

Draft Analysis of Amendments to Peruvian Law 27692

Introduction

The International Center for Not-for-Profit Law (ICNL) is an international organization that works globally to strengthen the legal framework for associations, foundations, and other nongovernmental organizations (NGOs). We have provided assistance on NGO law reform projects in over ninety countries in Europe, Latin America, Asia, the former Soviet Union, and elsewhere. We have provided assistance in countries as diverse as Mexico, Venezuela, Australia, Canada, and Russia. ICNL has been supported in its work by a variety of private and public funding sources, including the United States Agency for International Development (USAID), the United Nations, the European Union, Microsoft, Organization for Security and Cooperation in Europe, the World Bank, C.S. Mott Foundation, Open Society Institute, and others.

More specifically, ICNL's work in Latin America includes a five year NGO strengthening project with local partner FOPRIDEH in Honduras that focuses on reform of the legal environment to enable NGO delivery of development services. In addition, we are actively engaged in Mexico in an initiative to reform the tax laws and provide greater incentives for philanthropy. Assistance has been provided for legal and regulatory projects in El Salvador, Peru, Argentina, Colombia, and Guatemala. Most recently, ICNL worked with the USAID Mission in Venezuela to provide comments on a draft "Law of International Cooperation" that gives the Venezuelan government unprecedented authority to control the financing of associations, foundations, and others who work in the field of international cooperation.

ICNL also serves as the lead international NGO providing support to the G-8, local NGO sector, and donor community to address concerns under the recent Russian NGO law which contains features similar to that contained in the Peruvian draft. ICNL has also been called upon to address these issues in various international fora. In addition to testimony before the European Parliament and the US Senate, in September 2006 ICNL was invited to meet with 23 presidents and prime ministers attending the UN General Assembly to address foreign funding restrictions and other issues of NGO law.

Operating with generous financial support of USAID, ICNL is able to tap into a Global Rapid Response Fund to provide limited comments on legislation in response to requests from USAID missions and other local partners. ICNL welcomes this opportunity to work with the USAID Mission in Peru and national and international NGOs concerned about the recent passage of amendments to Peruvian Law 27692 ("the Law") which created the Peruvian Association of International Cooperation.

As a result of tremendous support from USAID/Peru, ICNL was able to receive and quickly review the recently passed amendments and detailed local legal opinions prepared in response to the amendments.¹ In our opinion, these legal opinions reflect an informed and thoughtful analysis of the constitutional implications of passage of the

¹ A copy of a 30-page legal opinion prepared by the Echecopar law offices was provided to ICNL on Wednesday, November 8, 2006.

amendments. Thus, to make the best use of limited available Global Rapid Response funds and add value to the ongoing analysis, ICNL focuses here on international and comparative law so as to complement other analyses. Please note that these are initial, draft comments prepared under significant time pressure. We nonetheless hope that this information proves helpful and stand ready to provide any additional assistance related to these observations.

Initial Comments

Right to Contract

Local experts have noted that the Peruvian constitution protects the right to contract for any lawful ends, provided that the ends do not contravene “public order.” Local experts argue that this includes the right to contract to receive foreign funding.

To complement this constitutional argument, one might refer to the *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. This Declaration, adopted by the UN General Assembly, recognizes the “important role of international cooperation” in eliminating violations of human rights and fundamental freedoms. It affirms that each state has the responsibility to protect human rights and fundamental freedoms by “adopting such steps as may be necessary to create all conditions necessary . . . as well as the legal guarantees required to ensure” that all persons are able to enjoy these rights and freedoms. (Art. 2) Among these rights are:

- The right “to form, join, and participate in non-governmental organizations, associations or groups;” and “to communicate with non-governmental or intergovernmental organizations” (Art. 5); and
- The right, either individually or in association with others, “to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms . . .” (Art. 13.)

The UN High Commissioner for Human Rights has explicitly recognized that Article 13 of the *Declaration’s* protections extend to the “receipt of funds from abroad.”² By regulating the flow of foreign funding to human rights defenders, the Law and its amendments seem inconsistent with the UN Declaration on Human Rights Defenders.

