MINERAL RIGHTS OWNERS AND RENEWABLE ENERGIES IN CHILE: AN UNSETTLED CONFLICT

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Abstract
The article argues that the current structure of the mining concessions granted by the State of Chile is affecting the development of renewable energy projects. Then, it explains how this conflict could be settled using the accommodation doctrine developed in Texas. It is also discussed how the accommodation doctrine might be adapted for the Chilean legal system, and how this solution would help to mitigate the factors that are stopping or delaying or adding costs to renewable energies projects.

Key words: *mineral rights; renewable energies; accomodation doctrine; Texas, Chile.*

I. INTRODUCTION

In Chile, renewable energies developers are facing problems to develop projects because of conflicts with mining rights owners in the same area in which they are planning to develop a project. The current regulatory framework of mining concessions has generated these problems because it allows mining concessionaires to stop the works over the surface or impose easements based on the rights granted to mining concessionaires, affecting the development of the projects. This use of mining concessions has been known as *nuisance value*.[1] There are some attempts to modify the system of mining concessions, but up to this date they have not succeed.[2]

In the article, I will argue that the current structure of the mining concessions granted by the State of Chile is affecting the development of renewable energy projects and then explain how this conflict could be settled using the accommodation doctrine developed in Texas. I will also discuss how the accommodation doctrine might be adapted for the Chilean legal system. To do so, I would like to describe the current regulatory framework of mining concessions in Chile. Then, I will explain how such regulatory framework is being used to stop the projects or to increase the

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1 Novoa y Bambach (2017), p. 51.

2 El Mercurio S.A.P, *Gobierno estudia cambiar mecanismo de concesiones mineras por concentración y especulación de pertenencias* <http://diario.elmercurio.com/2014/06/09/economia_y_negocios/_portada/noticias/6566EF72-2DBB-4B69-BF17-77A651A7BD32.htm?id={6566EF72-2DBB-4B69-BF17-77A651A7BD32}>.

costs of renewable energies projects. Later, I will analyse how the conflict between landowners and mining rights owner has been treated in other jurisdictions in order to propose an alternative solution. In particular, I will analyse the solutions provided by the accommodation doctrine developed in Texas. Subsequently, I will discuss how Chile could adopt the accommodation doctrine to its legal system and show how this solution would help to mitigate the factors that are stopping or delaying or adding costs to renewable energies projects.

II. CURRENT REGULATORY FRAMEWORK OF MINING CONCESSIONS IN CHILE

2.1 Regulatory Framework

The regulatory framework for the mining industry in Chile is mainly contained and developed in three different Acts.[3] Those Acts are the *Chilean Constitution*, the *Organic Mining Act*, and the *Mining Code*.[4] The regulation under various Acts and the inclusion of part of the mining regulation in the Constitution respond to historical and political situations.[5]

This framework contains the core elements of a self-contained system that we can name as Chilean mining law.[6] The whole system is designed for protecting the mining exploration and exploitation.[7] In the following description, I will describe only the main aspects of the mining industry regulatory framework and focus only on those features that are relevant for the scope of this article.

2.1.1 Constitution

Article 19 number 24 of the Chilean Constitution establishes that the State is the absolute, exclusive, inalienable, owner of mines without statutory limitations.[8] However, the exploration and exploitation of certain minerals can be granted through mining concessions.[9] In this regard, although the State is the owner of all the mines, the exploration and exploitation are granted in concession to private parties that can access to the minerals by obtaining a concession granted by an ordinary court of justice, without the participation of a special administrative body responsible for granting mining concessions.

3 Vergara Blanco (2014), p. 633. All translations to English are mine.

4 Vergara Blanco (2014), p. 633.

5 Vergara Blanco (2003), p. 23.

6 Vergara Blanco (2014), p. 634.

7 For further reference on the constitutional discussion, please see, among others: Zuñiga Urbina (2005).

8 See Constitución de La República de Chile [Constitution Act of the Chilean Republic] (Chile) article 19 number 24.

9 Constitución de La República de Chile [Constitution Act of the Chilean Republic] (Chile) article 19 number 24.

The Chilean Constitution also states that the State is the owner of the all the mines having a different statute to the ownership rights over the surface.[10] This means that over the same area coexist two distinct property rights: one over the surface and another over the mines.[11] The effect of the coexistence of different rights is that there are different interests that in some cases can generate conflicts.[12]

