



Suprema Corte
de Justicia de la Nación



**DERECHOS
HUMANOS**

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**PARTICIPATION IN QUESTIONS THAT AFFECT THE ENVIRONMENT
(PARTICIPACIÓN EN CUESTIONES QUE AFECTEN EL MEDIO AMBIENTE)**

CASE: *Amparo en Revisión 640/2019*

REPORTING JUDGE: Javier Laynez Potisek

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: January 15, 2020

KEY WORDS: right to a healthy and adequate environment, right to access to information in environmental questions, right to informed participation in environmental decisions, repair and/or compensation for environmental and health damages, environmental and health risks, remediation and corrective measures.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 640/2019*, Second Chamber, Javier Laynez Potisek, J., decision of January 15, 2020, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AR%20640-2019.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo en Revisión 640/2019*, Mexico.

SUMMARY OF THE *AMPARO EN REVISIÓN* 640/2019

BACKGROUND: On August 6, 2014 there was a spill of acidulous copper sulphate in the “Río Bacanuchi” tributary of the “Río Sonora” located in the State of Sonora (the spill), caused by the facilities of a mining complex located in the Municipality of Cananea, belonging to a mining company. The Federal Environmental Protection Agency (PROFEPA) initiated an administrative proceeding against the mining company, which resulted in an agreement to remediate, repair and compensate the environmental damages and the persons affected and, as a product thereof, a trust was generated. Subsequently, the Ministry of Environment and Natural Resources (SEMARNAT) considered that sufficient levels of remediation had been achieved, and the PROFEPA considered the corrective measures to be completed and determined that the purposes of the trust had been met. The inhabitants of the community where the damage was caused (the affected parties) disagreed with this determination and filed an *amparo indirecto*, arguing that their right to participate in an informed manner had been violated because it was a matter that affected their right to a healthy environment and to reparations for the violations of human rights. A district judge in Mexico City issued a decision on August 30, 2018 and denied the constitutional protection to the affected parties because the environmental norms that govern the administrative procedure do not provide for their participation. The affected parties filed a *recurso de revisión*, which was heard by a collegiate court in Mexico City. Subsequently, Mexico’s Supreme Court of Justice (this Court) exercised its power to assert jurisdiction, the case was placed with the Second Chamber, and the matter was turned over to Judge Javier Laynez Potisek.

ISSUE PRESENTED TO THE COURT: Whether the persons inhabiting the community affected by the spill should be given the opportunity to participate in the administrative procedure established with the mining company to verify compliance with its environmental obligations resulting from the spill, in spite of the fact that there is no legal basis for their participation.

HOLDING: The *amparo* was granted for essentially the following reasons. A study was done of the right of persons affected by environmental questions to participate, which is part of the parameter of constitutional regularity. That study revealed that under the Federal Constitution and various international instruments, the fact that the authorities had not consulted with the affected persons about the administrative procedure violates their right to an informed participation in matters that could impact their right to a healthy environment, since only through that involvement is it possible to achieve a more complete analysis of the environmental impact and effect on human rights. Therefore, it was decided to revoke the resolution and grant the *amparo* in order to allow the persons affected to participate in the procedure and its determinations.

VOTE: The Second Chamber resolved this matter unanimously with five votes of judges Yasmín Esquivel Mossa, Alberto Pérez Dayán, José Fernando Franco González Salas (issued his vote with reservations and reserved the right to issue a concurring opinion), Luis María Aguilar Morales and Javier Laynez Potisek.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=260294>

EXTRACT OF THE *AMPARO EN REVISIÓN* 640/2019

- p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of January 15, 2020, issues the following decision.

BACKGROUND

On August 6, 2014 an acidulous copper sulphate spill occurred in the "Río Bacanuchi", tributary of the "Río Sonora" located in the State of Sonora (the spill), caused by the facilities of a mining complex, located in the Municipality of Cananea, belonging to a mining company.

- p. 2 On August 12, 2014, the State Delegation of the Federal Environmental Protection Agency (PROFEPA) notified the mining company of an order to adopt corrective measures, issued in an administrative case file.
- p. 3 On September 15, 2014, the PROFEPA and the mining company executed the "Agreement for taking measures to remediate, repair and compensate for the environmental and public health damages, and to repair the material damages to persons resulting from the spill of the acidulous copper sulphate solution in the Arroyo Tinajas or Rastritas, the Río Bacanuchi, Río Sonora and Presa El Molinito which affected various municipalities of the State of Sonora" (environmental damages agreement), in which the mining company agreed to repair the damages caused by the spill through a remediation program approved by the Ministry of the Environment and Natural Resources (SEMARNAT), and create a trust as a means of paying for the remediation, repair and/or compensation measures for the damages to the environment and human health.
- p. 3-4 That same September 15, 2014, the trust agreement referred to in the cited agreement was executed, in which the mining company was the settlor; and the beneficiaries were: in first place, the persons owed reparations for material and health impacts as a direct consequence of the spill, as well as the SEMARNAT and other authorities, for the restitution of expenses and past and future outlays to repair the damages and, in second place, the settlor itself, for any remaining funds.

