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LAWS ON INDIGENOUS PEOPLES IN ARGENTINA

SEPTEMBER 2012

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I. EXECUTIVE SUMMARY

The "Convention concerning Indigenous and Tribal Peoples in Independent Countries" (ILO Convention No. 169, 1991, hereinafter "C169") was ratified by the Argentine Republic in 1992.[1]

As a federal republic, Argentina has three levels of government: Federal, Provincial and Municipal. Rights stated in C169 are recognized both in the Argentine Federal Constitution (Article 75, Section 17 - 1994) and in provincial laws and constitutions, including the right to consultation with respect to measures that may affect indigenous peoples, rights of ownership and possession over the lands which traditionally occupied by indigenous communities, and rights concerning natural resources.

While judicial precedents are scarce and this is a relatively new and undeveloped area of Argentine law, there are precedents at a federal and local level that acknowledge the pre-existing rights of indigenous communities to their land and natural resources.

A bill to integrally reform the Argentine Civil Code has been recently introduced to the Argentine Congress by the Federal Executive. This bill includes a section on the common property of land by indigenous communities and the need for a consultation process prior to conducting any project that may affect their land.

II. RELEVANT PROVISIONS OF THE ARGENTINE FEDERAL CONSTITUTION AND PROVINCIAL CONSTITUTIONS

Article 75.17 of the Argentine Federal Constitution provides that the Federal Congress must:

> Recognize the ethnic and cultural pre-existence of the Argentine indigenous peoples. To guarantee the respect of their identity and to a bilingual and intercultural education; to recognize the legal entity of their communities and the possession and common property of the land they traditionally occupy; and to regulate the conveyance of other lands apt and sufficient for human development; none of these lands will be able to be sold, transferred or subject to liens. To secure their participation in the management of their natural resources and other interests that may affect them. These attributes can be exercised concurrently by the provinces.

While this Article has been construed as "programmatic" (meaning, that the rights mentioned in it are subject to their implementation by Congress), the declaration of the pre-existence of indigenous people has been given effect in case law, as developed below.

The provinces of Buenos Aires, Chaco, Chubut, Entre Ríos, Formosa, Jujuy, La Pampa, Neuquén, Salta, Río Negro and Tucumán also have constitutional provisions recognizing rights to indigenous peoples aligned with the Federal Constitution. In addition, Chubut's Constitution guarantees the intellectual property and the economic benefits obtained from indigenous theoretical and practical knowledge, in case their traditions are used for profit. Neuquén's Constitution guarantees technical and economical assistance to native communities, in order to be trained in the rational use of their land.

III. RELEVANT LAWS

(a) Indigenous Policy Act

[1] Law No. 24,071

Law No. 23,302 on "Indigenous Policy and support to indigenous communities" ("Indigenous Policy Act") was issued in 1985, and its most relevant provisions are:

(i) Recognition of the legal entity of indigenous communities: It creates a Registry of Indigenous Communities. The only indigenous community registered in the Department of Los Andes, Salta, is the "El Desierto" Kolla Community, registered in 2002.[2]

(ii) Creation of the National Institute of Indigenous Affairs ("NIIA"). The NIIA is in charge of keeping the Registry of Indigenous Communities, elaborating on plans for the award and exploitation of lands, education and health, and proposing a budget to the Federal Congress to address indigenous affairs and advise on the support, promotion and development of indigenous communities. Its structure includes a "Coordination Council" formed by members of government and members of indigenous communities and an "Advisory Council" formed by members of government".

(iii) Land. The law provides for the award of land to registered communities, and the elaboration of the plan for their exploitation. This land cannot be sold, transferred or subject to liens. It can be subject to common property of the community or the individual property of families. Communities must settle in the land and personally work in them. While the Indigenous Policy Law does not include provisions on these points, the conveyance of land to communities has been made by expropriating privately-owned land or through the award of fiscal land.