To settle the eventual conflicts that may arise due to the coexistence of rights, the Constitution states that the surface is subject to the limitations and burdens that the law declares in order to facilitate the exploration and exploitation.[13]

To summarise, the Chilean Constitution establishes a system of 'split estates', which means that different parties can own the surface and the mineral estate.[14] Also, Chilean Constitution establishes a dominance of the mineral property, meaning that surface owner is forced to allow the access to the mineral estate title-holder, without prejudice the rights or indemnities that may arise for the former.[15]

2.1.2 Organic Mining Act

Organic laws are a contentious type of law in the Chilean system.[16] Political and historical reasons led Chile to adopt a system in which some laws require a greater quorum to be approved. That is the case of the 'Organic Laws.' Even though organic acts have the same place in the hierarchy as general laws in the Chilean legal system, they require a greater quorum than the latter. The Chilean Constitution indicates the matters subject to organic laws procedures. The incumbent government decided to establish some aspects of the mining industry as a matter of the organic act.[17]

In general terms, the Organic Mining Act regulates the minerals that can be granted by concessions, the types of grants and their features, the rights of mining concessionaires, and the obligations assumed under the concessions by the title holders.[18] The Mining Code also regulates most of these matters. The difference between the Organic Mining Act and the Mining Code regarding their content is that the former establishes a general framework while Mining Code contains more detailed regulation than the previous.

10 Constitución de La República de Chile [Constitution Act of the Chilean Republic] (Chile) article 19 number 24.

11 Ossa Bulnes (1999), p. 35.

12 Ossa Bulnes (1999), p. 35.

13 See Constitución de La República de Chile [Constitution Act of the Chilean Republic], article 19 number 24.

14 Jones, Welborn & Russell (2013), p. 181.

15 Jones, Welborn & Russell (2013), p. 184.

16 See Vergara Blanco (2003).

17 Vergara Blanco (2003), p. 27.

18 See Ley Orgánica Constitucional Sobre Concesiones Mineras [Organic Mining Law] (Chile).

At this point, it is relevant to highlight the existence of some regulation of mining concessions that cannot be modified by the rule of the majority. On the contrary, it needs greater quorums than general laws. The above makes that any amendment of the content of this law needs at least the votes of 58 per cent of each of the Chambers of the Congress.[19] This issue is also discussed further in this article.

2.1.3 Mining Code and its Regulation

The Mining Code contains most of the regulation of mining concessions.[20] In turn. the Mining Regulation specifies the content of the Mining Code. I will describe the relevant features based on the purpose of this article, that is to say, the types of grants, the main characteristics of each of the types of concessions and some procedural components.

A. Types of mining concessions

In Chile, there are two kinds of mining concessions: exploration concessions and exploitation concessions.[21] Each of them grants different types of rights regarding the phases of a mining project. The exploration concession grants rights to study and search the existence of minerals in a certain area. On the other hand, the exploitation concession grants right to obtain and commercialise the minerals found in a certain area.[22] It is not necessary to obtain an exploration concession prior to obtaining an exploitation concession. Although the Mining Code establishes a preference to exploit the area to a holder of an existing exploration concession when applies to an exploitation concession. In other words, these titles are not granted on a sequential basis.[23] An ordinary court of justice grants both types and both types of concession must pay a licence to keep the title.[24]

Both exploration and exploitation concessions can be revoked or lapsed for limited reasons. In general terms, there must be a cause of invalidity, such as minimum technical requirements, or if the titleholder did not paid the annual license.[25] The language of the Mining Code to refer to invalidity causes is expressly limited, stating that 'only' the reasons established therein can be used to invalidate a mining title.[26]

19 Constitución de La República de Chile [Constitution Act of the Chilean Republic], article 66.

20 Lira Ovalle (1998), p. 49.

21 See generally Mining Code [Código de Minería].

22 Vergara Blanco (1988), p. 250.

23 See generally Mining Code [Código de Minería].

24 Mining Code [Código de Minería].

25 Ossa Bulnes (1999), p. 37.

26 See generally Mining Code [Código de Minería].

B. Key features of each of the types of mining concessions[27]

i. Exploration concessions

Exploration concessions grant rights to search for minerals within a determined area. It is forbidden for the holder of an exploration permit to exploit the area of the concession. To do that, the concessionaire of an exploration concession will require an exploitation concession.[28]

