

Land rights in Chile – impact of proposed constitutional changes on foreign investors

by Jaime Gallego and Christophe Guibert de Bruet

Indigenous peoples in Chile will gain significant new rights and protections over land, resources and territories under the proposed new constitution, raising major implications for existing and future foreign investors in the country.

On 4 July 2022, the Chilean Constitutional Convention (*Convención Constitucional*) finalised the draft of a new constitution for Chile, whose adoption will be determined by plebiscite on 4 September 2022. If agreed, it will establish comprehensive environmental and social rights.

The new constitution would grant significant rights and autonomy to indigenous peoples.

- Article 34 states that “Indigenous peoples and nations and their members [...] have the right to autonomy; to self-government; [...] to the recognition and protection of their lands, territories and resources; [...] to the recognition of their own or traditional institutions, jurisdictions and authorities...”.¹
- Article 79 recognises and guarantees the right of indigenous peoples and nations to their lands, territories and resources. The ownership of indigenous lands enjoys special protection, for which the State will establish effective legal instruments for, among other things, its demarcation, and restitution, with this restitution constituting a

¹ Proposed Constitution of the Republic of Chile, Article 34 (“Los pueblos y naciones indígenas y sus integrantes, en virtud de su libre determinación, tienen derecho al pleno ejercicio de sus derechos colectivos e individuales. En especial, tienen derecho a la autonomía; al autogobierno; a su propia cultura; a la identidad y cosmovisión; al patrimonio; a la lengua; al reconocimiento y protección de sus tierras, territorios y recursos, en su dimensión material e inmaterial y al especial vínculo que mantienen con estos; a la cooperación e integración; al reconocimiento de sus instituciones, jurisdicciones y autoridades, propias o tradicionales; y a participar plenamente, si así lo desean, en la vida política, económica, social y cultural del Estado.”) available at <https://www.chileconvencion.cl/wp-content/uploads/2022/07/Texto-Definitivo-CPR-2022-Tapas.pdf>.

preferential mechanism of reparation, of public utility and general interest.²

- Article 191(2) states that “[t]he indigenous peoples and nations must be consulted and shall grant free, prior and informed consent in those matters or matters that affect their rights recognized in this Constitution.”³

This could have significant consequences for various industries in Chile in which there is major foreign investment (e.g. the mining industry), as well as concessionaires in infrastructure and utilities. We discuss below how foreign investors in these industries may have recourse to protections under international investment agreements.

Potential breaches of Chile’s international obligations regarding land rights

It is still uncertain how the proposed constitution would apply in practice, but – depending on how these provisions are enforced – Chile may find itself in breach of various international investment agreements by failing to meet its obligation to protect foreign investments.

²Proposed Constitution of the Republic of Chile, Article 79 (“1. El Estado reconoce y garantiza, conforme con la Constitución, el derecho de los pueblos y naciones indígenas a sus tierras, territorios y recursos.

2. La propiedad de las tierras indígenas goza de especial protección. El Estado establecerá instrumentos jurídicos eficaces para su catastro, regularización, demarcación, titulación, reparación y restitución.

3. La restitución constituye un mecanismo preferente de reparación, de utilidad pública e interés general.

4. Conforme con la Constitución y la ley, los pueblos y naciones indígenas tienen derecho a utilizar los recursos que tradicionalmente han usado u ocupado, que se encuentran en sus territorios y sean indispensables para su existencia colectiva.”).

³ Proposed Constitution of the Republic of Chile, Article 191(2) (“Los pueblos y naciones indígenas deberán ser consultados y otorgarán el consentimiento libre, previo e informado en aquellas materias o asuntos que les afecten en sus derechos reconocidos en esta Constitución.”).

Potential issues could arise during the implementation of the provisions granting rights and autonomy to indigenous peoples.

- The proposed constitution does not precisely define the land belonging to indigenous peoples, but, rather, provides that the State will “establish effective legal instruments for its cadastre, regularization, demarcation, titling, repair and restitution.”⁴
- The mechanism for restitution of indigenous land is deemed “preferential” and “of public utility and general interest”.⁵ The reference to public utility is significant as expropriation can only occur “by virtue of a law that authorizes expropriation for reasons of public utility or general interest.”⁶ Therefore, depending on how the mechanism for restitution of indigenous land is implemented, and depending further on how the demarcation of this land is carried out, the State could find itself under an obligation to expropriate surface rights from foreign investors whose property falls within the boundaries of the newly-defined indigenous land.

Should expropriation occur, there is also uncertainty regarding the compensation to be paid. Under the proposed constitution, the owner “has the right to be compensated for the fair price of the expropriated property.”⁷ However, the proposed constitution does not specify the criteria for determining a “fair price”. This provision arguably provides a greater discretion than the current constitution, which provides for the right to be indemnified for the “damage effectively caused”.⁸

Any shortfall between “fair price” and the fair market value could lead to international claims being brought against Chile. Like many other States, Chile has entered into numerous international investment agreements, in

⁴ Proposed Constitution of the Republic of Chile, Article 79(2).

⁵ Proposed Constitution of the Republic of Chile, Article 79(3).

⁶ Proposed Constitution of the Republic of Chile, Article 78(3) (“Ninguna persona puede ser privada de su propiedad, sino en virtud de una ley que autorice la expropiación por causa de utilidad pública o interés general declarado por el legislador.”).

⁷ Proposed Constitution of the Republic of Chile, Article 78(4) (“La propietaria o el propietario siempre tiene derecho a que se le indemnice por el justo precio del bien expropiado.”).

⁸ Chile's Constitution of 1980 (as amended through 2021), Article 19.24, available at https://www.constituteproject.org/constitution/Chile_2021?lang=es.

which it has committed to protect foreign investments and has agreed to arbitration for disputes arising from alleged breaches of its commitments.⁹ While international investment agreements usually permit the expropriation of a foreign investor's property, such expropriation must be for a public purpose, cannot be arbitrary or discriminatory, and must be against prompt, adequate and effective compensation.¹⁰

The protections afforded to indigenous peoples under Article 34 are extremely broad and include, not only the protection of their land and territories but also “their resources in the material and immaterial dimension” among other things. Anything that affects such rights is subject to “prior and informed consent” as per Article 191(2). Should that consent be withheld in a case where a project affecting such rights already exists, the project may be severely affected as a consequence. The State may then be under an international obligation to compensate the foreign project owners.

Outlook

- If the new constitution is adopted, the State needs to balance the rights recognised by the new constitution with its obligation to protect foreign investments.
- Until the boundaries of indigenous lands are defined, foreign investors may be hesitant to further invest, due to lack of certainty.
- Foreign investors could be considered “on notice” that their future investments could be affected by these new indigenous rights, which (depending on circumstances) may curtail their right to compensation under the applicable international investment agreement.

⁹ According to the United Nations Conference on Trade and Development, Chile has signed at least 55 international investment agreements, of which 42 have entered into force. See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/41/chile>.

¹⁰ See e.g. Agreement between the Swiss Confederation and the Republic of Chile on the Promotion and Reciprocal Protection of Investments, Article <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4810/download>.

For further questions or comments about this topic, please contact the authors:



Jaime Gallego
Partner
jgallego@lalive.law



Christophe Guibert de Bruet
Counsel
cguibert@lalive.law