- p. 4 On October 10, 2014, an administrative procedure was initiated against the mining company, in conformance with the General Law of Ecological Balance and Environmental Protection (LEGEPA), and the General Law for the Prevention and Integral Management of Waste (LGPGIR).
- p. 4-5 On January 27, 2015, the SEMARNAT approved the proposal of the mining company to divide the contaminated site into five zones. Subsequently, it approved the Remediation Programs for the zones, through various official notices (approval of remediation programs).
- p. 6 On December 1, 2016, the SEMARNAT issued a ruling on compliance with the objectives of the Remediation Programs (remediation programs compliance ruling) and concluded that the remediation levels proposed and authorized were achieved with respect to zone one and that the levels of iron, arsenic and vanadium in zones two to five were identified as acceptable; however, the company was obligated to continue executing Monitoring Programs.

On January 26, 2017, the PROFEPA considered the corrective measures (corrective measures compliance ruling) specified in the ruling adopted by the SEMARNAT on December 1, 2016 complied with.

- p. 7 On January 31, 2017, the PROFEPA determined that the purposes of the trust had been met (trust compliance determination).

As a result, on February 2, 2017, the Technical Committee of the Trust determined that the competent authorities had complied with the objectives of the remediation program and that the reparations had been paid to the persons who suffered material and health effects from the spill, and there was no claim or petition pending, and therefore the purposes of the trust had been met. Thus, the instruction was given to execute trust termination agreement.

- p. 7-8 Various inhabitants of the community where the environmental harm was caused (the affected parties) disagreed with these acts and filed an amparo claim through which they essentially argued the violation of their right to participate in an informed manner in those

matters that could affect, among other rights, their right to a healthy environment and to the repair of violations of human rights, since the following was omitted: a) allowing them to participate in the acts of the administrative procedures initiated against the company and b) holding a prior consultation before considering the objectives of the remediations programs to have been met and the purposes of the trust to have been complied with.

- p. 8-9 A district judge issued a decision on August 30, 2018 that denied the constitutional protection to the affected parties considering that the environmental norms that govern the administrative procedure do not envision their participation and that interested social groups must seek involvement through routes established for that purpose, in the appropriate form and time periods. The affected parties filed a *recurso de revisión*.
- p. 11 A collegiate court in administrative matters in Mexico City heard the case. On April 12, 2019, it asked this Court to exercise its authority to assert jurisdiction. On July 3, 2018, this Court decided to exercise that authority, and on September 17, 2019 it was ordered to turn the matter over to Judge Javier Laynez Potisek.

STUDY OF THE MERITS

- p. 43 The affected parties argue that, although the environmental norms do not establish their right to participate in the challenged acts, this does not mean that the obligation to respect the human right to participation of anyone with a proven legitimate interest can be ignored, as it was in this case, since they were affected by the spill; this keeping in mind that the violation of the right to participation was asserted as a direct violation of the Federal Constitution.

The district judge ruled that there were no legal grounds that provided for the participation of the affected parties in the administrative procedure from which the acts arise, in addition to the fact that the nature of the administrative procedure of inspection and oversight is not compatible with the participation of persons who claim to have a legitimate interest, since they have access to other means to defend their rights, so the authorities did not violate any right of the affected parties.

The allegedly violatory acts that will be analyzed are the following:

- p. 43-45 1) The environmental damages agreement; 2) the approval of remediation programs; 3) the remediation programs compliance ruling; 4) the corrective measures compliance ruling; 5) and the trust compliance determination.
- p. 45 Those acts were issued as a result of the administrative proceeding initiated by PROFEPA with the mining company in order to verify compliance, physically and through documents, with the environmental obligations referring to the prevention, control, characterization and remediation of the soil occurring as a result of the spill.
- p. 47 Inhabitants of the community adjacent to the damage caused to the environment or those directly harmed are not allowed to intervene in this proceeding; their participation is only allowed in the administrative agreement for carrying out reparations or for compensation for environmental damages. This means that their participation is only allowed in the alternative dispute resolution mechanisms, as established in article 168 of the LEGEPA.
- p. 48-49 Nevertheless, this Court considers that while under the applicable regulations the inhabitants of the community adjacent to the damage caused to the environment or those directly harmed are not allowed to intervene in the administrative procedure of inspection and oversight, according to articles 1, 4, fifth paragraph, 6 and 35, section III, of the Federal Constitution; 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); 25, subsection a), of the International Covenant on Civil and Political Rights; 13, number 1 and 23, number 1, subsection a), of the American Convention on Human Rights (ACHR), the affected parties must be consulted and allowed to participate not only in the administrative agreements established in article 168 of the LEGEPA, but also in those acts issued by the administrative authority for the reparation and compensation of the damages caused to the environment, specifically those related to compliance with the corrective measures imposed in the ruling with which the administrative procedure concluded.

