



## Protection of Urban Wetlands: Absence of Transition Relief and Legal Certainty

### Protección de humedales urbanos: ausencia de transitoriedad y seguridad jurídica

JAIME PHILLIPS LETELIER<sup>\*</sup>

#### Abstract

This article examines the changes implemented by Law 21.202, which protects urban wetlands in Chile. It highlights that the lack of adequate transitional rules has generated significant conflict before environmental courts and administrative agencies. Based on a normative and jurisprudential analysis, the regulatory gaps in Law 21.202 are identified, which generate uncertainty for property owners, project owners, and beneficiaries of administrative acts or contracts by failing to provide adequate transitional rules. Based on this analysis, proposals are made for the correct application of Law 21.202 and guidelines for transitional rules for future legal reforms.

**Keywords:** *Wetlands; Intertemporal Law; Transience.*

#### Resumen

Este artículo estudia los cambios implementados por la Ley 21.202, que protege humedales urbanos en Chile. Subraya que la falta de reglas de transitoriedad adecuadas ha generado una alta conflictividad ante los tribunales ambientales y organismos administrativos. A partir de un análisis normativo y jurisprudencial se identifican los vacíos normativos de la Ley 21.202 que generan inseguridad a propietarios, titulares de proyectos y beneficiarios de actos o contratos administrativos, al no prever normas transitorias adecuadas. A partir de ese diagnóstico, se propone la forma correcta de determinar los efectos en el tiempo de la Ley 21.202 y se sugieren directrices para regular futuras transiciones. Se formulan propuestas para aplicar correctamente la Ley 21.202 y directrices de normas transitorias para reformas legales futuras.

**Palabras clave:** *Humedales; Derecho intertemporal; Transitoriedad.*

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<sup>\*</sup> Universidad de Chile ([jphillips@derecho.uchile.cl](mailto:jphillips@derecho.uchile.cl)) ORCID: 0000-0002-4054-3187. This paper is part of FONDECYT Initiation Project 2022 N° 11220262 entitled “The prohibition of retroactivity under the Chilean Administrative Law: foundations and practical application” and within the activities of the Coordinated Project I+D+I of Challenges of Society of the 2023 calling entitled “The Strategic Responsibility of the Green State (STrATE 2.0.)” (reference: PID 2023-149184OB-C41). I thank my colleague, professor Jorge Aranda Ortega, for his insightful comments on a previous draft and the anonymous reviewers for their useful suggestions. All mistakes are my own responsibility. Article received on February 25<sup>th</sup>, 2025 and accepted for publication on August 19<sup>th</sup>, 2025. Translated by José Pino.

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## I. INTRODUCTION

On January 23, 2020, Law 21.202, which protects urban wetlands, came into force. According to the National Strategy for the Conservation and Rational Use of Wetlands in Chile, these are characterized as “aquatic ecosystems that sustain rich biodiversity and provide important elements for life”<sup>1</sup>. Furthermore, according to the National Biodiversity Strategy, Chile has 1,317,704 hectares of wetlands, ecosystems that are altered by the creation of human settlements, water extraction, modification of their channels, among other activities.<sup>2</sup>

Until 2020, these ecosystems were protected when specific official declarations existed.<sup>3</sup> In 2017, a total of 27% of the total wetland area had protection declarations.<sup>4</sup> The entry into force of Law 21.202 brought with it new mechanisms for the protection of wetlands located within urban limits, threatened by the expansion of settlements.<sup>5</sup> These mechanisms include the declaration of the property as an urban wetland by the Ministry of the Environment (MMA), urban development postponements, mandatory entry into the Environmental Impact Assessment System (SEIA), and its inclusion in territorial planning instruments.

This law represents an important step forward for environmental conservation and biodiversity protection. It contributes to consolidating an ecological vision of wetlands,<sup>6</sup> moving beyond the notion of viewing them as hotbeds of infection.<sup>7</sup> Their ecosystem services, such as flood protection, water and biodiversity reserves, among others, are highlighted.<sup>8</sup> However, its implementation has been problematic. As of March 2022, the MMA declared 104 urban wetlands, and 79 claims had been filed before environmental courts.<sup>9</sup> Thus, there is a perception of high litigation.<sup>10</sup>

The hypothesis of this paper is that the conflict triggered by Law 21.202 is a consequence of the lack of transitional regulations that explicitly refer to the rights, activities, administrative acts or contracts existing upon the law’s entry into force. In the absence of transitional regulations, administrative and judicial authorities have resolved conflicts on a case-by-case basis by applying the general rules on the law’s effects over time. The case study reveals a dispersion of criteria, ranging from restrictive protection of rights or interests existing at the date of the law’s publication through immediate or even retroactive application of Law 21.202, to expansive protection that encompasses administrative due-process, non-retroactivity, and protection of activities carried out on the properties.

Considering the factual basis of the cases, this paper will propose an interpretation of Law 21.202 and Chilean intertemporal law that will overcome the dispersion of criteria. To achieve this, a dogmatic and jurisprudential methodology will be used. Regarding the dogmatic aspect, international treaties, legal norms, and regulations related to the protection of wetlands are analyzed in light of legal scholarship. Regarding the jurisprudential study, a search was conducted on Vlex for decisions citing “Law 21.202”, which revealed the existence of 86

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<sup>1</sup> MMA (2018), p. 17.

<sup>2</sup> MMA (2017), pp. 19 and 21.

<sup>3</sup> As a “Ramsar site” (Decree 771, Ministry of Foreign Affairs), “Nature Sanctuary” (Article 31, Law 17,288) or “Priority Conservation Sites” (Article 29, Law 21,600).

<sup>4</sup> MMA (2017), p. 33.

<sup>5</sup> SCHMIDT (2024), pp. 43-44.

<sup>6</sup> DELGADO (2022), p. 12.

<sup>7</sup> DELGADO (2021), pp. 549-551.

<sup>8</sup> HUNTER (2024), p. 161.

<sup>9</sup> CARRASCO & ALFARO (2023), pp. 142-143.

<sup>10</sup> GÓMEZ (2024a), p. 395; CARRASCO & ALFARO (2023), p. 156.

judicial pronouncements and 11 opinions from the General Comptroller of the Republic (CGR) from October 5, 2020, to July 17, 2024.

Each decision is analyzed and classified in tables with colors based on the allegation underlying the appeal or request. Four groups were established: cases involving a simple infringement of property rights are in yellow; cases involving an ongoing activity are in blue; cases involving an administrative act or contract are in green; and cases unrelated to the temporal effects of Law 21.202 are in red. Based on this classification, the main conflicts in the interpretation and application of intertemporal law are identified, and a unifying proposal is formulated.

The paper is structured as follows. The first section analyzes current regulations and then judicial and administrative jurisprudence, which is classified into two periods: initial and advanced. The second section analyzes the normative premises of Chilean intertemporal law and the dominant scholarship to identify the four main points of discussion generated by Law 21.202 and propose the correct interpretation of the applicable regulations in each case. The paper ends with brief conclusions and proposes *de lege ferenda* guidelines for addressing similar future transitions.

## II. PROTECTION OF URBAN WETLANDS

### 2.1. Legal and Regulatory Standards

The purpose of Law 21.202 is to provide protection to ecosystems known as “wetlands” that are located in whole or in part within urban boundaries.<sup>11</sup> The law empowered the president to issue norms (under his constitutional “reglementary powers”) for the determination of the details of what will be considered an urban wetland, the recognition procedure, and minimum sustainability and governance criteria.<sup>12</sup>

Protection is for “declared” wetlands.<sup>13</sup> In this regard, Article 3 establishes rules for the provisional protection of wetlands from the moment recognition is requested, consisting of the postponement of “the issuance of permits for subdivision, lotting, or land development and for construction on the land where they are located”,<sup>14</sup> in accordance with sectoral urban planning and construction regulations.<sup>15</sup> It also establishes a claim action, the hearing of which falls under the jurisdiction of the respective environmental court.<sup>16</sup>

It also introduced amendments to Law 19.300 on general environmental principles. It expressly included urban wetlands in Article 10, which establishes the types of entry into the SEIA: in letter p), which refers, in general, to areas placed under official protection; in letter q), which refers to the massive application of chemical products; and created a new letter s), referring to activities with an environmental impact on urban wetlands.<sup>17</sup>

Finally, Law 21.202 amended the General Urban Planning and Construction Law to establish the obligation to incorporate urban wetlands into territorial planning instruments. It

<sup>11</sup> Article 1, Law 21.202.

