

Energy & Natural Resources - Argentina

Indigenous protection: implications of Civil Code reform for resources projects

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[Introduction](#)
[Civil Code Reform Bill](#)
[Implications](#)

Introduction

Argentina recently drafted changes to its national Civil Code to protect indigenous rights, requiring that indigenous communities be consulted before activities are conducted on their land. Consultation requirements already exist in some Argentine provinces. The changes have been introduced to Congress through the Civil Code Reform Bill and importantly include recognition of indigenous common property in rural land, which may impact natural resources companies.

Civil Code Reform Bill

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 the Civil Code Reform Bill which, with minor changes, was introduced into Congress on March 27 2012.

The Civil Code Reform Bill includes a title on indigenous common property that sets out the following points:

- 'Indigenous common property' is defined as a real estate right on rural land, aiming to preserve the cultural identity and land of indigenous communities.
- It is owned by registered communities, which are empowered to define their own community rules and organisation and the manner in which they appoint their representatives.
- Indigenous common property can be created by:
 - the states' recognition of the traditional possession by the community;
 - adverse possession;
 - gifts or sales; or
 - testament.
- Such property must be registered in public land registries.
- It is exclusive of other forms of property and perpetual.
- It cannot be:
 - subject to adverse possession once it is granted to the community; and
 - transferred, encumbered or foreclosed.
- It vests the indigenous community with the right to use and enjoy it and dispose the fruits derived from its use.

In addition, the bill sets forth 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.

While it is uncertain whether this term will be met or when it will be submitted to a vote by either the Senate or the House of Representatives, there is a substantial likelihood of the bill being approved in some form in early 2013.

Implications

If the changes are implemented, it will provide greater certainty for both resources companies and indigenous communities. This is arguably a latent issue within the

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mining industry in Argentina. International resources companies are aware of the need to pay attention to indigenous rights from their experiences of mining in countries such as Canada and Australia. Accordingly, many companies currently go beyond what is specifically required of them by Argentine law to protect indigenous rights. If these changes are implemented to the Civil Code, they would provide indigenous communities with greater involvement and consultation concerning the use of their traditional land, in line with international standards and practices.

The requirements to obtain the approval of the indigenous community would vary from case to case, but may often involve the provision of jobs and infrastructure (eg, roads and schools). Specific requirements for the process are not detailed under the bill. At present, in order to receive informal approval, companies survey the residents of the surrounding communities to determine if the project site is on traditional land of indigenous people. If so, a public consultation is held outlining the plans and seeking approval from the local community.

Irrespective of whether the changes envisaged in the Civil Code Reform Bill are enacted, indigenous rights will be an important focus for resources companies on both current and future projects.

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