Also, exploration concessions last two years and can be prolonged for two additional years if the area of the concession is reduced at least to a 50 per cent of the former area.[29] After that period, the holder of the title can choose between applying for an exploitation concession or leaving the area free of concessions.

ii. Exploitation concessions

Exploitation concessions grant to their holder the exclusive right to exploit the area within the boundaries of the concession. To do so, *Mining Code* establishes several rights to access the surface and burdens to the surface owner to allow the holder of a concession to exploit the area.[30]

Mining concessions are unlimited in their duration. The principal obligation of the holder is to pay an annual license to keep the title. According to the *Chilean Constitution*, a holder of a mining concession is forced to explore or exploit his concession.[31] However, there is no statute or regulation that forces the holder of a mining concession to explore or exploit effectively its concession.[32] So the constitutional rule has no practical effect.[33] The lack of enforcement regulation, as will be discussed below, causes one of the main problems that are facing the developers of renewable energy projects.

2.2 Mineral estate dominance and relevant rights that mining concessions grant to their holders

According to the system described, Chilean mining law establishes a system of mineral estate dominance, which means that the conflict between the interests of the landowner and the holder of a mining right is settled *ex ante* in favour of the mining titleholder.[34] In practice, it results in granting access to the mining concessionaire to

27 To review a detailed explanation of the constitution process, see Insunza Corvalán (2015), p. 43.

28 Mining Code [Código de Minería], article 95.

29 Mining Code [Código de Minería], article 112.

30 Mining Code [Código de Minería], article 120.

31 Constitución de La República de Chile [Constitution Act of the Chilean Republic].

32 Vergara Blanco (1989), p. 57.

33 Vergara Blanco (1989), p. 58.

34 Jones, Welborn & Russell (2013).

his property.[35] Several laws reveal the hierarchy of the mineral right over the surface right. In this section, I will describe two of the most important consequences of the mineral estate dominance in Chile, which are the right to impose easements over the surface, and the action of the mining titleholder to inhibit the development of construction projects over the surface.

2.2.1 Impose easements

The Mining Code allows a mining concessionaire to impose easements over the surface (not necessarily the same area of the concession) to facilitate the exploration and exploitation of the site granted in concession.[36] The idea of this easement is to protect the right of the mining titleholder to explore or exploit the granted area.[37] Prior to the actual use of the surface, the mining titleholder must agree with the landowner or the land tenant on an indemnification.[38] However, if relevant parties are not able to reach an agreement, the Mining Code establishes a special summary judicial procedure to determine the amount of such compensation.[39]

Should be noticed that, according to the Mining Code, while the trial to determine the indemnification is ongoing the judge can authorise the mining titleholder to use the surface if the latter gives a determined guarantee. This guarantee consists in a payment of a specified amount determined by a court that the petitioner can pay to access the land immediately.[40] Finally, it is important to mention that to be effective against third parties, the beneficiary must register the easement.[41]

2.2.2 Court order to suspend new works

The Chilean legislation allows the mining concessionaire to obtain an injunction to suspend new works performed by the owner or tenant of the surface.[42] The main feature of this action is that once it is filed the judge must provisionally suspend the works under a penalty in case of infringement of the referred order.[43] After the suspension of the works, there is a special procedure in which the central discussion is whether to grant the injunction or nor.[44] It is not a discussion about

35 Wenzel (1993), p. 623.

36 See Mining Code [Código de Minería], article 120.

37 Obando Camino (2010), p. 270.

38 Mining Code [Código de Minería], article 122.

39 IMining Code [Código de Minería], article 123.

40 Mining Code [Código de Minería], article 125.

41 Mining Code [Código de Minería], article 123.

42 This is not expressly indicated in any Chilean law. However, the doctrine and jurisprudence construed such argument by the reference that Mining Code makes in article 94 to the civil possessory actions, in which has been considered the court order to suspend new works.

43 Huerta Molina & Rodríguez Diez (2012), p. 347.

44 Huerta Molina & Rodríguez Diez (2012), p. 350.

property rights.[45] Meanwhile, the surface tenant can only take the minimum actions to avoid the destruction of the works already performed, but in any case can continue with the construction.[46] As will be discussed below, because the structure of this injunction has been used by mining rights holders to suspend the development of renewable energy projects. Although there are some legislative institutions included in the lasts years to mitigate this issue, the general understanding is that they have not been efficient enough and have not tackled the structural issues of the mining concessional system.