<sup>12</sup> Article 2, Law 21.202; Decree No. 15 of the Ministry of the Environment, which establishes the regulations for Law 21.202.

<sup>13</sup> Article 1, Law 21.202.

<sup>14</sup> Article 3, Law 21.202.

<sup>15</sup> Article 117, Decree 458, General Law on Urban Planning and Construction.

<sup>16</sup> Article 3, final paragraph, Law 21.202; Article 17 No. 11, Law 20.600.

<sup>17</sup> Article 4, Law 21.202; Article 10, letters p), q) and s), Law 19.300.

also incorporated wetlands of navigable rivers and lakes as lands eligible for maritime concessions.<sup>18</sup>

## 2.2. First Period of Law 21.202 in Force (2020-2021)

The initial validity of Law 21.202 goes from its publication in January 2020 to December 2021. This law encompasses proceedings initiated under protection actions and complaints filed with the SMA, the purpose of which is related to activities carried out in urban wetlands. It culminates with the latest protection ruling issued in December 2021. In total, there are seven protection actions and two filings of complaints to the SMA approved by the Third Environmental Court, i.e., nine proceedings.<sup>19</sup>

Four cases (1-4) explicitly address the issue of the temporal effects of the new law. In three of them, the appellate courts ruled that the legislator did not grant retroactive effect to Law 21.202. They ruled that projects covered by prior administrative acts can continue to be implemented without entering the SEIA. Two of these rulings were overturned by the Supreme Court (CS). It determined that there was no retroactive effect in submitting an activity to the SEIA occurring during the validity of the new letter s) of Article 10 of Law 19,300. A ruling by the CS, however, upheld the ruling of the Puerto Montt Court of Appeals, but on the grounds that the site did not meet the characteristics of a wetland.

The fourth case was filed by the Third Environmental Court, which dismissed a complaint alleging activities carried out in an urban wetland that, having been declared, could not be protected. The decision was in line with the CGR's current jurisprudence at the time, which interpreted the new grounds for inclusion in the SEIA incorporated by Law 21.202 as depending on the wetland's declaration by the Ministry of Environment.<sup>20</sup>

The issue of the temporality of Law 21.202 is implicitly raised in three other proceedings (5-7). The appeals courts rejected three protection actions for failure to meet its admissibility requirements. The CS overturned all three rulings and ruled that activities carried out during the validity of Law 21.202 must be included in the SEIA, even when the wetland was not declared or in the process of being declared. It bases its decision on the Convention on Wetlands of International Importance (known as the "Ramsar" Convention, named after the Iranian city where it was signed in January 1971 and ratified by Chile in 1981), Article 11, letter d) of Law 19.300, and the National Biodiversity Strategy 2017-2023, regulations that according to the CS contain the obligation to protect wetlands even before January 2020.

The last two sentences of the period do not refer to the problem of the effects over time of Law 21.202 (8-9).

The cited cases belonging to the initial period are summarized in the following table according to the numbering in which they were presented (Table 1):

<sup>18</sup> Article 5, Law 21.202; Articles 60 and 64, Decree 458, General Urban Planning and Construction Law.

<sup>19</sup> Regarding the jurisprudence of the CS ruling on protection actions, see PAVEZ (2024).

<sup>20</sup> CGR (2021a).

Table 1: Initial validity jurisprudence

#	Cover	Action	1st instance	Comment 1st instance	2nd instance	Comment 2nd instance
1	Junta de Vecinos de Chorrillos y otros con Constructora Manque y otro	Protection	CA Concepción 11.114-2020	The court upholds the action, stating that there is retroactivity since the project was based on an administrative contract prior to Law 21.202 (c. 8°)	CS 129.273-2020	Revokes because there is no retroactivity in applying Law 21.202 to a project that is being executed during its validity (c. 11°)
2	Coñuecari con Municipalidad de Puerto Montt	Protection	CA Puerto Montt 1.866-2020	Rejects the action to protect wetland because the project's administrative permits predated Law 21.202 (c. 9°)	CS 21.970-2021	Revokes because there is no impediment to applying Law 21.202 if the project is being executed during its validity (c. 8° and 9°)
3	Farez con Sociedad de Rentas Inmobiliarias	Protection	CA Puerto Montt 1.180-2021	Rejects the action because previous new construction permits are not affected by Law 21.202 (c. 8°)	CS 95.910-2021	Confirms the ruling considering that the affected property is not a wetland (c. 4°)
4	Juan Mera Lucero con Superintendencia del Medio Ambiente	Art. 17 No. 3, 20,600	3TA R-43-2020	Activity with previous permits. Approval of filing of complaint by the SMA because undeclared wetland is not protected by Law 21.202 (c. 31°)	Finalized in the Environmental Court	-
5	Gallardo con Ministerio de Obras Públicas	Protection	CA Rancagua 9.448-2021	Activity prior to Law 21.202. Rejects the action on the ground that it is not the subject matter of the protection action (c. 7°)	CS 49.869-2021	Revokes and orders the entry into the SEIA of a port project underway since 2017 (c. 4°)
6	Garrido con Estrada	Protection	CA Pta Arenas 825-2021	Activity prior to Law 21.202. Action rejected for not being subject to protection (c. 6°)	CS 57.992-2021	Revokes and orders the project prior to Law 21.202 to enter the SEIA (c. 9°)

7	Municipalidad de Temuco con Constructora Waldo Jara	Protection	CA Temuco 1.773-2021	Prior activity without permits. Appeal rejected for lack of proof of illegality or arbitrariness (c. 10)	CS 1.536-2022	Revokes and indicates that drying and drainage activities in wetlands must cease by application of Law 21.202 (c. 4°)
8	Contzen y otros con Municipalidad de Quillón	Protection	CA Chillán 3-2021	Action against ordinance regulating the use of vessels in wetlands is accepted for arbitrariness.	CS 18.955-2021	Revokes because it considers that there is no arbitrariness in the decision that was based on Law 21.202
9	Daisy del Pilar Güentian Quintana y Otros con Superintendencia del Medio Ambiente	Art. 17 No. 3, 20,600	3TA R-44-2020	It cites Law 21.202 but does not argue about it.	Finalized in the Environmental Court	-

### 2.3.Advanced Period in Force

The second period is characterized by two elements. First, the entry into force of Decree No. 15, which contains the regulations for Law 21,202 (1), a rule that establishes the procedure for declaring a property as an urban wetland. With this, the MMA began to exercise its new powers. Second, the change in the CGR's jurisprudence, which aligned with the CS's regarding the temporal effects of Law 21,202. Initially, the CGR considered that the new grounds for entry into the SEIA required the property to be declared a wetland by the MMA (2, 3, and 4). It later established that the grounds set forth in Article 10, letter s) of Law 19,300 operated *ipso iure* even before the filing of a declaration request in the MMA (5 and 6). The rest of the pronouncements provide a greater definition of the legal regime of urban wetlands, but they do not refer to the problem of the effects over time of Law 21.202 (7-11).