(iv) Education, health, housing and social security planning.

The Indigenous Policy Act is not a federal law, but it is open to be adopted by Argentine provinces. The province of Salta has not adopted this law to date.

(b) Indigenous Land Emergency Law

In 2006 the Federal Congress issued Law No. 26,160, "Declaration of Emergency in the Matter of Possession and Ownership of Land Traditionally Occupied by Indigenous Communities" (the "Land Emergency Act").

As indicated by its title, the Land Emergency Act declared a state of emergency on the matter of possession and ownership of land traditionally occupied by indigenous communities. Section 1 of this law concerns the land occupied by registered indigenous communities (see point (a) above), and Regulatory Decree No. 1722/2007 extends the benefits of this law to unregistered communities.

The Land Emergency Act suspended all evictions of indigenous communities for a term of four years. This term was extended until November 23, 2013. It also ordered the NIIA to conduct a survey on the status of land occupied by indigenous communities.

(c) Implementation of consultation and participation mechanisms, and land survey

As interpreted by the NIIA, Section 6 of C169 is fulfilled by the creation of the Coordination Council set forth by the Indigenous Policy Act. While this Act was passed in 1985, the Coordination Council was only formed in 2008. In 2004, the NIIA also created an Indigenous Participation Council, which has the following functions:

[2] National Institute of Indigenous Affairs Resolution 115/2012, Exhibit I. The Kolla "El Desierto" community was registered as an indigenous community in 2002, pursuant to Resolution No. 66 of the Social Development Secretariat.

(i) Appoint the indigenous members of the Coordination Council.

(ii) Assist communities in devising development projects and the procedures to obtain the registration as legal entities;

(iii) Promote the participation of indigenous communities in the land survey set forth by the Land Emergency Act.

(iv) Make proposals concerning indigenous policy to the Coordination Council.

(v) Coordinate and liaise with their regional representative at the Coordination Council.

The Coordination Council envisaged by the Indigenous Policy Act was formed in 2008, more than 20 years after the enactment of the Act. The activities of the Coordination Council and the Participation Council, their agendas and documents are not accessible to the public. Equally, the survey set forth by the Land Emergency Law, according to the NIIA, continues to be in preparation and no information on this matter is available to the public.

At a national level there are no consultation or participation requirements other than the creation of the aforementioned councils. In particular, there are no laws or regulations implementing consultation mechanisms for specific activities or projects. Mechanisms of this kind are implemented in certain provinces, including Salta, but not in the Department of Los Andes, where the Taca Taca Project is located.

In the recent unedited report of the visit of UN's Special Rapporteur James Anaya to Argentina, it is stated that:

> There is a significant number of laws and national and provincial programs in indigenous matters. However, there are a number of problems in connection with the implementation of the rights and guaranties of indigenous peoples, especially in connection with their land and natural resources, access to justice, education, health and other basic services. In general, the Special Rapporteur observed the absence of an adequate policy to prioritize and address the creation and implementation of public policies to make effective the rights of indigenous peoples recognized in the national laws and international instruments entered into by Argentina.[3]

(d) Provincial laws

There are also a number of laws concerning indigenous peoples at a provincial level, both covering general issues related to the promotion of their welfare, as well as specific topics such as land allocation or the establishment of registries of native communities.

IV. COURT PRECEDENTS

(a) Federal Supreme Court

[3] UN document A/HRC/21/XX/Add.Y, *Informe del Relator Especial sobre los Derechos de los Pueblos Indígenas*, James Anaya, available at http://unsr.jamesanaya.org/docs/countries/2012_report_argentina_sp_auversion.pdf, last visited on July 14, 2012

In *Eben Ezer Indigenous Community vs. Province of Salta*,[4] the Argentine Supreme Court ruled, in September 2008, that indigenous peoples are entitled to pursue an *amparo*[5] claim for the protection of the lands traditionally occupied by them.

