

Critères distinctifs de l'indemnisation préalable à l'expropriation de biens fonciers en Argentine

La constitution nationale de l'Argentine reconnaît à la personne le droit de posséder une propriété privée. Cependant, ce droit est assujetti à certaines réglementations et l'État peut déposséder le propriétaire de façon forcée pour cause d'utilité publique. Cette procédure s'appelle l'expropriation.

Cet article présente une analyse comparée des lois en vigueur en Argentine pour l'établissement de l'indemnisation préalable pour les biens fonciers expropriés. En Argentine, la loi n° 21499 constitue le cadre juridique de l'expropriation pour l'ensemble du territoire national. Néanmoins, dans le cadre du système fédéral du pays, chaque province a le pouvoir de mener les procédures selon ses propres lois en matière d'expropriation. Cet article montre que des critères d'unification sont nécessaires afin de garantir une valeur équitable pour toutes les parties sur l'ensemble du territoire argentin pendant la procédure d'expropriation.

Criterios distintivos de la compensación previa por la expropiación de bienes raíces en la Argentina

La Constitución de la Argentina reconoce el derecho individual a la propiedad privada. No obstante, el derecho está sujeto a determinados reglamentos, y el Estado puede privar al poseedor de su propiedad con carácter forzoso a fin de lograr un objetivo de utilidad pública. Este proceso se conoce como expropiación.

En este artículo se presenta un análisis comparativo de las leyes en vigor en la Argentina con objeto de examinar la compensación previa por bienes raíces expropiados. La Ley 21499 constituye el marco jurídico para la expropiación en todo el territorio nacional. Sin embargo, en el contexto del sistema federal argentino, cada provincia tiene jurisdicción para llevar a cabo los procedimientos con arreglo a sus propias leyes sobre expropiación. En este artículo se destaca la necesidad de establecer criterios unificadores para garantizar un valor justo para todas las partes en la totalidad del país en el contexto de los procesos de expropiación.

Distinctive criteria for previous compensation to real property expropriation in Argentina

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The national constitution of Argentina recognizes a person's right to own private property. However, this is subject to certain regulations and the state can deprive the owner of property on a compulsory basis in order to achieve a public utility aim. This process is known as expropriation.

This article presents a comparative analysis of the laws in force in Argentina for determining previous compensation to real property expropriation. In Argentina, Act No. 21499 constitutes the legal framework for expropriation for the whole of the national territory. Nevertheless, within the country's federal system, each province has the jurisdiction to conduct proceedings according to its own expropriation laws. This article emphasizes that unifying criteria are needed in order to guarantee fair value for all parties throughout Argentina during the expropriation process.

INTRODUCTION

The national constitution of Argentina (the Constitution) recognizes the subjective right to private property subject to the regulations that determines its exercise. In order to achieve a public utility aim, the state can deprive the owner of real property on a compulsory basis, following specific procedures and paying fair previous monetary compensation. This process of public law is known as expropriation.

Under the Constitution, the federal system of government implies the coexistence of a national state with limited powers and provinces with broad powers, only defined and mostly exercised by the delegated powers (Sections 121 and 126 of the Constitution). As a result, expropriation legislation is under the jurisdiction of the provincial states as it has not been delegated from the provinces to the national state.

In general, in correspondence with the national constitution, the provincial constitutions affirm in their declarations of rights and guarantees that real property

is inviolable and that no inhabitant can be deprived of it except by virtue of judgment founded in accordance with the law and that expropriation for reasons of public utility must be qualified by law and previously compensated.

The Constitution attributes to the legislative power the liability for assessing the public utility through a formal act. The jurisdiction to assess the public utility corresponds to the National Legislative Congress and to the local legislatures, as a consequence of the federal system of government.

Compensation is an economic offset owed to the person whose property has been expropriated for the sacrifice imposed in the public interest. It includes the objective value of the real property and the damages that may be a direct consequence of the expropriation. The "objective value" is what the property is worth in the open market for this type of property and corresponds also to the location of the property and the time of its expropriation.

Personal circumstances, affective values and hypothetical profits are not taken into account in determining the compensation. In addition, damage to profits is not paid and, in real estate matters, the panoramic value or the value derived from historical facts is not considered either (unless that historical value is the reason for the expropriation). On the other hand, the value of the real property must be estimated without considering the increased value that the proposed building project could determine (and which is the cause of the declaration of public utility).

DETERMINATION OF PREVIOUS COMPENSATION

The amount of compensation paid for expropriations is determined by conciliation or trial.