The CGR's pronouncements are summarized in the following table, according to the numbering in which they were presented (Table 2):

Table 2: CGR jurisprudence advanced validity

#	Opinion	Date	Comment
1	E51700N20	11-13-2020	Approval of the regulation Law 21.202
2	E129413N21	08-13-2021	Project previously authorized by the General Directorate of Water. If the property is declared a wetland, it will be necessary to determine whether it should be included in the SEIA.
3	002268N21	24-09-2021	Projects with a negative relevance declaration prior to Law 21.202 should not be entered into the SEIA.
4	E267949N22	10-18-2022	Declaration of wetland and nature sanctuary affects water use rights prior to its validity
5	E157665N21	11-19-2021	Reconsiders Opinion E129413N21 in that the new cause of article 10, letter s), of Law 19,300 operates without declaration of the wetland by the MMA
6	E420195N23	24-11-2023	SEIA entry requires wetland declaration in the case of letter p) and if the activity causes environmental impact
7	E249979N22	26-08-2022	Application of the deadline for postponing urban development acts
8	E271028N22	26-10-2022	Deadline for the authority to declare a wetland
9	E312592N23	16-02-2023	Deadline for the authority to declare a wetland
10	E381858N23	08-17-2023	Powers of municipalities in relation to wetlands
11	E394238N23	20-09-2023	Municipalities must incorporate wetlands into the urban regulatory plan as soon as possible.

At the environmental court level, during this period, there were 32 cases in which challenges to the MMA's declaration of an urban wetland were resolved.<sup>21</sup> Twelve claims were rejected, and 20 were granted in whole or in part. The 12 rulings that rejected claims maintain that the MMA's declaration of a property as an urban wetland—with due justification—can overrule the rights or interests of the owners of properties declared as urban wetlands.

The 12 rejected claims are summarized in the following table (Table 3):

Table 3: Claims rejected under Article 3 of Law 21.202

#	Parts	Role	Facts	Date	Result
1	Inmobiliaria de Deportes La Dehesa SA con Ministerio del Medio Ambiente	2TA R-319-2022	Impact on property ownership and water use rights prior to Law 21.202	19-02-2022	Claim dismissed. Declaration overrides prior rights or interests (c. 45°)
2	Inversiones FK con Fisco de Chile	3TA R-25-2021	Impact on property ownership on real estate prior to Law 21.202	31-03-2022	Claim rejected. Declaration overrides prior rights or interests (c. 1, 2, and 36)
3	Empresa de los Ferrocarriles del Estado / Ministerio del Medio Ambiente	2TA R-307-2021	Impact on property and previous railway activity	02-11-2022	Claim rejected. Declaration overrides prior activity (c. 15°)
4	FERRORNOR con MMA	2TA R-315-2021	Impact on railway property and activity prior to Law 21.202	24-11-2022	Claim rejected. Declaration overrides prior activity (c. 15°)
5	Empresa de Ferrocarriles del Estado con Ministerio del Medio Ambiente-Fisco de Chile.	3TA R-30-2021	Impact on property ownership and activity prior to Law 21.202	09-12-2022	Claim rejected. Declaration overrides prior activity (c. 34°)
6	Empresa de Ferrocarriles del Estado con Ministerio del Medio Ambiente-Fisco de Chile	3TA R-31-2021	Impact on property ownership and activity prior to Law 21.202	09-12-2022	Claim rejected. Declaration overrides prior activity (c. 33°)
7	Empresa de Ferrocarriles del Estado con Ministerio del Medio Ambiente-Fisco de Chile.	3TA R-32-2021	Impact on property ownership and activity prior to Law 21.202	09-12-2022	Claim rejected. Declaration overrides prior activity (c. 33°)

<sup>21</sup>Article 3, Law 21.202; Article 17 No. 11, Law 20.600. Cassation before the CS is not admissible against these rulings. See, CS (2023d), consideration 3. In CS (2023f), consideration 3, it was held that the judgment of the environmental court did not terminate the procedure. In the complaints filed, the decision of the court *a quo* has been kept unchanged: see CS (2023c); CS (2023a); CS (2023b); CS (2023e); CS (2024a).



8	Celis Lister Víctor Claudio/Ministerio del Medio Ambient	2TA R-305-2021	Impact on property ownership on real estate prior to Law 21.202	16-12-2022	Claim dismissed. Declaration overrides prior rights or interests (c. 67°)
9	Soc. Adm. de las Aguas del Tercer Sector del Rio Maipo / Ministerio del Medio Ambiente	2TA R-395-2023	Impact on property ownership and activities prior to Law 21.202	19-03-2023	Claim rejected. Declaration overrides prior rights or interests (c. 27°)
10	Consorcio Punta Puyai S.A. / Ministerio del Medio Ambient	2TA R-354-2022	Impact on property ownership on real estate prior to Law 21.202	19-07-2023	Claim rejected. Declaration overrides prior rights or interests (c. 13°)
11	Heather Price Saffery y otros con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-21-2023	Impact on property ownership on real estate prior to Law 21.202	23-02-2024	Claim rejected. Declaration overrides prior rights or interests (c. 29°)
12	Inmobiliaria e Inversiones Puerto Octay S.A con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-3-2022	Property damage to real estate and activity prior to Law 21.202. Permits were being processed.	06-06-2023	Claim rejected. Declaration overrides prior activity and interests (c. 14 and 41)

Of the 20 claims accepted in whole or in part, in 13 cases, claims were accepted against the MMA declaration due to lack of foundation and/or contradictoriness with respect to the rights and interests affected, ordering the MMA to decide the matter again (1-13).<sup>22</sup> In two proceedings, the infringement of rights or interests, together with the lack of justification, led the court to order the exclusion of the affected property from the polygon declared as an urban wetland (14-15).<sup>23</sup>

<sup>22</sup>CAÑAS & GUERRERO (2024), pp. 277-283, speak in this line.

<sup>23</sup>Along these lines, HUNTER (2024), p. 174.

The rulings are summarized in the following table, according to the numbering in which they were presented (Table 4):

Table 4: Claims under Article 3 of Law 21.202, fully or partially accepted

#	Parts	Role	Facts	Date	Result
1	Fernández Jorquera Juan José/Ministerio del Medio Ambiente	2TA R-339-2022	Impact on property ownership on real estate prior to Law 21.202	21-11-2022	Accepts the claim. Orders a new ruling, respecting the contradictory nature of the matter (c. 1, 10, and 20).
2	Inmobiliaria Zenteno SpA con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-31-2022	Impact on property and activity with permits prior to Law 21.202	27-07-2022	Accepts the claim. Orders a new ruling, respecting the contradictory nature of the matter (c. 102, 103, and 177).
3	Inversiones Butamal con MMA	2TA R-297-2021	Impact on property prior to Law 21.202	24-11-2022	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 52°)
4	Castillo Antezana Valeria Cecilia y otros/Ministerio del Medio Ambiente	2TA R-316-2021	Impact on property ownership and activity with permits prior to Law 21.202	01-30-2023	Accepts the claim. Orders a new ruling, respecting the contradictory nature of the matter (c. 18 and 47).
5	Nicolás Reichert Haverbeck con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-37-2021	Impact on property ownership and activities prior to Law 21.202	10-03-2023	Accepts the claim. Orders a new ruling, respecting the contradictory nature of the matter (c. 27, 46, and 49).
6	Inmobiliaria Pocuro y otros con Fisco (MMA)	3° TA R-15-2022	Impact on property ownership and activity with permits prior to Law 21.202	05-17-2023	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 50).
7	Agrupación Cultural por los Humedales y Entornos Naturales con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-12-2022	Impact on property ownership and activity with permits prior to Law 21.202	28-06-2023	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 61).
8	Agrícola Laguna Redonda S.A y otros con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-19-2023	Impact on property ownership and activity with permits prior to Law 21.202	04-03-2024	Accepts the claim. Orders a new decision, respecting the contradictory nature (59th)