So far, I have described the regulatory framework of the Chilean mining industry. In Part III, I will expose the problems that this structure is generating for developing renewable energy projects.

III. ANALYSIS OF THE PROBLEMS GENERATED BY THE DESCRIBED REGULATORY FRAMEWORK

The regulatory framework described above undermines the development of renewable energy projects in Chile. By enforcing a system of mining concessions rights, the mining titleholders are forcing to developers of energy projects to negotiate with them even in the case that the mining titleholder is not interested in developing a mining project in the area. This is not a new problem in the system nut courts have not acted consistently in the way they solve this issue so he problem persists.[47] In this Part III I will analyse the causes and consequences that this conflict may have in the Chilean energy market.

3.1 How the rights granted by the mining concession affect the development of energy projects

As has been said above, the holder of a mining concession has specific rights that arise from his mining concession to use the surface. The purpose of these rights is to facilitate the exploration and the exploitation of the minerals within the area of the concession.[48] These rights are granted due to in the Chilean legal system, as said, the landowner might be different from the mineral rights owner in the same area.

Up to this point, there are not many differences with other systems based on mineral estate dominance. In a system where the owner of the surface might grant access to the party with mineral rights, it is frequently and has sense granting the access to the owner of such minerals and giving him the chance to exploit his concession.[49]

45 Huerta Molina & Rodríguez Diez (2012), p. 350.

46 Huerta Molina & Rodríguez Diez (2012), p. 350.

47 Bambach (2003), p. 71.

48 Mining Code [Código de Minería] (Chile), article 120.

49 Vergara Blanco (1989).

However, some so-called 'speculators' are using mining concessions for a different end.[50] These 'speculators' are trying to take advantage of the rights described above to obtain compensations or payments from the developers of another type of projects. They do not have an interest in develop a mining project.[51]

The mechanism used by 'speculators' is simple. They apply for mining concessions in areas that can be used for other types of projects that would be probably developed over the surface. Then, when the developer of the surface project is starting his works –and generally the price of the indemnification that the mining right holder has to pay is low– the 'speculator' appears threatening to use his mining rights to impose an easement or to suspend the works, using the mechanisms described in Part II of this article.[52]

As a result, the developer of a project upon the surface is forced to negotiate with the holder of a mining concession even if the latter is not interested in using the land to access to the minerals granted in his concession or apply for mining concessions to developing a project over the surface.[53]

3.2 The structural causes behind this use of mining concessions

The described regulatory framework creates this perverse use of mining concessions.[54] In fact, to obtain mining concessions there are not many technical requirements, such as work programs or analysis of the commercial viability of mining projects. The previous leads to a system in which any interested person can obtain a mining concession although he has no interest, nor knowledge, in develop a mining project.

Second, the holder of a mining concession does not need to exploit the concession. Although there is a constitutional mandate,[55] there is no regulation that enforces the concessionaire to exploit his concession. According to the *Chilean Constitution*, the concessionaire has to perform the activity necessary to satisfy the public interest that justifies the validity of the permit granted.[56] However, within the rest of the regulatory framework described above there is no regulation that enables the enforcement of the constitutional mandate.[57] The aforementioned constitutes, in practice, an authorization to apply for and keep mining concessions without the

50 Vergara Blanco (2012), p. 403.

51 Vergara Blanco (2012), p. 404.

52 Vergara Blanco (2012), p. 404.

53 Vergara Blanco (2012), p. 404.

54 Vergara Blanco (2012), p. 404.

55 Constitución de La República de Chile [Constitution Act of the Chilean Republic], article 19 number 24.

56 Constitución de La República de Chile [Constitution Act of the Chilean Republic], article 19 number 24.

57 Vergara Blanco (1989).

obligation to invest in a mining project. It is a distortion of the purpose of a mining concession.[58]

Third, since judges grant mining concessions with a minimum participation of a technical body,[59] neither the applicant nor any other authority reviews the operational conditions or the ability to exploit the mining area. This allows any petitioner to request mining concessions even in areas in which the exploitation of mineral resources is not feasible. The current regulatory framework emphasizes procedural aspects instead of the viability of the projects.[60]

Finally, since mining concessions are revoked in rare circumstances–and the limited circumstances are not related to the practical use of the concession–the possibilities to release an area covered by a mining concession are very limited. In fact, until 2013, 41 per cent of the Chilean territory was covered by mining concessions.[61]

Developers of renewable energy projects face this regulatory framework of mining concessions when they want to develop an energy project. In the next section, I will describe the effects of the problems analysed herein in connection with renewable energy projects.