The facts of the case were the following: The law issued by the province of Salta had disaffected a natural reserve and authorized the provincial executive power to conduct a sale of the land. The Eben Ezer community filed an *amparo* against that decision before a first-instance court, which rejected the case because it involved the constitutionality of a provincial law, which meant that the Supreme Court of Salta had original jurisdiction in the matter. Subsequently, Salta's Supreme Court also rejected the case because it was filed after the 30-day term that Salta's procedural code provides for to challenge the application of unconstitutionality actions.

The Federal Supreme Court reasoned that the *amparo* is an action for the immediate protection of constitutional rights and, quoting the Inter-American Court of Human Rights, stated that:

> The culture of the members of indigenous communities correspond to a particular way of life, of being, seeing and acting in the world, based in the close relationship with their traditional territories and the resources that are located there, not only because they are their main means of subsistence, but also because they conform their conception of the world, their religion and therefore, their cultural identity. […] The guarantee of the common property right of indigenous peoples must take into account that the land is closely related with their oral traditions, customs, language, arts, rituals, knowledge and uses related to nature, culinary arts, consuetudinary law, dressing, philosophy and values.

The Federal Supreme Court did not issue a judgment on the merits but remanded the case to the Supreme Court of Salta to continue with the *amparo* procedings. Notwithstanding the absence of a decision on the merits, the materiality of this case resides in the recognition of a pre-existing right of common property of indigenous communities.

Later that year, the Federal Supreme Court decided another case against the province of Salta, also related to indigenous communities.[6] Here, a group of indigenous and local people filed a claim before the Federal Supreme Court, to stop Salta authorities' from cutting down certain native forests. Prior to the Court's judgment, the Federal Attorney General issued an opinion on the Court's jurisdiction on the case, where it concluded that it was not a federal matter and that the case should be heard by the courts of Salta.

On December 29, 2008, the Court ordered the province of Salta to suspend its activities in connection to the native forests, requested information in these actions, and called the parties of the case to a hearing. The notable aspect of this case is that it was clearly outside the formal jurisdiction of the Court, but it nonetheless heard it based on its institutional relevance.

(b) Provincial Courts

In September 2001, the Civil and Commercial Court of Appeals of the province of Jujuy ruled in favor of the adverse possession of a piece of fiscal land in favor of the indigenous community of Quera and Aguas Calientes. The province of Jujuy alleged that adverse possession can only be exercised by individuals, and not communities, and that, in any event, the 20-year term required to qualify for adverse possession had not lapsed since the date the community had been registered as a legal entity.

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[4] CSJN, 09.30.2008, Comunidad Indígena Eben Ezer vs. Provincia de Salta, Fallos 331:2119

[5] An *amparo* is a expeditive action for the protection of constitutional rights.

[6] CSJN, 12.29.2008, Salas Dino et al vs. Provincia de Salta s/ amparo, SC S.1144, L.XLIV

The Civil and Commercial Court of Appeals ruled that Article 75.17 of the Federal Constitution recognizes the ethnic and cultural pre-existence of indigenous peoples. It reasoned that the Constitution does not institute a new right, but recognizes pre-existing ones, including a guarantee on the common ownership of traditional lands.[7]

Similarly, in October 2007, the Magistrate Court of the Fourth District of the Province of Neuquén rejected the eviction of two members of a Mapuche community, based on the community's historical use of the land. In this case, the community did not live permanently in the land, but had traditionally used them for foraging, ceremonies, hunting and food gathering. The land had burial sites and caves with paintings made by the defendants' ancestors. Testimonies showed that over the years, the parents and grandparents of the defendants were forcibly evicted from the land and had their homes burnt by the landlords, but periodically returned to them. The Magistrate Court based its decision on the pre-existence of indigenous rights acknowledged by the Federal Constitution and C169, and in the Land Emergency Act.[8]