Freedom of Association

Local experts have done an excellent analysis of the freedom of association under the Peruvian constitution. The right to establish and operate an NGO to pursue common goals has also been recognized under international law.³ The only grounds on which the

² <http://www.ohchr.org/english/issues/defenders/declaration.htm>

³ See *Sidiropoulos v. Greece*, 4 Eur. Ct. H.R. 500 (1998). Because the language of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is virtually identical to that of Article 22 of the International Covenant on Civil and Political

right to freedom of association may be restricted are set out in Article 22 of the ICCPR. The ICCPR states in relevant part:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Rare are the restrictions that are deemed “necessary in a democratic society.” Moreover, the terms “national security,” “public safety,” “public order,” etc. have been interpreted strictly. As such, an organization should be permitted to form and pursue any lawful activity or objective⁴ and any restriction on the right to form an organization must be: (a) “convincing and compelling,”⁵ and (b) “proportionate to the legitimate aim pursued.”

Given that the few permissible limitations imposed on the right to associate are interpreted so narrowly, it is difficult to envision that the Peruvian government’s interest in “harmonizing” NGO activity with “national development policy and the public interest” could be equated with one of the accepted limitations or that it would meet the “necessary in a democratic society” standard. Additionally, the establishment of a mandatory registration requirement in order for an organization to be permitted to engage in activities funded by foreign entities has the potential to severely restrict the right of NGOs to associate freely.

Right to Privacy

Both the ICCPR and the American Convention contain provisions that protect the right to privacy.⁶ The European Court of Human Rights, interpreting similar provisions under the European Convention,⁷ has specifically held that the right to privacy extends to legal entities.⁸ Moreover, leading European scholars have argued that privacy objects:

can arise against obligations to supply government authorities with (possibly) confidential data, such as names and addresses of donors of the organization, or a list of members. Obviously, obligations of this nature may be, in a climate of political unrest, particularly detrimental to organizations with (unpopular) advocacy purposes.⁹

Rights (ICCPR) and Article 16 of the American Convention on Human Rights (American Convention), decisions under the European Convention are considered to have global significance.

⁴ Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association Source Book*, (Budapest 2003).

⁵ See *Sidiroupoulos v. Greece*, 4 Eur. Ct. H.R. 500 (1998) and *United Communist Part of Turkey and Others v. Turkey*, 4 Eur. Ct. H.R. 1 (1998).

⁶ American Convention, Article 11. ICCPR, Article 17

⁷ See footnote 3 regarding the global significance of ECHR decisions.

⁸ *Niemetz v. Germany*, Judgement of 16 December 1992, Series A, No. 251-B, 16 EHRR (1993), para. 31.

⁹ Erik Denters and Wino van Veen, “Voluntary Organizations in Europe: the European Convention on Human Rights,” 1 *IJNL* 2 (December 1998).

Depending on the interpretation and application of the Law and its amendments, issues may therefore arise under the right to privacy.

Freedom of Expression

The Constitution of Peru protects the “liberty of expression” without “prior authorization ... or other impediments.” Supplementing the local context, Peru has acceded to several international conventions that protect this fundamental human right.¹⁰ Article 19 of the ICCPR is particularly helpful as it recognizes that the freedom of expression applies “regardless of frontiers.”

To the extent that the APCI can constrain the activities of NGOs that it believes are not furthering “national development policy and the public interest” by cutting off their access to foreign funding, the amendments to Law 27692 restrict the ability of organizations to express themselves freely. Quite simply, organizations may be impeded in their ability to advocate or otherwise express themselves.

Sanctions

The amendments also raise a number of restrictions on the right to form, join, or participate in NGOs. Of particular concern is the ability of the APCI to sanction NGO directors, administrators, advisors, legal representatives, and agents of entities whose registration has been revoked by preventing their participation directly or indirectly in another entity undertaking international cooperation activities for a period of five years. Additionally, this harsh sanction does not absolve violators from possible criminal and civil liability for violations. Moreover, under principles of limited liability, it is generally not acceptable to impose strict liability upon officers, directors, etc. if an NGO fails to file reports or carry out other administrative acts. As a general rule, they should be personally liable only under extreme circumstances, and we’d be pleased to provide details in a separate memorandum. At bottom, this provision has the potential to quell the participation of individuals in NGO activities for fear of imposition of individual liability, and may violate the right of association.

Additional Issues

ICNL has reviewed available legal opinions prepared by local experts relating to the amendments to the Law. They also raise interesting issues relating to proportionality in state restrictions on rights; limits on state intervention in private activity; equality before the law; and due process in processes involving administrative sanctions. These are all fertile areas for research, and we would be pleased to provide comparative information on any of these issues with further time.

¹⁰ Specifically, the International Covenant on Civil and Political Rights, Article 19 (ICCPR) (date of adherence July 28, 1978), the American Declaration on the Rights and Duties of Man, Article IV (American Declaration) which has been signed by all Organization of American States (OAS) members and the American Convention on Human Rights, Article 13 (American Convention) (signed July 27, 1977).