3.3 Effects of the issues described in renewable energy projects

Renewable energy projects require large extensions of land to be developed. For instance, a wind farm project requires using the surface for the turbines, roads, underground connections, and substations, among other usages.[62] The space for turbines depends on several factors and also needs to consider free areas to avoid obstructions of the resource.[63] Solar projects also require a vast extension of land. Solar panels, as well as substations, grid, and other factors affect the area of land required. In Chile, for example, recently has been approved a solar project that uses 1436 hectares to inject 210 MW into the system.[64]

In many cases, developers of renewable energy projects are developing their project over a mining concession owned by a third party. Consequently, they are at risk of their works might be suspended by a judicial order or interrupted by an easement. This leads them to find a solution to mitigate this risk. Also, the lenders of the financing for the projects will require a solution to this issue.

58 Vergara Blanco (2012).

59 Vergara Blanco (1988).

60 Vergara Blanco (1988).

61 Servicio Nacional de Geología y Minería, 'Estadísticas Sobre Concesiones Mineras' '[Mining Concessions Statistics]' <http://www.sernageomin.cl/pdf/mineria/estadisticas/estadisticas%20de%20concesiones%20mineras/propiedad_minera_2_2013.pdf>.

62 Duvivier & Wetsel (2009), p. 9.

63 Duvivier & Wetsel (2009), p. 10.

64 Servicio de Evaluación Ambiental de Antofagasta, 'Resolución Exenta 0231/2014 [Resolution 0231/2014]'.

To mitigate this risk, developers of renewable energy projects mainly need to reach an agreement with mining concessionaires. The form of the arrangement may vary. They can be agreements to acquire the mining concession or negative easements in which the concessionaire waives to use the surface.[65]

These agreements, however, imply many disadvantages. Firstly, they can increase the costs to developers.[66] Since in most of the cases the concessionaire will charge a price for the agreement, the developer will have to consider in his costs these agreements. The law does not regulate the price for these contracts, and the concessionaire does not need to prove any interest in the area. It is enough with his status of concessionaire.

Secondly, reach an agreement with an additional party may increase the delays in the development of energy projects. The argument made here is not that these agreements necessarily are the sole cause of delays in the development of projects, but they might cause such delays. Certainly, there are many others factors that can be causing delays in energy projects.[67] The emphasis should be placed on the adverse effects of the delays in the energy projects. In Chile, the impact of the delays in the development of energy projects can be considerable.[68] Also, delays in the development of energy projects might imply delays in the pursuance of the Chilean renewable energy target.[69]

Thirdly, as a general practice, the developers are expected to mitigate the risks aforementioned in order to obtain financing from lenders.[70] To some extent, the development of renewable energy projects depends on, among other factors, an effective solution to this problem. In the end, this results in difficulties for developers of renewable energy projects to access to funds for the development of their projects.

3.4 The lack of a consistent solution

As has been said above, this is not a brand-new problem. Developers are facing this issue for years, and the Chilean legal system has adopted some measures to prevent the problem. However, these measures have not been very effective in practice.

65 Gardner, Sewell & Stahl (2010), p. 248. The validity of these negative easements can be discussed in the Chilean context. However, such discussion is out of the scope of this article.

66 Vergara Blanco (2012), p. 405.

67 See, eg, Moraga Sariego (2012), p. 376.

68 See generally Agurto *et al.* (2013), p. 1.

69 According to the Chilean renewable energy target, the participation of renewable energies in Chilean energy market shall be 20 per cent in 2025.

70 Alfredo Olivares et al, 'Guía de Gestión. Aspectos Claves en el Desarrollo de Proyectos ERNC. [Management Guide. Key Aspects in the Development of NCRE Projects]' <http://cifes.gob.cl/archivos/guia%20gestion%20ernc/Guia%20de%20Gestion_%2001.pdf>.

