

Energy & Natural Resources - Argentina

Court strives to reconcile mining development and environmental protection

Contributed by [Beretta Godoy](#)

September 24 2012

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Introduction

The mining industry in Argentina has experienced unrelenting growth over the past decade. At present, 14 large metal mines are in operation across the country, with two major projects under construction (Pascua Lama and Potasio Rio Colorado) and many more in different stages of development.

This growth has boosted public revenue, injected foreign capital into the local market, helped to reduce imports and brought new jobs, better wages and progress to many places in Argentina. However, the mining industry has recently met with opposition from local communities due to its perceived environmental impact.

The Supreme Court recently issued a series of decisions that may be crucial in the government's effort to reconcile mining, economic development and environmental protection.

Fiscal stability

In *Minera del Altiplano SA v Estado Nacional - PEN s/ amparo*, the Supreme Court shed some light on the fiscal stability provisions regulated by the Mining Investments Law (24,196). In its ruling, the court clarified:

- what is included in fiscal stability under the law;
- the extent of this stability; and
- the circumstances under which a company may consider that this stability has been violated.

The law established a promotional mining investment programme in 1993, under which the state undertook, among other things, to refrain from increasing the tax burden on mining companies under the programme for a 30-year period from the date on which the mining project feasibility study was filed.⁽¹⁾

In 2007 Minera del Altiplano SA filed an *amparo* action⁽²⁾ against certain tax withholdings imposed by the state⁽³⁾ on mineral exports, on the basis that this impinged on its stability benefits granted by the law, and requested the suspension of withholdings until a decision had been reached on its legality.

On July 10 2012 the Supreme Court dismissed the claim on the grounds that the fiscal stability granted by the law entails a commitment from the state not to increase the total fiscal burden of mining projects, but does not prevent the state from establishing new taxes.

The court added that in order to determine the total tax burden, compensation granted by the state through the suspension or reduction of other taxes must be taken into account. In the court's view, the plaintiff had neither claimed nor proved that the state had refused to compensate or reimburse the amounts paid in excess.

With this decision, the court reaffirmed the application of the fiscal stability granted by the law, even though the claim in this case was dismissed as the plaintiff had grounded it only on the introduction of new taxes and not on an overall increase in the total fiscal burden. Moreover, this decision may seem to indicate that *amparo* claims are not the appropriate course of action to resolve disputes related to fiscal stability, as

Authors

[Federico Godoy](#)



[Phillip Smith](#)



the complexity of the analysis would exceed the limited frame of *amparo* claims.

Glaciers Law

The Supreme Court rendered another important decision in three cases⁽⁴⁾ concerning the Glaciers Law (26,639).⁽⁵⁾ The law was passed in 2010 in order to protect glaciers and periglacial areas in the country. The law declares such areas as public property and prohibits resource companies from:

- building infrastructure works;
- undertaking industrial works;
- releasing contaminating substances; or
- undertaking oil and gas and mining exploration or exploitation activities.⁽⁶⁾

All other activities that are intended to be performed in glacial and periglacial areas are subject to an environmental impact assessment.⁽⁷⁾ The law also provides for the realisation of an inventory of glaciers and periglacial areas,⁽⁸⁾ so that they can be protected, controlled and monitored.⁽⁹⁾

Shortly after the law was passed, a number of challenges to its constitutionality were filed by affected members of the mining industry in San Juan (for further information on this topic please see "[Impact of new Glaciers Law on the resources sector](#)"). San Juan Federal Court No 1 granted injunctions in all of these cases, which suspended the application of the law. The injunctions were based on the position that the law creates a state of uncertainty regarding the activities that may be carried out in potential glacial or periglacial areas, thus affecting the plaintiffs' constitutional rights to work and run a legal enterprise.

The cases eventually reached the Supreme Court. On July 3 2012 the court ordered the cancellation of the injunctions. The court found that by suspending the application of the law, the injunctions froze the mechanisms that had been designed to put an end to the state of uncertainty as to its scope of application (eg, the preparation of the referred inventory). Furthermore, the Supreme Court ruled that the plaintiffs had to undergo an environmental audit - only then would it be possible to know whether their activities were covered by the law.

As a result, the Glaciers Law is now back in force for the plaintiffs. This means that the Argentine provinces will continue to work, along with the Institute of Nivology, Glaciology and Environmental Sciences, on the preparation of the aforesaid inventory of glacial and periglacial areas.⁽¹⁰⁾ The inventory will not only enable each province and the national government to provide for better protection of the environment, but will also give resource companies more legal certainty as to whether their activities in each province are in compliance with the law.

Comment

Although these decisions have sparked some criticism, the Supreme Court has taken two significant steps towards a more clearly defined and secure legal framework.

For further information on this topic please contact [Federico Godoy](#) or [Phillip Smith](#) at [Beretta Godoy](#) by telephone (+54 11 4326 7386), fax (+54 11 4326 7396) or email (godoy@berettagodoy.com or smith@berettagodoy.com).

Endnotes

(1) Article 8 of Law 24,196.

(2) An *amparo* is an expeditive action for the protection of constitutional rights.

(3) More specifically, the National Mining Secretariat and the National Secretariat for Domestic Trade, through Resolutions 130/07 and 288/07, respectively.

(4) *Asociación Obrera Minera (AOMA) v Estado Nacional s/ acción declarativa de inconstitucionalidad*, CSJN,A 138 XLVII; *Barrick Exploraciones Argentina SA v Estado Nacional s/ acción declarativa de inconstitucionalidad*, CSJN,B 140 XLVII;and *Minera Argentina Gold SA s/ acción declarativa de inconstitucionalidad*, CSJN,M 185 XLVII.

(5) Law 26,639, published in the *Official Gazette* on October 28 2010.

(6) Glaciers Law, Article 6.

(7) Glaciers Law, § 7.

(8) This task has been assigned to the Institute of Nivology, Glaciology and Environmental Sciences. The inventory has not yet been completed.

(9) Law 26,639, Articles 3 to 5.

(10) So far, only the Province of La Rioja has claimed to have started working in the preparation of the inventory (see http://riojavirtual.com.ar/noticias/locales/la_rioja_ultima_detalles_para_la_confeccion_del_inventario_de_glaciares); while the Environment Commission of the Legislative Power of Neuquén has formally requested the Provincial Executive Branch to provide for the commencement of the inventory (see <http://www.miningpress.com/articulo.php?id=93576>).

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