Conciliation means that there has been agreement between the parties regarding the values estimated by the corresponding appraisal court or valuation jury in provincial state jurisdictions. On the other hand, when determined by trial, a judge sends a judicial file to the appraisal court or valuation jury within whose jurisdiction the expropriated property lies in order to obtain a report on its value and so be able to pronounce judgment.

Argentina also has a national appraisal court that establishes property values for properties whose acquisition, alienation or countable value could be required by national, binational or multinational organisms of which the national state is part or by provincial or municipal authorities. This court functions to assist itself or other bodies that supervise, control or audit the appraisals required by either a legal entity or a physical person.

In addition, some provinces (e.g. San Juan) also have their own appraisal courts. Instead of an appraisal court, others provinces have a valuation jury – generally made up of the authorities of the Cadastral Administration, Registry of Real Property and the Director of Revenue.

Act No. 21499 constitutes the legal framework for expropriation in the national territory. However, as noted above, in

territorial matters each province has its own jurisdiction concerning proceedings with regard to its own provincial laws on expropriation.

Where the state wishes to take possession of expropriated property, it must pay compensation in advance. However, the problem is that the amount of such compensation corresponds to the proceedings established by each jurisdiction. Argentina has 23 provinces or jurisdictions with the authority to establish their own proceedings.

Act No. 21499 establishes that a judge will grant possession once the expropriator has deposited the value corresponding to the appraisal determined out by the national appraisal court. However, some provincial laws establish that the amount to be deposited will consist of the fiscal valuation plus a percentage fixed by each jurisdiction, which fails to ensure that the compensation is fair.

Each province relies on its respective Tributary Code to relate the cadastral estimate to the tax base of the parcel, on the basis of which tax is paid annually. For most provinces, the fiscal estimate is synonymous with the cadastral estimate.

The cadastral estimate of a building is determined annually by the territorial cadastre, which uses basic zonal values that are ascertained in advance and updated periodically (usually annually). These values correspond to the land free of improvements and to the improvements. For urban and suburban zones, the basic value of the land free of improvements corresponds to the square metres by block. However, for rural and subrural areas, it corresponds to sectors of equal value per hectare. This approach privileges rapidity and efficiency for the cadastral organism at the expense of exactitude.

Thus, it is possible for the fiscal estimate to be lower than the objective value of the property and consequently for the compensation to be unfair. In the case of improvements for urban zones, value is added for construction work carried out. In rural and subrural areas, construction,

fencings, plantations and facilities are also considered.

In the cases considered in this article, the values are derived either from the determinations of an appraisal court or from the increased fiscal estimate in a pre-established percentage. In either case, the deposited amount represents a provisional value. The final value is determined through the expropriation procedure.

A comparative analysis of the laws in force in Argentina to establish compensation for expropriated real property indicates the particularities that appear between the different provinces. This analysis serves to underline the necessity of combining criteria throughout Argentina in order to ensure an integrally fair value for all parties.

MATERIALS AND METHODOLOGY

A descriptive design identified each of the proceedings established in the corresponding expropriation laws of the different Argentine provinces in order to determine the value that allows the state to take possession of real property in the public interest. Likewise, a comparative design allowed an analysis of such proceedings to distinguish the different considerations relating to previous compensation.

The cases can be classified into two groups. In both, the real property values are the result, on the one hand, of land free of improvements and, on the other hand, of the improvements to buildings, facilities and plantations as appropriate. The basic value of the land free of improvements for urban and suburban areas corresponds to the square metre (above). However, for rural and subrural areas, it corresponds to the hectare.

The two groups are:

- Group A: Cases where the state can acquire the real property with compensation established by mutual agreement. The compensation will be no higher than the fiscal valuation increased by a stated percentage by each jurisdiction. If the owner of the

expropriated land disagrees with the evaluation, he/she can accept that the value of the real property be determined by an appraisal jury (created in Catamarca by Decree 249/57). If the expropriated landowner withdraws from these two forms of conciliation, the difference is decided in summary proceedings in which the judge states the compensation according to the acts and judgments prepared by the appraisal jury. In this instance, the appraisal jury must include a representative of the landowner among its members.

- Group B: Cases where compensation arises from the value determined by technical agencies specialized in real property valuation. The depositing of the amount determined in this way does not exclude the possibility of a subsequent discussion during the expropriation trial.

Group A includes the procedures used in most Argentine provinces. For example, in the Province of Catamarca, Act No. 2210 establishes that the compensation in common agreement may exceed the increased fiscal estimate by no more than 30 percent. However, as indicated above, the fiscal value does not always represent the objective value of real property.