3.4.1 Guarantee bond to continue with the works

The first solution that appeared, was an amendment to the Energy Law including article 34 bis. According to this provision, if the mining titleholder begins a process to suspend the works, the developer is entitled to provide a guarantee in order to continue the works. This rule had a narrow scope of application, since it only applied to (i) projects developed under an electric concession (which is not mandatory for electricity generation projects); (ii) and renewable projects developed on public lands. In 2016, Congress passed a law to make wider the scope including renewable energy projects developed in private and public lands, excluding indigenous lands. Although this is a helpful tool, it has not been very used in practice. Also, from a theoretical point of view, it is not clear that the way to mitigate the actions of speculators is making the developers to pay *ex-ante* a guarantee. This could imply financial costs to developers that increase the total cost of the project.

3.4.2 Arbitration proceeding

Another mechanism included in the Energy Law is the Section 31 bis. This Section establishes an arbitration process to solve conflicts *between concessionaires*. In particular, this law sets forth that any concessionaire (electricity, mining, geothermal, among others) is entitled to trigger an arbitration proceeding in case it has problems with another concessionaire. Although well inspired, this proceeding is not very helpful for solving renewable energy projects, since many of these projects do not have a concession and the access to land is granted through private agreements.

These mechanisms that aim to fix the problem in any case imply costs to developers and, in practice, have not been frequently used. As will be explained, courts have developed other mechanisms to address the issue.

3.5 The voice of judges: How courts have tackled the issue

Courts have a say on the matter. Through different constructions, courts have tried to stop the use of mining concessions as a lottery ticket. The following are the main interpretations that courts have construed during the last years.

3.5.1 Courts orders to suspend the works do not proceed under any circumstance

As was noted above, courts have tried to limit the effects of the suspension of new works by mining concessionaires. One of the mechanism used to do so, is to require -in addition to the mining concession- the existence of a mining easement to accept the new works suspension action. This mechanism has been even recognized by the Supreme Court.[71] The argument works as follows: (i) mining concessionaires do not have a right over the surface; (ii) however, mining concessionaires are entitled to impose mining easements; (iii) only when a mining easement has been granted (judicially or by means of an agreement), the mining concessionaire is entitled to

71 E.g. Supreme Court N° 76468/2016, November 22, 2016.

suspend the works over the surface; (iv) consequently, if the mining concessionaire does not prove the existence of such mining easement, judge must reject the order to suspend the works in their judgment.

The argument looks interesting. However, it has a major pitfall. The sole filing of the claim in this process obliges the judges to order the suspension of the works. The existence of the easement is a matter that will be discussed later on and the judgment -after the appeal processes could last more than a year. Consequently, in practice the renewable energy developer in this scenario must wait until a final judgement to continue with the works that could imply more than a year.[72] Just as a side note, the building period for a major renewable energy project (wind, solar) in Chile could last a year, so the term of the judicial suspension is material for this kind of projects.

A new different approach has been intended during 2019.[73] It consists in postponing the decision on the provisory suspension, if the judge determines that there are no grounds to assess whether the legal requirements are met. In this case, the court decided that, since the claimant did not prove a right over the surface, it cannot be granted the provisory suspension.[74]

This last solution is very promising because it overcomes the problem of the provisory suspension aforementioned, but it is directly against the law and the intention of the new works action. In fact, the main purpose of this action is to suspend the works, in order to prevent potential damages, until a definitive judgment settles the conflict.[75] As such, and considering that in the Chilean legal system the judicial precedent is not binding for further decisions, this is not a solution in which developers can rely upon.

3.5.2 Mining easements require a mining project

Courts have said that in order to obtain a mining easement, the applicant must provide evidence of the seriousness of the mining project. Normally, the seriousness is linked to the existence of mining or environmental permits or, even in some cases, to an indigenous people's prior consultation.

Although it seems like a reliable solution, it has a major issue to tackle. It is quite arguable that courts have powers to reject the granting of a mining easement based on the seriousness of the project. In fact, the mining regulatory scheme does not contemplate such powers.

72 Please note that this solution is prior to the existence of the guarantee previously analyzed. In any case, the guarantee, as discussed, has its own pitfalls.

73 Sotomayor, María José & Chomali, Juan Luis *"Alentadora interpretación de la suspensión provisional en la denuncia de obra nueva " [*"encouragingly interpretation of the provisory suspension of new works."*]* (2019) El Mercurio Legal visited on December 30, 2019.