p. 52 It is useful to recall the terms established in the *Amparo en Revisión* 641/2017 by the Second Chamber of this Court, where it was determined that in view of the reforms to article 4 of the Constitution, the Constituent Assembly recognized that "that environmental conditions in an ecosystem directly influence the health of those who inhabit it" and therefore it was sought to define an objective parameter with respect to the conditions of development and wellbeing that the State has the obligation to guarantee to its citizens, and the responsibility they have to participate, although in a differentiated manner, in the safeguarding of such fundamental right, and therefore the responsibility was established for the one that provokes it in the terms established by the secondary legislator.

It was held that the human right to a healthy environment presents its teleology in two aspects: i) as the obligation to guarantee the full exercise of this right and its judicial protection; and ii) as the responsibility, although differentiated, of the State and the citizen for its preservation and restoration.

p. 52-53 This Court considered that, given this constitutional mandate, the courts can review whether, in fact, the actions or omissions of the authority are in conformance with the full realization of the human right to a healthy environment.

p. 53 The importance of the human right to a healthy environment lies in the fact that there is an undeniable relationship between its protection and the realization of other human rights, given that environmental degradation affects its effective enjoyment, as the Inter-American Court of Human Rights has established.

In this regard, the right to access to information established in article 6 of the Constitution, in relation to article 13, number 1, of the ACHR, forms the basis for the exercise of other rights, in this case, the access to information has an intrinsic relationship with public participation with respect to environmental protection.

p. 54 Access to information on the environment strengthens the transparency of environmental governance and is a prerequisite for the effective participation of the public in the adoption of decisions relative to the environment.

p. 55 The Inter-American Court of Human Rights has determined that, in addition to providing information, the State must ensure that the members of a community have knowledge of the possible risks, including the environmental and health risks, so they can give their opinion on any project that may affect their territory within a voluntary consultation process with knowledge. The State must also generate sustained, effective and reliable channels of dialog with the indigenous peoples in the consultation and participation proceedings through their representative institutions.

The right of public participation in environmental matters is reflected in various international instruments related to the environment and sustainable development, such as the Rio Declaration on Environment and Development; the North American Agreement on Environmental Cooperation; the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters “Aarhus Convention” and the Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters “Bali Guidelines”.

p. 55-56 Although not all those instruments are binding, they constitute guiding principles that show the importance of public participation in environmental matters, and therefore this Court cannot overlook them, in that they create guiding criteria that lead to the full realization of the right to a healthy environment, access to information and citizen participation.

p. 61 These international instruments revolve around the basic idea that every person should have adequate access to environmental information, as well as the opportunity to participate in the processes of adopting decisions from the first stages, in order to have a real influence on the adoption of measures that may affect their right to a healthy environment.

From the above this Court reaches the conclusion that the right to participation established in articles 35, section III, of the Federal Constitution; 25, subsection a) of the International Covenant on Civil and Political Rights and 23, number 1, subsection a) of the ACHR, is

not restricted to participating in political matters, but includes the possibility of involvement in the discussion relative to environmental questions, especially when they affect citizens.

The above makes it possible to implement the intention that the fundamental right to a healthy environment not be limited to a programmatic norm, but rather has full legal efficacy, which means that it becomes a specific mandate for the authority, consisting of guaranteeing to the population a healthy environment for their development and wellbeing.

p. 62 The participation of the interested public allows for a more complete analysis of the possible environmental impact and whether or not human rights will be affected, and therefore it is appropriate to permit the people who could be or have been affected to present their opinions or comments on the matter that concerns them at the beginning of the procedure, since that is when all the options and solutions are still possible and they can exercise a real influence.

p. 63 In view of the above, this Court reaches the conclusion that the fact that the authorities have not consulted the affected parties violates the rights of the defendants to participate in an informed manner in those matters that could affect their right to a healthy environment. In other words:

A. In entering into the environmental damages agreement, the authorities should have allowed the affected parties to participate in accordance with article 168 of the LEGEPA, in relation to article 28, section I, of the Federal Environmental Liability Law [*Ley Federal de Responsabilidad Ambiental*] (LFRA), since those norms establish the participation of inhabitants of the community adjacent to the damage caused to the environment in such agreements.