On the same line of reasoning, the Civil and Commercial Court of Appeals of Tucumán, in November 2011, ordered a landowner to destroy a fence he had recently placed on its property, because it impeded the passage of members of the Diaguita – Calchaquí community. As in the previous case, the decision was based on Article 75.17 of the Federal Constitution, C169 and the Land Emergency Act.[9]

V. BILL TO REFORM THE ARGENTINE CIVIL CODE

In 2011, a commission chaired by two members of the Federal Supreme Court and a former member of Mendoza's Supreme Court was created to reform and unify Argentina's Civil and Commercial Codes. The commission included more than 100 judges, practitioners and scholars and produced a bill that, with minor changes, was introduced by the Federal Executive into the Argentine Congress on March 27, 2012 (the "Civil Code Reform Bill").

The Civil Code Reform Bill includes a chapter on indigenous common property, which sets for the following relevant points:

(i) Indigenous common property is defined as a property right over rural land, aimed at the preservation of the cultural identity and land of indigenous communities.

(ii) The land is owned by registered communities, which are empowered to define their own community rules and organization, and the manner in which they appoint their representatives.

(iii) Indigenous common property can be created by the States' recognition of the traditional possession by the community, by adverse possession, by gifts or sales, or by testament. It must be registered in public land registries.

(iv) It is exclusive of other forms of property, perpetual, cannot be subject to adverse possession once it is granted to the community, and cannot be transferred, encumbered, or foreclosed.

(v) It vests the indigenous peoples with the right to use and enjoy it, and dispose the fruits derived from its use.

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[7] Cámara de Apelaciones en lo Civil y Comercial de Jujuy, 09.14.2001, Comunidad Aborigen de Quera y Aguas Calientes vs. Provincia de Jujuy, JA 2002-III:702

[8] Juzgado Correccional de la IV Circunscripción Judicial de la Provincia de Neuquén, 10.30.2007, Antiman Victor H. y Linares José C. s/ Usurpación, Expte No 4930/2006

[9] Cámara de Apelaciones en lo Civil y Comercial Común de Tucumán, Sala I, 11.10.2009, Comunidad Indígena Diaguita Calchaquí Potrero Rodeo Grande vs. Posadas Antonio P., Abeledo Perrot No. 70060979

In addition, the Civil Code Reform Bill provides that exploitation of natural resources by the State or by private entities that has an impact on indigenous land is subject to a prior information and consultation process with the relevant communities.

Currently, a Senate Commission must be formed to analyze the bill in a term not exceeding 90 days. While it is uncertain whether this term will be met and when will it be submitted to a vote by the Senate and, afterwards, the House of Representatives, there is a substantial likelihood of the Civil Code Reform Bill being approved in late 2012 or in 2013.

VI. CONCLUSIONS

While Argentina counts with a complete legal framework on the rights of indigenous peoples at a federal and local level, and national and provincial programs on indigenous matters, in practice these rules and programs are at an early stage of implementation. This was noted by U.N. Special Rapporteur James Anaya in his visit to Argentina in late 2011, who leveled severe criticism at the management of indigenous affairs in Argentina.[10]

While there are only a few court cases on the recognition of indigenous rights, they have set forth key principles recognized in C169 and Argentina's and Salta's constitutions, namely, the pre-existing rights of indigenous people to the common property of their ancestral lands. The implementation of indigenous policies, while partial and incomplete, has significantly advanced in the last decade and everything indicates that it will continue to be developed. This evolution is likely to be fostered by international organizations.

In addition, if the Civil Code Reform Bill is passed into law, common properties of indigenous land and consultation processes with indigenous communities will become mandatory in all the Argentine territory.

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If you have any question or comment regarding the foregoing, do not hesitate to contact us by calling at 54-11 4326-7386, via fax to 54-11 4326-7396 or via email addressed to sonoda@berettagodoy.com

[10] UN document A/HRC/21/47/Add.2. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, 4 July 2012