74 See, Concepción Court of Appeal, No. 1801-2016.

75 Dossi Osorio (2016), p. 35.

3.6 Struggles to amend the mining concessional system

The current regulatory framework for mining concessions is causing problems for developing renewable energy projects. Pragmatism suggests changing the current regulatory framework of mining concessions to avoid the issues described and to generate a regulatory system that improves its outcomes. In fact, the most direct way to do it could be to pass a law that states that all granted mining concessions would need to prove that there are mining projects that justify their grant and, if there are no projects, such permits could be revoked. Also, the duration of the concession could be limited to a particular period based on the average length of mining projects. However, it is not that easy. Amending the regulatory framework also has to deal with some constitutional issues. Just as an example of the difficulty of amend the current system, nowadays is under discussion an amendment of the mining concession system that aims to increase the costs of the licences when mining concessions are not being used that has been resisted by the private sector adducing that such modification can cause uncertainty to investors.[76]

3.6.1 Property rights over a mining concession

After declaring the existence of property rights over things, Chilean Civil Code establishes the existence of a 'kind' of property rights over intangibles, such as rights.[77] At the same time, article 19 number 24 of the Chilean Constitution assure to all persons property rights over tangibles and intangibles.[78]

Also, there is a special constitutional proceeding that aims to recover the rule of law and protect such constitutional rights.79 By means of this procedure, and based on the broad interpretation that property rights have received in Chile,[80] the Chilean Supreme Court has accepted ownership rights over rental agreements, educational services, concessions, edification permits, among others.[81]

Then, the Chilean Supreme Court has understood that private entities have property rights over intangibles. Although this position has been criticised due to the impact that it has on constitutional grounds and in the legal system,[82] it is a general

76 'Plan pro Inversión: Gobierno Matiza Cambios y Delinea Nueva Institucionalidad en Concesiones Mineras' <http://www.mch.cl/2015/04/27/plan-pro-inversion-gobierno-matiza-cambios-y-delinea-nueva-institucionalidad-en-concesiones-mineras/>.

77 Código Civil de La República de Chile [Chilean Civil Code] (Chile), article 583.

78 Constitución de La República de Chile [Constitution Act of the Chilean Republic] (Chile), article 19 number 24.

79 Constitución de La República de Chile [Constitution Act of the Chilean Republic] (Chile), article 20.

80 See generally Jana & Marín (1996).

81 Navarro Beltrán (2012), p. 628.

82 See generally Jana & Marín (1996).

practice to invoke property rights over licenses or agreements in such protection action.[83] Generally, these claims are won.[84]

Amending the regulatory framework of mining concessions, particularly limiting rights stemming from them, fits exactly with the situation described. If the amendment restricts the rights already granted, that might be considered unconstitutional. Taking into consideration the way in which the Chilean Supreme Court has understood property rights over intangibles, it is expected that in the case of mining concessions the Court would argue that the mining concessionaire is owner of the rights granted by his concession and, therefore, to limit or take those rights the State shall follow a taking procedure and indemnify the concessionaire. The aforementioned makes unfeasible any attempt to restrict the rights already granted.[85]

3.6.2 Immutability of acquired rights

Some rights cannot be modified if they were established under a particular regulation.[86] The immutability of acquired rights has been affirmed based on article 19 number 24 of the Chilean Constitution.[87] This responds to the fact that Chile has broad interpretation of property rights. In practice, the immutability means that any situation or right created in a particular regulatory framework cannot be revised or amended by subsequent laws.[88]

In the case considered herein, the limitation of the rights granted by a mining concession, could be considered a breach of the intangibility stated–or construed–in the Chilean Constitution. The consequences are the same described above. The State needs to follow a taking proceeding and in any case is required to indemnify the concessionaires. Again, this makes unfeasible such limitations.

3.6.3 Organic Acts

As was noted above, many of the matters of the mining regulatory framework are regulated in organic acts. The Chilean Constitution of 1980 incorporated organic acts in Chile.[89] The existence of organic laws is controversial.[90] This should sound unfamiliar for a common law reader and probably to many civil law readers.

