical questions such as active legal standing, the anticipatory nature of the decisions, the burden and determination of proof, the effects of the rulings, intervention of third parties, and systems of implementation of decisions, etc.

# Autonomous and specialized bodies



- **Specialization** is fundamental not only for judges but also for Public Prosecutors, the Police, Public Defenders, members of Courts of Audit
- Technical knowledge to analyze evidence and the necessary macro view to uphold the rights are only possible with specialized bodies. The judge, public prosecutor or public defender ensure fast action and offer greater certainty to all parties. Justice is more agile as the lack of knowledge causes delays
- But specialization alone does not suffice – such bodies have to be **autonomous**, have political and budgetary independence and be irremovable

# Cost



- One of the central aspects of access to justice.
- Access has to be completely free given that it is not safeguarding an individual or economic interest
- Access to justice, preventive measures, determination of proof should have no costs save for bad faith
- No cost shall prevail in all cases and not only for vulnerable persons or groups

# Preventive character, effectiveness and no cost



- The guiding principle of environmental law is prevention
- This is why it is fundamental that the measures established to prevent the damage are not only precautionary, but also anticipatory; that the judge may adopt measures *ex officio*, early, to prevent harm
- Such measures must be effective and result in real changes to the situation
- No guarantee should be required to obtain an anticipatory measure given that it is not a juxtaposition of two individual, economic rights, but the defense of a diffuse right to a healthy environment



# Broad legal standing



- Since it is a supra-individual right, legal standing should be as broad as possible and include any individual (with due representation), NGOs, the Public Prosecutor, the Ombudsman, etc.
- Preference should be given to collective actions, which should be clearly stated in the text

# Hierarchy between obligations



- The obligations related to a ruling should follow this hierarchy: restoration, compensation and provision of damages, as provided for in art. 41 of Argentina's Constitution, being cumulative. This ensures the principle of full reparation

# Burden of proof



- Notwithstanding strict civil liability for environmental damage or risk, it is important to have special rules for the determination of proof in the environmental process
- The difficulty to prove the causal link, whether it be because of the distance between the fact and the damage, the impact of various causes or a late detection of the damage makes the reversal of the onus of proof or the dynamic onus of proof necessary (based on procedural solidarity)

# Hermeneutical interpretative criterion – *in dubio pro natura*



- The social role of property justifies an inclination towards the environment
- *In dubio pro natura* is a hermeneutical criterion
- The judge cannot invent something that is not explicitly or implicitly included in the laws, but when several options or interpretations exist, the one that best safeguards the environment should be chosen
- It is different from the precautionary principle as the latter aims to solve scientific uncertainties whereas the *in dubio pro natura* principle aims to solve legal uncertainties, as an interpretation principle
- It is applied in Costa Rica, Brazil, Argentina and Ecuador

- **Art. 9°, 2, “c”:** It is important that access to justice be guaranteed in a broad manner for **any public or private action that can affect the environment and not only to challenge the denial of access to information or the public participation process**. Access to justice is an **instrumental right** that is meaningless without the objective of safeguarding the right to live in a healthy environment.



- **Art. 9°, 3, “a”:** specialization not only for judicial bodies. Also for all judicial professions related to environmental protection. These bodies have to be autonomous and independent
- **Art. 9°, 3, “c”:** it is important to include collective actions (do not leave as “could”). It is a diffuse, collective and individually homogeneous right. **A priority in the administration of Justice**
- **Art. 9°, 3°, “e”:** importance of suggestion made by Antigua and Barbuda; to include **restoration as a way of reparation of environmental damage**. Restoration is the main objective, on the basis of full reparation and the polluter-pays principle
- **Art. 9°, 3, paragraph:** it is important to establish homogeneous judicial and administrative interpretation criteria for cases of environmental damage and harm. **Prevention and *In dubio pro natura* principles**
- **Art. 9°, 5, “a”:** Free access to justice (no cost of actions and preventive measures) is fundamental. Costs discourage social action
- **Art. 9°, 9:** cooperation in environmental crimes. Encourage administrative, public prosecutor networks, etc.
- **Art. 9°, 10: alternative dispute resolution mechanisms** are key, such as mediation and arbitration. Duration, costs, and execution of judicial orders.

# Conclusions



- Access to justice requires an informed and aware population, with wide legal standing
  - Implementation of information systems (with audits)
- Access to Justice does not equate to access to the Judiciary
- Not to limit access but ensure that the final aim is to safeguard the right of all to a healthy environment
- Effectiveness: objective of the laws should be restoration and reparation instead of provision of damages
- Give priority to collective conflict resolution
- Give priority to prevention instead of damages
- Access free of cost
- Need to ensure independence of the Judiciary, Public Prosecutor, Police and Courts of Audit
- Network actions, by hydrological basin, biome, or for transboundary matters
- Specialization at all levels
- Need of countries to report on implementation of the agreement and review mechanism is required