Figure 1 illustrates how compensation is established in different Argentine jurisdictions by mutual agreement.

Membership of the appraisal jury is made up of the Director of Revenue, the Cadastral Administration Director and the Director of the Registry of Real Property. These public officials are appointed to the appraisal jury by the provincial executive authorities for a set term – normally four years. The appraisal jury is assisted by two secretariats: the administrative and legal secretariat; and the technical secretariat.

Because the responsibility for determining the market value of the expropriated property lies with the technical secretariat, this will generally be headed by a professional from the Cadastral Administration (the agency that provides

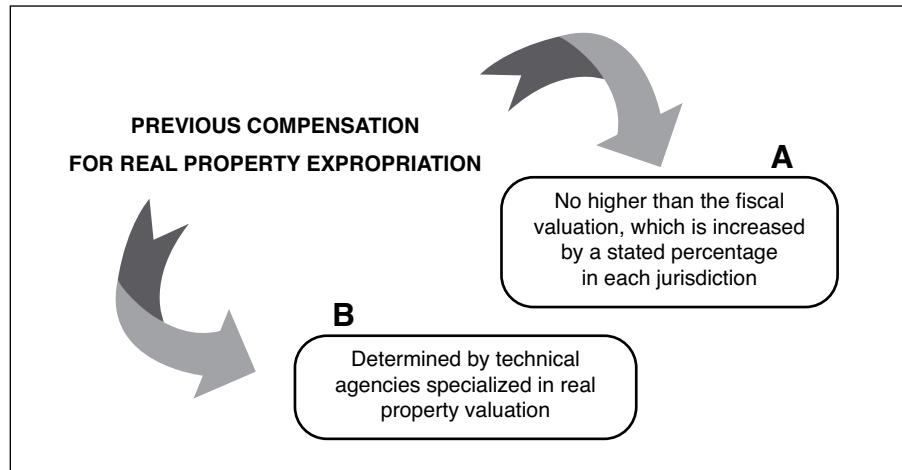


FIGURE 1
Mutual agreement compensation methods

the basic values of the real property for fiscal purposes). Thus, it is not surprising that the values determined by the jury are not that dissimilar to the fiscal valuations.

In practical terms, the expropriation process entails submitting a declaration of the public utility project, together with a survey map specifying the real property to be expropriated. Once the expropriation has been authorized, the State Prosecutor's Office commences the corresponding expropriation trial, enclosing the receipt of the fiscal valuation deposit increased by 30 percent.

Taking the expropriations carried out in the Province of Catamarca in the period 2005–06 as examples, an appraisal jury (which included the representative of the owner of the expropriated property) intervened – at the request of the judge – in all cases as mutually agreed compensation had not been achieved in any of the cases examined.

Group B corresponds to expropriations covered by Act No. 21499 and by the expropriation laws of the provinces that have an appraisal court (as in San Juan). Both cases imply the convening of appraisal courts, assisted by property valuation experts independent of the state agencies (such as the Cadastral Administration, which establishes the basic values of real property for fiscal purposes).

From conclusions issued by the National Appraisals Congresses, the creation of independent appraisal courts in all Argentine provinces has been recommended both for expropriation purposes and also

for appraisals concerning the purchase and sale of property by the state. However, the provincial legislatures have not introduced bills to enable the creation of such courts.

CONCLUSIONS

In terms of previous compensation for real property expropriation, the amount deposited by the state when bringing an expropriation trial represents a provisional value, with the final amount being determined through the expropriation process. This final amount can differ from the fiscal valuation and significantly exceed the value referred to in the legal provisions.

It must be underlined that the basic property values in the different provincial jurisdictions refer to land free of improvement and also to the improvements of buildings, facilities and plantations, as appropriate.

In provinces where there are no appraisal courts independent from the state agencies (such as the Cadastral Administration), compensation for expropriation is rarely determined by mutual agreement. The owner whose property has been expropriated withdraws from the forms of possible conciliation and has to look for a skilful valuer to perform the particular valuation to demand and conciliate the final price of the expropriated real property.

In general, the values determined by appraisal courts are closer to the objective value and, consequently, the discussions that may arise between the parties involved are concerned with smaller amounts.

The creation of appraisal courts as independent institutions with expert and stable members in each of the provinces will ensure equity and impartiality in determining fair compensation for real property expropriation as enshrined in the Argentine Constitution.

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