Moreover, in other countries, laws can be found unconstitutional if they are so vague that they fail to provide adequate notice of what is legal or illegal. Sometimes this is cast as “void for vagueness” doctrine. In the European context, this is sometimes cast as the requirement that restrictions on the freedom of association be “prescribed by law.” We are not sure if an analogous doctrine exists in Peru, but this might be an issue worth exploring.

Trade Promotion Agreements

Background

In the US-Peru Trade Promotion Agreement (“TPA”),¹¹ the term “enterprise” is defined as:

any entity constituted or organized under applicable law, **whether or not for profit** ... including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.” (Art. 1.3) (emphasis added).

It is not surprising that the TPA extends coverage to “not-for-profit” entities, as NGOs are a significant economic force. According to a twenty-two country survey by Johns Hopkins University, the NGO sector constituted a \$1.1 trillion industry employing over nineteen million full-time equivalent paid workers.¹² In Peru alone, the NGO sector accounted for over \$1 billion in revenue.¹³

National Treatment Issues under the TPA

The TPA obligates Peru to provide US investors with treatment:

no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, and operation ... of investments in its territory. (Art.10.3)

The form of investment may include an “enterprise” (Article 10.28), a term which encompasses “not-for-profit” entities (Article 1.3).

To illustrate an issue that arises, consider a US organization operating in Peru seeks to co-found an NGO with a Peruvian partner in order to provide services to street children. Let’s further assume that the US organization commits capital to the enterprise, assuming substantial financial risk if the organization proves unsuccessful.

¹¹ The TPA is currently pending US Senate ratification. The full text is available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html

¹² Lester M. Salamon, Johns Hopkins Comparative Nonprofit Sector Project, *Global Civil Society: Dimensions of the Nonprofit Sector, Volume I* (2001). Indeed, in many countries, the not-for-profit sector is called the “social economy,” and there is even an International Association of Investors in the Social Economy See <http://www.inaise.org/>.

¹³ *Id.* at Appendix Table 3.

Under the terms of the TPA, this sort of investment would appear to be a covered investment. Moreover, the cumbersome regulatory requirements imposed on the enterprise and its US investor would not apply if the organization were funded solely from domestic sources. Accordingly, the law and its amendments impose treatment “less favorable” to the US investor, in apparent contradiction to the national treatment requirement of TPA Article 10.3.

Market Access Issues under the TPA

Chapter 11 addresses cross-border trade in services. This term includes services supplied, “in the territory of one Party by a person of that Party to a person of another Party.” Article 11.14. In other words, it seems to cover services provided in Peru by a Peruvian NGO to a US organization under a contract or grant agreement.

Article 11.1 makes clear that the TPA applies to measures adopted or maintained by a Party affecting cross-border trade, including “the purchase or use of, or payment for, a service.” More specifically, Article 11.15 states:

Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory.

An argument can be made that the cumbersome registration and vetting procedures in the amendments violate this provision, which requires Peru to permit transfers and payments for services “freely and without delay.”¹⁴

Other Bilateral Investment Treaties

Similarly, the amendments may prove incompatible with provisions contained in the recently negotiated Canada-Peru Foreign Investment Protection Agreement (FIPA), an agreement which is expected to be signed in the coming months.¹⁵ Peru has ratified at least 28 similar bilateral investment treaties, including with such countries as the United Kingdom, the Netherlands, Sweden, Denmark, Finland, France, Germany, Italy and Spain. These treaties typically guarantee protections similar to those of the US-Peru TPA and the Canada-Peru FIPA. Moreover, foreign organizations covered by these treaties can be defined broadly; for example, the Denmark’s investment treaty with Peru defines covered investors explicitly to include “development finance institutions” and “associations.”

¹⁴ These restrictions would also appear to be beyond the scope of permissible restrictions articulated in Article 11.10 because they are “discriminatory,” and Article 11.7 because they are more burdensome than “necessary to ensure the quality of the service.”

¹⁵ For more information on these negotiations see: <http://www.dfait-maeci.gc.ca/tna-nac/RB/peru-en.asp>.

In summary, it is troublesome that Peru is erecting these barriers at the same time that it is seeking ratification of a Trade Promotion Agreement to remove barriers to the flow of capital, goods and services with the United States

Conclusion and Possible Next Steps

ICNL would welcome the opportunity to develop in further detail the arguments presented in this summary. Thank you again for this opportunity, and we hope our initial, draft comments are helpful.