9	Fundación Invica y otro con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-28-2022	Impact on property ownership and activity with permits prior to Law 21.202	12-03-2024	Accepts the claim. Orders a new ruling, respecting the contradictory nature of the case (16th and 54th).
10	Leonardo Jaña López con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-1-2023	Impact on property ownership on real estate prior to Law 21.202	19-04-2024	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 21).
11	Gilda Silvana Tortello Manetti y otro con Ministerio del Medio Ambiente	1TA R-70-2022	Impact on property ownership on buildings prior to Law 21.202	12-06-2024	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 17).
12	Eduardo Radomir Cambiaso Tomic y otros con Ministerio del Medio Ambiente	1TA R-69-2022	Impact on property ownership on real estate prior to Law 21.202	12-06-2024	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 17).
13	Silvia Haverbeck Mohr con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-1-2022	Impact on property ownership and activities prior to Law 21.202	10-03-2023	Accepts the claim. Orders a new decision, respecting the contradictory nature of the matter (c. 31).
14	Agrícola Chivilcán LTDA y Otros con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-22-2021	Impact on property ownership and agricultural activities prior to Law 21.202	13-12-2022	Accepts claim and orders to exclude the property from the declaration (c. 21° and 35°)
15	Inmobiliaria Teja Sur Limitada con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-4-2022	Impact on property ownership and activity with permits prior to Law 21.202	01-30-2023	Accepts claim and orders the property to be excluded from the declaration (c. 53°)

However, five claims were accepted for reasons unrelated to the temporal effects of Law 21.202 (1-4), although one of them alleged that property was affected and that permits existed prior to Law 21.202 (5). The information is summarized as follows (Table 5):

Table 5: Claims under Article 3 of Law 21.202 unrelated to transience

#	Parts	Role	Comment	Sentence date	Result
1	Ilustre Municipalidad de Villa Alemana/ Ministerio del Medio Ambient	2TA R-341-2022	Restrictive delimitation of the wetland. It has no relation to the temporary effects of Law 21.202.	02-12-2022	Accepts claim
2	Junta de Vecinos Salida Panimávida y otros/ Ministerio del Medio	2TA R-324-2022	Restrictive delimitation of the wetland. It has no relation to the temporary effects of Law 21.202.	28-02-2023	Accepts claim
3	Ilustre Municipalidad de Curacaví / Ministerio de Medio Ambiente	2TA R-356-2022	Restrictive delimitation of the wetland. It has no relation to the temporary effects of Law 21.202.	26-07-2023	Accepts claim
4	Ilustre Municipalidad de Algarrobo/Ministerio del Medio Ambiente	2TA R-355-2022	Restrictive delimitation of the wetland. It has no relation to the temporary effects of Law 21.202.	08-17-2023	Accepts claim
5	Juan de Dios Toledo Ulloa y otros con Fisco de Chile - Ministerio del Medio Ambiente	3TA R-30-2022	Impact on property and activity with permits prior to Law 21.202	09-12-2022	Claim accepted. Property was not a wetland.

Another group corresponds to 5 proceedings related to SMA resolutions regarding activities in urban wetlands.<sup>24</sup> In one case, a claim against the SMA inspection file was rejected because the property being reported was not a wetland and the adjacent property had not been declared as such (1). Two claims against compliance plans approved by the SMA were also rejected because they did consider the presence of the wetland with respect to activities with an RCA prior to Law 21.202 (2-3). In one case, the SMA ordered a drainage project prior to Law 21.202 to be entered into the SEIA, and the Third Environmental Court rejected the claim (4). One case does not refer to the temporal effects of Law 21.202 (5).

The jurisprudence is summarized in Table 6, according to the order in which they were presented.

<sup>24</sup>Article 17 No. 3, Law 20,600.

Table 6: Claims under Article 17 No. 3, Law 20,600

#	Parts	TA	CS	Facts	Result
1	Selumiel con SMA	2TA R-432-2023	TA executed	Complaint regarding activity in a wetland prior to the declaration	Claim against inspection filing rejected. Property was not a wetland and the adjacent property was not declared.
2	Salinas Martinez Pablo Rodrigo y otros / Superintendencia de Medio Ambiente	2TA R-408-2023	CS 38.420-2024	Complaint about a wetland project with RCA and a compliance plan prior to Law 21.202	Complaint against inspection filing. Wetland activity did not generate new negative impacts, and the compliance plan did consider the wetland (c. 28°, 35°, 39°, and 44°).
4	Patagonia Ridge Spa con Superintendencia del Medio Ambiente	3TA R-28-2021	CS 246.934-2023	Activity prior to Law 21.202. SMA orders entry into the SEIA	Orders the entry into the SEIA of activities initiated prior to Law 21.202 (c. 33°)
3	Municipalidad de Peñaflores con Superintendencia del Medio Ambiente	2TA R-353-2022	TA executed	Claim regarding a compliance plan approved during the validity of Law 21.202, regarding a project with a previous RCA	Rejects the claim because the compliance plan did consider the wetland (c. 39°)
5	Inversiones Lampa SPA / Superintendencia del Medio Ambiente	2TA R-342-2022	CS 147.311-2023	It has no relation to the effects over time of Law 21.202	There was evasion of the SEIA because the wetland was a priority site before Law 21.202

In eight cases, the SMA requested a provisional measure to suspend activities related to urban wetlands. One of the measures authorized was for an undeclared wetland, but during the period in which Law 21.202 was in force (1). In two cases, the suspension measure was authorized for activities with administrative permits in force prior to Law 21.202 or the declaration of the MMA (2-4). In four others, the measure was also authorized because one of the new typologies of Law 21.202 was verified, but without expressly reflecting on the administrative permits prior to Law 21.202 or the function of the MMA declaration (4-7). A final case occurred during the period in which Law 21.202 was in force, as it involved an activity carried out after the wetland had been declared, although the provisional measure was rejected because a significant impact on the ecosystem could not be proven.

The cases are summarized according to the numbering in which they were presented (Table 7).

Table 7: Requests for provisional measures, art. 48 Law 20.417

#	Parts	Action	Role	Comment	Decision
1	Solicitud SMA, Inmobiliaria Rossan Ltda	MP Request	3TA S-5-2024	Request for suspension of activities on an undeclared wetland. Positive relevance consultation.	Suspension of undeclared wetland authorized (c. 6°)
2	Solicitud SMA, Proyecto Condominio Tierra Noble 4ta etapa	MP Request	3TA S-1-2022	Suspension is requested regarding activity with permits prior to Law 21.202	The suspension is authorized because the obligation to enter the SEIA is with respect to activities carried out during the validity of Law 21.202 (c. 14°)
3	Solicitud SMA, Unidad fiscalizable Inmobiliaria Pocuro Sur-Sector Valle Volcanes	MP Request	3TA S-4-2022	Suspension is requested regarding activity with permits prior to Law 21.202	Suspension authorized. Law 21.202 overrides previous planning permits (c. 4°)
4	Solicitud SMA, Proyecto inmobiliario "Lote A", "Lote B", "Lote C" y "Lote D" del sector Alto la Paloma	MP Request	3TA S-5-2022	Suspension is requested regarding real estate activity prior to Law 21,202. No discussion is made regarding previous urban development activities.	The measure is authorized
5	Solicitud SMA, proyecto inmobiliario ejecutado en el "Lote A", "Lote B", "Lote C" y "Lote D" del sector Alto La Paloma	MP Request	3TA S-6-2022	Suspension is requested regarding real estate activity prior to Law 21,202. No discussion is made regarding previous urban development activities.	The measure is authorized
6	Tercer Tribunal Ambiental con Solicitud SMA, Proyecto inmobiliario ejecutado en el "Lote A", "Lote B", "Lote C" y "Lote D" del sector Alto La Paloma	MP Request	3TA S-10-2022	Suspension is requested regarding real estate activity prior to Law 21,202. No discussion is made regarding previous urban development activities.	The measure is authorized

7	Tercer Tribunal Ambiental con Solicitud SMA, Proyecto inmobiliario ejecutado en el "Lote A", "Lote B", "Lote C" y "Lote D" del sector Alto La Paloma	MP Request	3TA S-8-2022	Suspension is requested regarding real estate activity prior to Law 21,202. No discussion is made regarding previous urban development activities.	The measure is authorized
8	Solicitud SMA, Proyecto Camino Inmobiliaria Nahuel S.A.	MP Request	3TA S-1-2023	Requests suspension regarding activity after Law 21.202 and wetland was declared	The measure is rejected because the existence of an environmental impact on the wetland was not proven.

