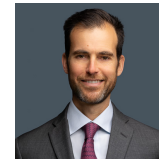


LALIVE

Proposed text for new Chilean constitution provides for nationalisations in the mining industry and taking down Chile's network of international investment treaties



Jaime Gallego

Partner
Geneva



Christophe Guibert de

Bruet
Counsel
Geneva

Chile's constitutional reforms could have far-reaching implications for the mining industry; investors in the country should be prepared for a seismic shift in operations and rights of redress.

The proposed text

Chile's 2021 constitutional convention is in charge of drafting Chile's new constitution and the mining industry is firmly in its sights. One measure gaining traction is a proposal for widespread nationalisation of mining companies exploring or exploiting Chile's abundant mineral and hydrocarbon resources – with minimal compensation.

- On 1 February 2022, the Environmental Commission preliminarily approved the proposal for the inclusion of rules requiring the State to cancel concessions and nationalise all the assets of all companies exploring or exploiting “strategic assets” – which would include copper, lithium, and hydrocarbons generally – within one year of the adoption of the new constitution. The Environmental Commission is now to discuss any proposed amendments to the rules and will vote again on the individual rules later this month.
- The current text states that there would be no compensation for the cancellation of rights over minerals and hydrocarbons. The only compensation due would be for the book value as of 31 December 2021 of the other assets taken, although there would be a deduction for “[a]ll or part of the excessive income obtained by the nationalised companies may be deducted from the amount of the compensation.” The rules do not specify how the Comptroller General would deem past income to be “excessive”.
- Payment would be made in a period to be determined through decree – which could be up to 30 years.

The proposed rules will then be voted on by the full Constitutional Assembly and the possibly further discussed and adapted before being submitted, together with the final text of the new constitution, for ratification in a referendum expected to take place at the end of this year. Should the proposed rules clear all these hurdles, it would lead to the Chilean State nationalising some of the largest lithium and copper mining projects in the world.

Adoption of these rules by the full Constitutional Assembly as currently drafted is difficult to predict, but the proposals are radical and go much further than President Boric's pre-election campaign, where he proposed a mining royalty reform that would institute a progressive rate based on global prices. The proposed reform would severely damage the competitiveness of Chile's mining industry, imposing one of the heaviest tax burdens in the world.

What does it mean for investors?

- Industry players with investments that are properly structured would be able to benefit from treaty-based international law protections.
- The measures envisaged by the proposed rules would be inconsistent with the obligations Chile has typically entered into under various investment treaties and international investment agreements.
- These treaties and agreements typically require that any nationalisation be conducted through the payment of prompt, adequate and effective compensation, which will ordinarily translate into an assessment by the arbitral tribunal determining the dispute of the fair market value of the nationalised property just prior to the nationalisation.

Further proposals

A second initiative relating to investment treaties was also debated on 1 February 2022, resulting in the approval of far-reaching proposals by the same commission.

- Within three years from the promulgation of the new constitution, the State will propose amending or denouncing any international treaties to which Chile is a party and which are contrary to the constitution.
- The initiative also proposes disallowing any form of dispute resolution between investors and Chile other than through Chile's court system (including arbitration) whether this be contained in a treaty or in any other instrument.
- Chile would denounce the ICSID Convention after the promulgation of the constitution, as well as any investment treaties "where their expiry date has been attained". Treaties with Chile often have an initial period – say 10 years – after which they may be denounced at any time with a notice period. However, many treaties have what is known as a "sunset clause" (e.g., the investment treaty with Switzerland), which states that its investor protection provisions continue to apply for 20 years after the treaty has been denounced, provided that the investments were made before official notice of denouncement was given (article 12).

This second constitutional initiative will go through the same process as the first and will also be closely watched internationally.