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# **Barriers and Opportunities Under the 1994 Argentine Constitutional Amendments for Both Environmental Protection and the Sustainability of the Socio-Economic System**

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In their dialogue, these attorneys identify the barriers and opportunities under the 1994 constitutional amendments for creating an integrated legal system that promotes both environmental protection and the sustainability of the socio-economic system. In this analysis, the following points are examined: the creation of new categories of environmental rights and duties; jurisdictional conflicts, not only between national, provincial and municipal governments, but also between the executive and the legislative branches of government; the new constitutional obligation to remediate environmental damage; the procedural remedies for environmental harm; and the creation of a system for environmental regulation at the national level.

1) Walsh and Sabsay explain that Article 41<sup>2</sup> contains many features that make it a unique constitutional amendment. The amendment guarantees Argentine citizens the right to a healthy and balanced environment. It charges both the national and provincial governments with the duty of pro-

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1. Fundación Ambiente y Recursos Naturales.

2. CONST. ARG., art. 41.

tecting this right. Article 41 also provides that the government is responsible for the preservation of natural resources and has an obligation to provide environmental information and education.

Unfortunately, the way this amendment was drafted makes it difficult to resolve the jurisdictional conflicts among levels and branches of government that exist under current environmental statutes. One response to this confusion is the recent establishment of the Federal Council on the Environment (COFEMA), formed under a compact between the national and provincial governments whose charge includes the resolution of these conflicts. Ironically, the existence and operation of COFEMA itself manifest the legal conflicts inherent in the Constitution; to date there is no indication that this new entity is going to be competent to resolve these issues.

2) The jurisdictional ambiguity of Article 41 may present the provinces an opportunity to create regional entities to coordinate their policies and programs with the national government at the regional level. This may be necessary to protect natural resource areas that are shared by two or more provinces and to accomplish other constitutional objectives such as the protection of biological diversity and the cultural heritage of the nation. A clear limitation on the powers of any regional confederation of this sort is that its recommendations, under law, have to be ratified by the individual provincial legislatures. How such entities can be used to resolve the tension between the power of the provinces and the authority of the National Congress over interstate commerce is far from clear.

3) The ambiguity of Article 41 is heightened by the provisions of Article 124,<sup>3</sup> which continue the previous constitutional delegation of authority over natural resources to the provinces. In the opinion of Sabsay and Walsh, Article 124 gives plenary authority over these matters to the provinces. Article 41 means that this plenary authority must be exercised within the context of threshold national standards for the protection of the environment, which the national govern-

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3. CONST. ARG., art. 124.

ment must establish. It may resolve the contradictions within Article 41 to see the National Congress as charged with establishing minimum standards for environmental protection while continuing provincial authority for natural resource planning and protection within this national scheme. This interpretation would give the national government the authority it needs to establish standards to honor its international obligations, to prohibit the entry of hazardous wastes into the country and to protect biological diversity and other matters of national interest. If there is evidence that the provinces are not acting competently to enforce these national standards and protect the national interest, there may be implied authority for the national government to exercise more direct authority in that event.

As a model of how this joint authority could be administered, Sabsay and Walsh point to the existing system of providing harmonious and uniform tax policies throughout the country. Under this system, tax policy is created through a two step process. First, it is adopted by the National Congress and then ratified by the provincial legislatures before it becomes effective.

4) Article 41 contains language that requires the complete remediation of environmental damage.<sup>4</sup> This seriously extends the current concept of remediation which does not require a return to the status quo ante, but only imposes liability for specific damages. Depending on how this constitutional mandate is carried into law, it could impose unprecedented costs on the private sector. Further, there are no existing judicial procedures, or civil or criminal penalties, being used in Argentina that are effective to enforce this degree of remediation of environmental damage.

5) Sabsay and Walsh believe that Article 41 is too specifically drawn insofar as it prohibits, as a matter of constitutional law, the transport of hazardous wastes into the country. They believe that this type of provision has no place

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4. CONST. ARG., art. 41.

in the Constitution and may violate the reciprocity clauses of various MERCOSUR<sup>5</sup> and other international agreements.

6) In summarizing, Sabsay and Walsh note that these constitutional ambiguities and conflicts place a tremendous premium on clarity and organization in the drafting of all legislation intended to discharge these newly articulated federal and provincial duties.

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5. *Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market* (signed Mar. 26, 1991), U.N. Doc. A/46/155 (1991), reprinted in 30 I.L.M. 1041 (1991).