In three cases, the validity of environmental qualification resolutions (RCA) prior to Law 21.202 that did not consider impacts on urban wetlands was discussed.<sup>25</sup> On two occasions, an RCA prior to Law 21.202 was deemed unlawful for not considering impacts on the respective wetland (1-2). Naturally, in these cases, the activity should have been included in the SEIA under other typologies than those introduced by Law 21.202. In such a situation, the environmental impacts on wetlands should have been considered by applying the heading of Article 10 of Law 19.300. One case does not address the issue of the temporal effects of Law 21.202 (3).

The cases are summarized in Table 8 according to the indicated numbering.

<sup>25</sup> Article 18 No. 8, Law 20,600.

Table 8: Claims art. 17 No. 8 Law 20,600

#	Parts	1st Instance	2nd Instance	Comment	Decision
1	Fundación Raíces de Pucón con Servicio de Evaluación Ambiental Región de la Araucanía	3TA R-29-2020	TA executed	RCA prior to Law 21.202 is challenged for not considering the impact on the wetland	The RCA was repealed (c. 100°)
2	Ilustre Municipalidad de Pucón y otros con Comisión de Evaluación Ambiental de la Región de la Araucanía	3TA R-18-2021	CS 14.448-2022	RCA prior to Law 21.202 is challenged for not considering the impact on the wetland	The RCA (3TA c. 67°-80°) was repealed
3	Ilustre Municipalidad de Pucón y otros con Comisión de Evaluación Ambiental Región de la Araucanía	3TA R-5-2021	CS 5.721-2023	It cites Law 21.202 but does not discuss it.	Accepts claim



Regarding environmental damage, there were three cases linked to Law 21.202. Two lawsuits for environmental damage were accepted, ordering the suspension of activities related to an urban wetland and the execution of repair plans. In both cases, it is noted that the pre-existing sectoral administrative permits do not allow the execution of an activity contrary to Law 21.202, which is binding upon the State from its entry into force (1-2). A third case is not related to the temporary effects of Law 21.202 (3).

The jurisprudence is summarized according to the indicated numbering (Table 9):

Table 9: Claims for environmental damage

#	Parts	1st Instance	2nd Instance	Comment	Decision
1	Municipalidad de Valdivia con Baeza	3TA D-10-2019	CS 22.719-2024	Claim for environmental damage prior to Law 21.202. The SAG authorized subdivision, drainage, and drying.	Accepts environmental damage claim. Orders halt to activity until permits are obtained. Orders repair plan.
2	Ilustre Municipalidad de Valdivia con Nicolás Reichert Haverbeck	3TA D-9-2019	TA executed	Activity with a sanitary permit prior to wetland declaration. The request was accepted, and environmental restoration measures were ordered.	The permit was for another property. Furthermore, administrative authorizations do not authorize the exercise of an activity that is contrary to other rights. This activity predates Law 21.202.
3	Ilustre Municipalidad de Saavedra con José Ruiz Müller	3TA D-11-2021	TA executed	Alleged rubble filling in a wetland. Rejected due to lack of accreditation. Undeclared wetland.	No evidence of wetland or significant environmental damage was found.

Outside of environmental institutions, there are two municipal legality claims related to wetlands. In one case, a municipal illegality claim was upheld regarding a clay extraction permit prior to Law 21.202 for violating its Article 1. In a second case, the inclusion of wetlands in territorial planning instruments was challenged, in accordance with Article 60 of the General Law on Urban Planning and Construction, as amended by Article 5 of Law 21.202. The CS ruled that the inclusion of the wetland in the regulatory plan and its declaration as a public utility were within municipal powers.

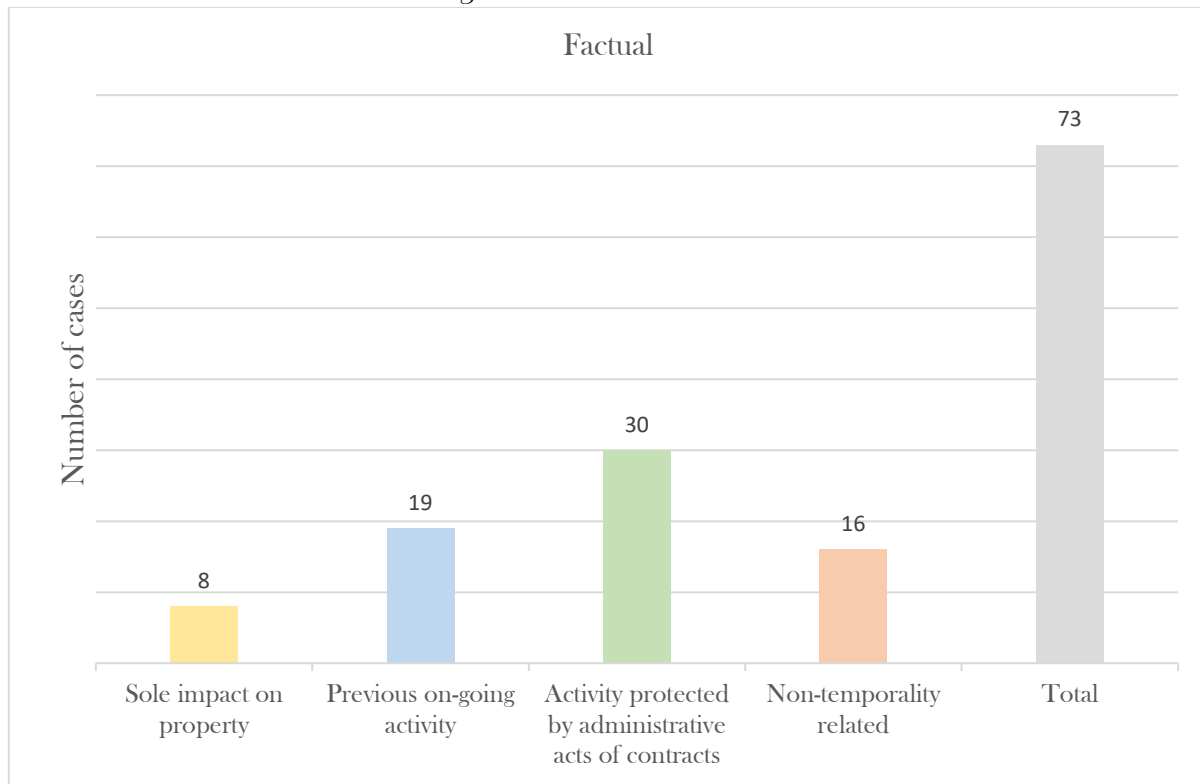
The jurisprudence is summarized in Table 10.

