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Private investment first, national interest last

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Availing itself of emergency decrees enacted in late January, the administration of President Alan García, whose terms ends in July, attempted to hand over to the private sector 33 strategic infrastructure projects.

On Jan. 18, the executive signed emergency decree 001-2011 with special provisions to speed up awarding concessions for 30 projects related to the country's strategic infrastructure. Three days later, the executive published in the official gazette another emergency decree, 002-2011, which added three new projects.

With those decrees, the government declared that the Agencia de Promoción de la Inversión Privada (ProInversión) should, as a national necessity and matter for priority execution, promote private investment through processes linked to concession awards for 33 investment projects, including ports, airports, highways, gas pipelines, hydroelectric plants, and even broadband and fiber-optic networks throughout the country.

To facilitate private investment, the decrees exempt those investment projects from the prerequisite of conducting environmental-impact studies to receive sector-specific administrative authorizations needed for economic activities in those sectors.

The measure caused an immediate and massive negative reaction among the public, regional governments, civil-society groups, opposition lawmakers, presidential candidates, environmentalists, members of the Catholic Church, and other national institutions such as the Defensoría del Pueblo.

Although the social pressure prompted the Cabinet on Feb. 16 to annul the clause that allowed the environmental-impact studies for those projects to be bypassed, the regional presidents and civil-society sectors that oppose the decrees are demanding that they be declared unconstitutional and repealed in their entirety.

Unconstitutional regulations

In a Feb. 12 statement, the Defensoría del Pueblo said that both emergency decrees are unconstitutional.

"The formal analysis of the emergency decrees allows us to point out that these do not justify their exceptionality and necessity and thus require the repeated jurisprudence of the Tribunal Constitucional. In other words, the aforementioned decrees do not precisely indicate the considerations of extraordinary and urgent necessity that justify their issuance. Neither do they indicate what irreparable harm would result if these regulations were not issued," read point seven of the Defensoría del Pueblo statement.

The Instituto de Defensa Legal (IDL) says that these mechanisms are not compliant with Article 119, Clause 19, of the Constitution, which establishes that such decrees can only be used for legislating
economic and financial matters and in exceptional, unexpected situations, in emergencies, and in circumstances of national interest.

The decrees, says IDL, do not meet those requirements, since they are administrative, not economic or financial, and they were not issued in an exceptional or extraordinary situation, and much less under unforeseeable circumstances.

The regional presidents of Moquegua, Lima, Junín, and Amazonas, among others, say President García's regulations must be repealed as they are unconstitutional, given that "they do not address any national emergency but the particular interest of some transnational businesses."

"The scope of these decrees involves US$15 billion in state properties and lands that will be undervalued for their delivery to transnational investors," Manuel Dammert, an expert on energy issues and congressional candidate for Gana Perú, the party on whose slate Ollanta Humala is running for president in the April 10 elections, told the daily .

The decrees essentially undervalue public assets and goods when the title to land and/or buildings is transferred from the state at no charge, including either direct or indirect property belonging to state enterprises.

In an analysis of these regulations, said that the decrees attempt to accelerate installation of control by the Chilean port and shipping monopoly over the strategic infrastructure of intermodal transport. In addition, they attempt to put Repsol in a dominant position in the national oil and gas industry.

"To license and sign contracts, breaking and jumping over any type of procedures, is a bad sign that demonstrates hidden interests," Deputy Washington Zeballos, president of the Comisión de Pueblos Andinos y Ecología, told .

Thirteen regional-government presidents met Feb. 14 with members of the executive (Ministerios de Justicia, Producción, and Ambiente), the Defensoría del Pueblo, and business leaders [the Confederación Nacional de Instituciones Empresariales Privadas (CONFIEP) and the Cámara Peruana de la Construcción (CAPECO)]. Some regional authorities called for the immediate repeal of the decrees and others requested changes, for which they made suggestions.

"I am not obsessed [with the decrees], but, yes, it would be a shame if there were much delay in initiating the works or the red tape that sometimes takes two or three years, and that cannot bring more jobs. But if the country does not adequately understand it, I have no problem [in partially rescinding the decrees]. I am not more Catholic than the Pope; I promote the development of the country, but if someone finds this suspicious, the decree will be adjusted, and that's that," President García told the press.

Modification to environmental-impact provision

Minister of Production Jorge Villasante said on Feb. 16 that some regional presidents believe—in his opinion, based on distorted information—that the environmental-impact studies have been eliminated and that they are no longer required for executing the 33 infrastructure projects. "If that were a concern of the regional governments, the executive decided, in a gesture of openness and an attitude of dialogue, to annul that specific part of the particular emergency decree," he said.
Minister of Justice Rosario Fernández said that the partial derogation complements two mechanisms that the Ministerio de Economía y Finanzas will submit in 10 to 15 days to speed up delivery of the projects, including expediting the red tape.

Dammert said that the businesses "will not be fooled nor will they fall for the government's game, since they would be subjecting their investments to unconstitutional regulations."

"García is ripping off the investors. These decrees are so unconstitutional that could easily fail, and then they will be unable to recover their investment and at best they will receive compensation from the next administration. While the Constitution guarantees agreements with contract-law status, investors who decide to accept the concession of any of the projects for the next 40 years might have problems with the next administration," Dammert told.

"What García wants is to leave interests set up for his return in 2016. In particular, he wants to secure his support with two groups: the Chilean shipping and port company led by Neptunia and the Repsol group that exports gas—his favorites. These decrees are to consolidate those groups. From now to July it will not be possible to conduct works, he only wants to deliver everything with contract-law status, and state money, to leave presents for his buddies," he said.

The congressional Departamento de Investigación y Documentación said that, in 2006-2011 (García's term in office), only 365 of the 4,649 bills introduced in the legislature by lawmakers have become law. In that same time period, 410 of the 758 bills sent by the executive have become law.

Besides the emergency decrees, the García administration, making use of the delegation of powers, signed 136 legislative decrees, among them number 1097, which attempted to grant amnesty to police and military who committed human rights violations between 1980 and 2003 and which was finally rescinded in September 2010.

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