p. 63-64 B. Prior to the approval of remediation programs, the authorities should have allowed the affected parties to participate since such programs establish the group of measures to which the contaminated sites will be submitted to eliminate or reduce the contaminants to a safe level for health and the environment or prevent their dispersion in the environment without modifying them, such that it is indispensable that the persons affected be informed of the possible risks, including the environmental and health risks, so they can give their

opinion on any aspect they consider should be taken into account in the execution of such programs.

p. 64 This is especially so considering that the remediation programs approved by the authority for zones two to five found that some agricultural areas are part of the affected polygons and that such activities could be considered a point of exposure because it is likely that the contaminated water and materials will reach those areas given the topography of the site, and the mining company indicated the human population and the ecological receptors (flora and fauna) as likely receptors of the contamination, which is why the participation of the affected parties prior to the approval of such programs was necessary, so they had a reasonable opportunity to make observations on the measures proposed.

C. Prior to the remediation programs compliance ruling, the authorities should have allowed the petitioners to participate and make comments in view of the fact that such information is important for the inhabitants of the affected community to the extent to which it may represent a potential risk to human health and other live organisms.

p. 65 D. Prior to the corrective measures compliance ruling, the authorities should have allowed the affected parties to participate since compliance with such measures is directly related to the remediation, reparation and compensation of the damage caused to the environment that they were subject to.

E. Prior to the authority issuing the trust compliance determination, the authorities should have allowed the affected parties to participate since the purpose of those acts was to remedy, repair and compensate those affected by the environmental damages and harm to public health and to repair the material damages caused by the spill; thus it should have been guaranteed that any observations they had on compliance with and the purposes of the trust were duly taken into account, since participation permits people to form part of the decision-making process and to have their opinions heard.

p. 65-66 This is so especially considering that the environmental damages agreement and the trust served as a payment mechanism with respect to the claims for material damages caused

as a direct consequence of the damage caused to the environment by the spill and as reparation for the damages to the environment and human health.

- p. 66 As observed, the failure to allow the affected parties to participate prevented them from influencing the decision-making process with respect to a matter in which their right to a healthy environment was involved, not only because they are inhabitants of the community where the environmental damage was caused but also, and principally, because the decisions made are related to the remediation, repair and compensation of the damages caused to the environment to which they were subject by the spill.
- p. 66-67 As said, while under the applicable norms in the administrative inspection and oversight procedure the participation of the affected parties is not envisioned, under the Federal Constitution and international treaties, the affected parties must be consulted and allowed to participate not only in the administrative agreements established in article 168 of the LEGEPA, but also in those acts issued by the administrative authority whose purpose is the reparation and compensation for the damages caused to the environment, specifically those related to compliance with the corrective measures imposed, in order to comply with the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity.

DECISION

- p. 67-68 Consequently, the appealed decision must be revoked and the *amparo* and protection of federal justice granted to the affected parties, for the authorities, in the scope of their competencies, to:
- p. 68-69 1.- Organize a public information meeting in which the following is explained to the affected parties: the contents of the environmental damages agreement; the environmental measures carried out as a result of the remediation programs; the process for reaching the determinations concluding that the levels of remediation were reached and the corrective measures complied with; and the process for concluding that the purposes of the trust had been met.

- p. 69-70 2.- Give the affected parties the opportunity to manifest their concerns and possible suggestions, so that their opinions are heard and the authorities take them into account in the following manner: when explaining the environmental measures carried out as a result of the remediation programs, the affected parties be permitted to propose some other measure that may be necessary to eliminate or reduce the contaminants to a safe level for health and the environment or prevent their dispersion in the environment without modifying them; prior to the authority concluding that the remediation levels were met and the corrective measures complied with, listen to the affected parties to allow them to state their agreement or disagreement in that respect and whether, in their judgment, there is some other measure that should be taken; and prior to concluding that the purposes of the trust have been complied with, listen to the petitioners so they may assert their rights.
- p. 70 The above is in the understanding that the opportunity the affected parties will have to explain their points of view includes the obligation of the authority to receive, have presented and assess the evidence the affected parties consider appropriate to support their statements.
- 3.- Once the above is done and the mining company has also been heard, the competent authorities shall issue a new determination on compliance with corrective measures and compliance with the purposes of the trust.
- p. 71 This Court considers it important to specify that the purpose of the granting of the *amparo* is not to disregard the payments made in terms of the trust, with respect to the claims for material damages caused to the affected parties or any other person as a direct consequence of the spill, given that in terms of article 1, last paragraph of the LFRA, the damages caused to the environment are independent of property damage.