Table 10: Actions outside the environmental institutional framework advanced validity

#	Parts	Action	1st instance	2nd Instance	Facts	Decision
1	Junta de Vecinos El Emboque con IM Chillán	Claim of municipal illegality	CA Chillán 9-2022	CS 160.534-2022	A permit for the extraction of aggregates granted during the validity of Law 21.202, but before the site was declared an urban wetland, is being challenged.	The site is not a wetland (c. 11° and 15°)
2	Inversiones Valmar Limitada contra IM de Concepción	Claim of municipal illegality	CA Concepción 65-2020	CS 201.305-2023	Property damage is alleged due to the inclusion of a property as a wetland in a territorial planning instrument.	The municipality may introduce limitations on the properties to protect biodiversity (CS c. 9°)

## 2.4. Preliminary Conclusions

The review conducted in the previous section reveals the existence of 57 proceedings or rulings related to the issue of the temporal effects of Law 21.202. In the tables, the cases are colored according to their factual basis and the arguments used to prevent the application of Law 21.202 to a particular property. There are three situations: (1) those where the existence of property rights prior to the entry into force of Law 21.202 or the declaration of the property as an urban wetland is alleged, which are pictured in yellow, (2) those where there is an on-going economic activity with the start of material execution prior to the entry into force of Law 21.202 or the declaration of the property as an urban wetland, which are pictured in blue, and (3) those cases where the prior property right or activity is also protected by an administrative act or contract prior to the entry into force of Law 21.202 or the declaration of the property as an urban wetland, which are pictured in green. The cases that are not related to the temporality of Law 21.202 are pictured in red (see Fig. 1).

*Fig.1. Factual substratum.*

### III. INTERTEMPORAL LAW AND URBAN WETLANDS LAW

Conflicts about the temporal application of Law 21.202 must be resolved in accordance with its own transitional provisions and by applying the permanent rules on the legislation's temporal effects. Both sets of regulations are known, respectively, as transitional and intertemporal law.

The only transitional provision of Law 21.202 concerns the deadline for issuing the regulations. Therefore, to determine the legal status of property rights, activities, acts, or administrative contracts prior to its entry into force, it is necessary to refer to the provisions of intertemporal law.

The most general rule of intertemporal law is Article 9 of the Civil Code, which states: "The law may only provide for the future, and shall never have retroactive effect". It is complemented by the Law on the Retroactive Effect of Laws of 1861 (LER), which in its Article 1 regulates "Conflicts arising from the application of laws enacted at different times". It contains various provisions on the permanence or extinction of legal positions in the face of a succession of laws over time.<sup>26</sup> The Constitution contains two specific norms: Article 19 No. 3, which prohibits *in peius* retroactivity in criminal matters, and Article 19 No. 24, which, according to the prevailing opinion, protects property rights from retroactive legislation.<sup>27</sup>

<sup>26</sup> Articles 12, 25 and 26, Law on Retroactive Effect of the Laws of 1861.

<sup>27</sup> CLARO SOLAR (2013), p. 74; ALESSANDRI *et al.* (2005), pp. 224-225; SACO (2006), p. 485.

This set of regulations is understood, interpreted, and applied according to the approach of José Eugenio Vergara, a 19th-century jurist credited with drafting the LER.<sup>28</sup> Vergara authored an article on the subject dating from 1857, and its relevance lies in the fact that his approaches are followed by the most influential legal scholarship to this day, with some later additions.

In accordance with the above, Article 9 of the Civil Code and the LER are inspired by the theory of acquired rights and mere expectations.<sup>29</sup> Vergara understood that an acquired right is “the individual appropriation of an object susceptible to being the subject of a legal relationship”.<sup>30</sup> Later, Alessandri’s definition prevailed, for whom acquired rights were “all those rights that are a consequence of an event capable of producing them under the legislation in force at the time the event occurred and that have immediately become part of the person’s assets, regardless of the circumstance that the opportunity to assert them arises at a time when another law governs”.<sup>31</sup> Thus, non-retroactivity safeguards rights that arose prior to the entry into force of a regulatory change.

The rules on the temporal effects of the law are of legal rank, therefore, they bind the judge, but not the legislator.<sup>32</sup> The judge’s mission is to interpret the law with the genuine extension given by the legislator as to its effects in time.<sup>33</sup> Through an express provision, legislation can have retroactive effect, either by stating it in explicit and direct terms, or by introducing a transitional rule that makes it govern from a date prior to its validity.<sup>34</sup> On the other hand, in its interpretative work, the court must consider that in matters of political organization of the State, the law must govern *in actum*,<sup>35</sup> an idea that was afterwards extended to all constitutional and administrative laws.<sup>36</sup>

The Constitution recognizes two limits to the retroactivity expressly provided by the legislator: (i) in criminal matters<sup>37</sup> and (ii) with respect to property rights.<sup>38</sup> Regarding the protection of wetlands, we are interested in the protection of property. Regarding this right, the Constitution allows for the introduction of obligations and limitations upon established property rights, but not for someone to be deprived of her property;<sup>39</sup> these limits are discussed in legal scholarship.<sup>40</sup>

Taking the above into account, the analyzed jurisprudence reveals four points of discussion associated with the temporal effects of Law 21.202. First, its reiterative or innovative nature in relation to the Ramsar Convention, determining whether it has its own entry into force or depends on the aforementioned international treaty. Second, the legal function of the declaration of the property as an urban wetland by the Ministry of Environment (MMA), determining the date on which the legal effects of Law 21.202 take place. Third, its potential

<sup>28</sup> UGARTE (2021), pp. 256-257.

<sup>29</sup> VERGARA (1857), pp. 201, 204, 207-212; BCN (1861), pp. 4-7.

<sup>30</sup> VERGARA (1857), p. 212.

<sup>31</sup> ALESSANDRI *et al.* (2005), pp. 227-228. See also CLARO SOLAR (2013), p. 68.

<sup>32</sup> VERGARA (1857), p. 202.

<sup>33</sup> VERGARA (1857), pp. 196-198.

<sup>34</sup> VERGARA (1857), p. 197; CLARO SOLAR (2013), p. 63; ALESSANDRI *et al.* (2005), p. 225.

<sup>35</sup> VERGARA (1857), p. 194.

<sup>36</sup> CLARO SOLAR (2013), p. 70; ALESSANDRI *et al.* (2005), p. 258; AYLWIN & AZÓCAR (1996), p. 50; SILVA CIMMA (1993), p. 111; VARAS (1940), p. 29.

<sup>37</sup> VERGARA (1857), p. 196.

<sup>38</sup> CLARO SOLAR (2013), p. 74; ALESSANDRI *et al.* (2005), pp. 224-225; SACO (2006), p. 485.

<sup>39</sup> Article 19 No. 24, Political Constitution of the Republic of 1980.

<sup>40</sup> MATUTE (2020), pp. 183-194.

limitation on property rights and its relationship to prior activities. Fourth, how it impacts administrative acts or contracts prior to its entry into force. Each of these discussions is examined below.

### 3.1. Wetlands Protection: Reinforcement or Innovation?

For one view within the CS, Law 21.202 only reinforces the obligations that already existed under the Ramsar Convention.<sup>41</sup> Thus, although its entry into force is January 2020, its content is identical to that of the aforementioned treaty ratified by Chile on November 11, 1981.<sup>42</sup> Consequently, its effects would unfold over time from Chile's ratification of the aforementioned treaty. I will examine this contention.

Article 1 of the Convention creates a list of wetlands of international importance. Article 3 obligates the Parties to “develop and implement appropriate plans to promote the conservation of wetlands” included in the list, and “the national use of wetlands within its territory”. Article 4 states that “Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves in wetlands, whether or not included in the List, and shall provide adequate protection for them”.

The title of the Convention states that it deals with “wetlands of international importance, especially as habitat for waterfowl”. This is consistent with paragraphs 1 and 2 of Article 1, which, when regulating the list, refers to wetlands of international importance, and with Article 3, which establishes the obligation of the parties to “develop and implement plans” to protect the wetlands on the list and their “rational use”. Today, that plan is the National Biodiversity Strategy 2017-2030. Among its thematic areas, it establishes an action plan related to the conservation and rational use of wetlands.<sup>43</sup> This is a highly important document for planning and guiding public policy. However, it does not have the characteristics of a current legal norm, but rather an indicative plan.<sup>44</sup>

However, Article 4 mentions wetlands “whether or not listed”, which the State must protect and conserve “when establishing natural reserves”.<sup>45</sup> Thus, the characteristics of international importance and providing habitat for waterfowl are relevant only to the listing of a wetland.<sup>46</sup> Article 4 also addresses the protection of other wetlands not listed. Such protection occurs in the context of the creation of “natural reserves in wetland areas” by States. Hence, for a wetland to be protected, the Convention requires a legal act by the State providing for this, such as when a natural reserve is established.<sup>47</sup> Consequently, the Convention is not self-executing since it expressly requires an additional juridical act.<sup>48</sup>

This interpretation is consistent with Chilean legal practice prior to Law 21.202. Article 17 of Law 20.283 (on native forest recovery and forestry development) assigns regulatory authority to determine the regulations for the protection of wetlands that are “Priority Conservation Sites”, declared by the former National Environmental Commission (currently

<sup>41</sup> See, CS ruling 1, 2, 3, 5, 6 y 7 from Table 1.

<sup>42</sup> Decree 771, Ministry of Foreign Affairs, of 1981, which promulgates the Convention on Wetlands of International Importance Especially as Waterfowl Habitat.

<sup>43</sup> MMA (2017), pp. 87-89.

<sup>44</sup> RODRÍGUEZ DE SANTIAGO (2023), pp. 91-92.

<sup>45</sup> Article 4, paragraph 1, Decree 771, Ministry of Foreign Affairs, 1981.

<sup>46</sup> Article 2, paragraph 1, Decree 771, Ministry of Foreign Affairs, 1981.

<sup>47</sup> GÓMEZ (2024a), pp. 362-364; HUNTER (2024), p. 162.

<sup>48</sup> URRUTIA (2022), p. 62; FUENTES & PÉREZ (2018), pp. 140-144.

through the MMA<sup>49</sup>) or that are Ramsar sites (declared by the Ministry of Foreign Affairs as the coordinating authority of the Convention). Thus, Decree 82 of the Ministry of Agriculture protects wetlands when they have been declared as “priority conservation sites”.<sup>50</sup> The CGR’s jurisprudence prior to Law 21.202 followed the same line.<sup>51</sup> Therefore, wetlands received protection prior to Law 21.202 to the extent that an official declaration existed or the project was included in the SEIA under some other typology.

Against this argument, one could cite the protective actions that ordered protective measures for wetlands before January 2020.<sup>52</sup> However, these resolutions reflect an “anthropocentric” perspective, not one related to the wetland itself.<sup>53</sup> The notable cases are those related to the Llantén wetland.<sup>54</sup> In one of them, the re-channeling of water was ordered because a housing development diverted it, affecting a neighbor,<sup>55</sup> while in the other, a similar situation occurred and the CS ordered a series of protective measures resulting from works that modified the natural course of the waters that did not include the obligation to enter the SEIA.<sup>56</sup> Rather, these are neighborhood conflicts or represent non-compliance with other regulations.

Essentially, Law 21.202 contains three innovations. First, without excluding the Convention List, it created a new avenue for the MMA to declare a property as an urban wetland, with its own precautionary logic and appeal mechanisms. Second, it established regulatory powers for municipalities,<sup>57</sup> specifically to regulate urban wetlands by ordinance and to include declared wetlands in territorial planning instruments. Third, it modified the grounds for entry into the SEIA, introducing one referring to wetlands that does not operate according to the logic of a typology of activity, but rather based on the risk that any activity poses to urban wetlands.<sup>58</sup> Therefore, it is incorrect to argue that the obligations provided for in Law 21.202 were already present in the previous legislation in order to avoid the transition problems posed by this regulation, which has only been in force since January 2020.

### 3.2.Function of the Wetland Declaration

Since the content of Law 21.202 has only been in effect since January 2020, it is necessary to determine the function of the MMA’s power to declare a property as a wetland in the implementation of its effects.

Article 1 of Law 21.202 establishes that its purpose is to protect “declared” wetlands. However, it is necessary to analyze the other norms to understand the function of the MMA declaration. Article 3 protects urban wetlands from the moment the declaration procedure begins. However, Article 4 modifies Law 19.300 without mentioning the procedure or the MMA declaration. Therefore, do its temporal effects depend on Law 19.300 or on Article 1 of Law 21.202?

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<sup>49</sup> Article 29, Law 21,600 of 2023.

<sup>50</sup> Decree 82, Ministry of Agriculture, approves regulations on soil, water and wetlands.

<sup>51</sup> CGR opinions CGR (2016); CGR (2017); CGR (2008); CGR (2019).

<sup>52</sup> GONZÁLEZ & INSUNZA (2024), pp. 160-164.

<sup>53</sup> DELGADO (2021), pp. 559-562.

<sup>54</sup> HARRIS (2019), pp. 1-5.

<sup>55</sup> CA PUERTO MONTT (2017a), consideration 4°; CS (2018a), consideration 15°.

<sup>56</sup> CA PUERTO MONTT (2017b), consideration 7°; CS (2018b), consideration 15°.

<sup>57</sup> On this point, see also GÓMEZ (2024b), pp. 76-79.

<sup>58</sup> CARRASCO & ALFARO (2023), p. 36.

The CS, CGR and some ruling from environmental courts maintains that the new typologies of entry into the SEIA, incorporated in article 10 of Law 19.300 by article 4 of Law 21.202, operate for as long as their factual hypothesis occurs, without needing a MMA's declaration.<sup>59</sup> The majority opinion is that the temporality of the new typologies of entry into the SEIA is governed by Law 19.300 and not by Article 1 of Law 21.202. Under the logic of Law 19.300, the existence of the described factual situation is sufficient for the obligation to enter the SEIA to arise. Therefore, urban wetland activities carried out under the new types, regardless of their timing, should be included in the SEIA pursuant to Law 19.300.

Despite all this, the described position has a significant weakness: it includes Article 4 of Law 21.202 in isolation from Article 1. The majority position applies the amendments to other legal bodies, ignoring their origin in Law 21.202. However, the literal wording is ambiguous. While Article 1 refers to "declared" wetlands, Article 4 makes no reference to the declaration of the MMA. Article 5, meanwhile, refers to "existing" wetlands.

The legislative history of Law 21.202 contains debate on this point. The original draft did not mention the declaration of the MMA.<sup>60</sup> The Executive branch introduced an amendment to add the word "protect" and then "urban wetlands declared" by the MMA to Article 1.<sup>61</sup> It is clear from the parliamentary debate that the aforementioned amendment restricted the initial scope of the draft,<sup>62</sup> since without the mention of the declaration, the protective regulations would have operated *ipso iure*.

Against this, it could be argued that, while Article 1 refers to declared wetlands, Article 5 refers to "existing" wetlands, thus creating an ambiguity in the law. However, Article 5's reference to "existing" wetlands is for the purpose of including them in territorial planning instruments, so that Article 5 fulfills a similar function to Article 1. Therefore, arguing that the amendments to Law 19.300 provided for in Article 4 of Law 21.202 apply from the moment the wetland is declared by the MMA is supported by the literal wording of Article 1, the history of Law 21.202, and the legislator's systematic choice to protect wetlands from the moment they are declared or incorporated into a territorial planning instrument.<sup>63</sup> Instead, the opposite position is supported only by the literal wording of Article 4, without reasons to avoid the application of Article 1.

Thus, the current law demands MMA's declaration to bring forth the Law's protection for wetlands, all this in line with CGR's old jurisprudence<sup>64</sup> and a ruling of the 3<sup>rd</sup> Environmental Court.<sup>65</sup>

### 3.3. Scope of the Limitation on Property Rights

Regardless of the position taken about the function of the declaration, what is the legal situation of rights arising before Law 21.202 takes effect? From a constitutional perspective, Law 21.202 incorporates "limitations and obligations" derived from the social function of property, based

<sup>59</sup> See CS rulings No. 1, 2, 3, 5, 6 and 7 from Table 1, CGR opinions No. 5 and 6 from Table 2, ruling 1 from Table 6, ruling 1 from Table 7, and ruling 2 from Table 9.

<sup>60</sup> BCN (2020), p. 6.

<sup>61</sup> BCN (2020), p. 90.

<sup>62</sup> BCN (2020), pp. 96, 104 and 133-134.

<sup>63</sup> In the same sense, GÓMEZ (2024a), p. 373.

<sup>64</sup> See CGR opinions No. 2 and 3 from Table 2.

<sup>65</sup> See ruling no. 4 from Table 1.

on the “conservation of environmental heritage”.<sup>66</sup> Law 21.202 does not entail the extinction or transfer of ownership of real estate, and therefore does not constitute a deprivation of ownership, according to the prevailing criterion of constitutional interpretation.<sup>67</sup>

Despite the above, the minority view holds that rights or interests prior to Law 21.202 must be considered for procedural reasons.<sup>68</sup> Substantive protection has even been provided by excluding certain properties from the temporary application of Law 21.202.<sup>69</sup> Naturally, procedural protection is always necessary due to the application of Law 19.880 and to prevent permits from lapse as a result of a project’s entry into the SEIA.<sup>70</sup> The conflicting point is rather whether a right prior to Law 21.202 should resist the application of Law 21.202.

For the majority, the obligation to enter the SEIA provided in Article 4 applies automatically, just like the other typologies set out in Article 10 of Law 19.300.<sup>71</sup> However, in doing so, it fails to take into account the logic of the temporal validity of Law 19.300. According to the CGR, Law 19.300 does not apply to those projects beginning (with so-called “initiated material execution”) before the entry into force of Law 21.202.<sup>72</sup> That is understood as the “execution of works or actions included in a project or activity concerning the materialization of one or more of its phases”.<sup>73</sup> However, the majority applies Law 21.202 to activities which are previous to the declaration of the site as a wetland and even previous to January 2020.

Thus, it is necessary to distinguish. As a general rule, holders of property rights prior to the production of effects of Law 21.202 must bear the obligations or limitations imposed on them because Article 19 No. 24 of the Constitution allows the imposition of “limitations” and “obligations” on existing property rights. Beyond this case, the current jurisprudence of the CGR on the temporal effects of Law 19.300 requires a distinction to be made between activities initiated before the production of effects of Law 21.202, since the new typologies added in Article 10 of Law 19.300 can only legally exist from the moment Law 21.202 takes effect. Consequently, the obligation to enter the SEIA should not extend to activities that began materially before the start of execution, unless there was an express legal provision providing for it. And, if there were, for reasons of protecting trust, such activities should not be interrupted without due transition.<sup>74</sup>

### 3.4. Administrative Acts and Contracts

There are also situations in which activities carried out in an urban wetland are covered by administrative acts or contracts that existed prior to the entry into force of Law 21.202. In fact,

<sup>66</sup> Article 19 No. 24, paragraph 2, Political Constitution of the Republic. See also, CONSTITUTIONAL COURT (2023a), recital 12; CONSTITUTIONAL COURT (2023c), recital 34; CONSTITUTIONAL COURT (2023b), recital 35; HUNTER (2024), p. 163.

<sup>67</sup> FUENTES (2018), p. 417.

<sup>68</sup> GONZÁLEZ & INSUNZA (2024), pp. 180-182.

<sup>69</sup> See rulings No. 14-15 from Table 4.

<sup>70</sup> See rulings No. 1-13 from Table 4. See also, PAVEZ (2024), p. 192.

<sup>71</sup> See rulings No. 1-12 from Table 3.

<sup>72</sup> For instance, see Opinions CGR N° E207410N22, 066261N15, 018436N03 y 038762N00. The same criterion applies in Opinion CGR N° 029143N06 respect to a project which did not start its actual execution before Law 19.300. The same criterion appears in Opinion CGR N° 012659N08 as *obiter dicta* concerning a project which was considered as not satisfying the corresponding date. All these examples are cited by CARRASCO & ALFARO (2023), pp. 155-158.

<sup>73</sup> Decree 40, Ministry of Environment; it approves regulations for the environmental impact evaluation system.

<sup>74</sup> BERMÚDEZ (2022), pp. 111-114 and 117-120.



30 of the 73 processes analyzed fall into this category. Do these administrative acts continue under Law 21.202, or are they interrupted by it?

Administrative acts enjoy a presumption of legality, validity, and enforceability, and must be executed unless there is a suspension order from the administrative authority or judge hearing the challenge.<sup>75</sup> The enforceability of an administrative act, in accordance with Article 3 of Law 19.880, cannot be interrupted in its effects except in its own challenge procedures. It could be argued that administrative contracts are also contracts to which Article 3 of Law 19.880 applies.<sup>76</sup> Nevertheless, if they are deemed contracts, they would be covered by Article 22 of the LER.

Therefore, Law 21.202 cannot interrupt an activity that has already met all the requirements for execution under an administrative act or contract, as it does not contemplate a specific express provision regarding Article 3 of Law 19.880 and Article 22 of the LER. This, moreover, is different from the problem of the initiation of material execution of the project. Altering the logic of the temporal validity of Law 19.300 to subject a previously initiated activity to the SEIA is one issue, and altering the rules on the temporal validity of administrative acts and contracts is another.

The foregoing does not imply affirming a right to the immutability of the rights and burdens regime of an authorization regime,<sup>77</sup> or the impossibility of modifying a rule because subjective rights are affected,<sup>78</sup> since the Constitution does not protect property with such a degree of rigidity.<sup>79</sup> It only implies understanding that, as a general rule, administrative acts or contracts that came into force before Law 21.202 cannot be interrupted in their enforceability unless new legislation does so explicitly. In that sense, I adhere to the position that administrative authorizations generate rights for their recipients.<sup>80</sup> Rights that, in accordance with the Constitution, can be limited or regulated by legislation.

#### IV. CONCLUSIONS

In conclusion, the proposed hypothesis can be confirmed, as Law 21.202 failed to reconcile the existence of prior activities with the new mechanisms for protecting urban wetlands. This leads to divergent interpretations and a lack of legal certainty regarding the legal status of the affected properties and activities.

When determining the temporal effects of Law 21.202, it is not correct to interpret it as a reiteration or reaffirmation of the obligations contained in the Ramsar Convention, because both provisions create distinct protection mechanisms for wetlands. On the other hand, an interpretation based on the reliable and systematic history of the law suggests that its effects are contingent upon the MMA's declaration of a property as an urban wetland.

Regarding the rights or interests affected by the declaration, it is necessary to distinguish. Law 21.202 is established as a property limitation that affects properties immediately or *in actum*, as a general rule. However, for the law to extend to previous activities, or to administrative acts or contracts in force before the declaration, a special transitional provision was required.

<sup>75</sup> Article 3, final paragraph, Law 19.880 of 2003.

<sup>76</sup> ARANCIBIA (2019), pp. 48-49.

<sup>77</sup> ARANCIBIA (2020), p. 23.

<sup>78</sup> FUENTES (2018), p. 416.

<sup>79</sup> GUILOFF & PONCE DE LEÓN (2024), pp. 124-125.

<sup>80</sup> ARANCIBIA (2020), pp. 14-15. Against, FUENTES (2012), pp. 567-568.

*De lege ferenda*, Law 21,202 could have contemplated transitional provisions to prevent litigation. For future cases involving the creation of administrative powers, it is advisable to clarify whether the new legislation will operate automatically or prior to an administrative act. Furthermore, it is advisable to anticipate the existence of administrative activities, acts, or contracts, in order to safeguard or interrupt them by considering some form of regulatory gradualism.

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**ADMINISTRATIVE JURISPRUDENCE****Chile**

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**LIST OF ABBREVIATIONS**

CGR	Comptroller General of the Republic
SEIA	Environmental Impact Assessment System
RCA	Environmental Qualification Resolution
SMA	Environmental Superintendency
MMA	Ministry of the Environment
BCN	National Congress Library
CS	Supreme Court
CA	Court of Appeals