83 Navarro Beltrán (2012), p. 627.

84 Navarro Beltrán (2012), p. 627.

85 Another possibility that can be analysed but is out of the scope of this research paper is the alternative and constitutional consequences that might have the creation of a statute that make applicable the constitutional mandate to explore or exploit the mining concession described above. The difference in this case is that already exists a law that obliges to the concessionaire to explore or exploit the concession but it is not enforceable. Then, the Constitutional question in this case would be whether is constitutional or not to make enforceable a rule that has not been over decades.

86 Sacco Aquino (2006).

87 Sacco Aquino (2006), p. 484.

88 Sacco Aquino (2006), p. 491.

89 Caldera Delgado (1984), p. 455.

90 See generally Verdugo (2012).

When a particular subject is matter of organic law, the requirements to approve it are different. Organic laws require a 58 per cent of approval in each Chamber of the Congress and a compulsory preventive control of the Chilean Constitutional Court.[91]

In the case of mining concessions, the duration, rights and duties that grant mining concessions are subject to organic law procedure.[92] This means that even if all the above issues were solved, to amend the current regulatory framework would not be enough to pass a simple law. It would be required the approval of the 58 per cent of each Chamber of the Congress as well as the approval of the Chilean Constitutional Court.

In this section, I have shown some of the problems that the amendment of the current regulatory framework would have to address if its purpose is limit somehow the rights already granted by mining concessions. As the reader might have noticed, in the current Chilean legal context is unfeasible to conduct such reform. The solution to address the conflict between the use of the land and the mineral rights owner must be found on other grounds. In the following Part IV of this article, I will describe and present an alternative to address the referred conflict.

IV. EXPOSITION AND ANALYSIS OF THE TREATMENT OF THE CONFLICT IN TEXAS

In Part IV, I describe and analyse a doctrine that can provide an alternative solution to the conflict between the mineral rights owner and the development of projects over the surface. This doctrine is known as accommodation doctrine and has been developed in Texas. Before the analysis, I will justify why Texas is an interesting case to observe. Then, I will describe the development of the accommodation doctrine in Texas.

4.1 Why Texas

In 2009, Texas concentrated more than 25 per cent of the renewable energy generation by wind power in the United States electricity market.[93] The growth of the generation capacity by wind power in Texas has been exponential.[94] Texas is attractive due to the conditions to develop wind farms.[95] Solar energy projects developed in Texas also require large extensions of land.[96]

91 Constitución de La República de Chile [Constitution Act of the Chilean Republic], articles 66 and 93.

92 Constitución de La República de Chile [Constitution Act of the Chilean Republic], article 19 number 24.

93 Duvivier & Wetsel (2009).

94 Duvivier & Wetsel (2009), p. 9.

95 Duvivier & Wetsel (2009), p. 6.

96 Gardner, Sewell & Stahl (2010).

Wind farms require large extensions of land to be developed. The growth of wind farms in Texas along with the land requirements for such development has drawn the attention to the access and risks involved in the access to the land to develop wind projects. Developers of renewable projects, as well as investors, see a risk of interference with the oil & gas industry in Texas.[97]

The perception of this risk is based on the fact that in Texas coexist different property rights within the same area. In fact, in Texas coexist on one hand the surface estate and, on the other, the mineral estate.[98] In other words, in Texas it is possible to split the rights over the surface and the rights over the subsurface. To the objectives of this article, it is not necessary to describe the whole system of property in Texas. It is just needed to say that mineral rights and surface rights can be split up.

Since such rights can be split up, conflicts between them may arise. In such conflicts, the mineral estate is considered as dominant.[99] There are policy reasons in Texas to establish mineral estate dominance.[100] This mineral estate dominance means that the owner of the mineral rights can impose easements. The right to impose an easement can be expressly indicated or implied.[101]

The exponential growth of renewable energy sector, the possibility to split mining and land rights, the mineral estate dominance, and the right to impose easements over the surface affecting the rights of landowner or tenant, make the Texas case notably similar to the Chilean case. Indeed, there are many differences, such as the way in which mineral rights are granted and the ownership of the minerals, but those differences do not have any impact on the analysis carried out herein.

In the following, I will describe how this conflict has been addressed in Texas.

4.2 How to deal with mineral rights owner in Texas for the development of renewable energy projects

There are two ways to deal with the mineral rights owner to access to the land without the risk of an easement. On one hand, a developer can reach an agreement with the mineral right owner.[102] The form of the arrangement may vary, but commonly will be waivers of surface rights, or non-interference agreements.[103]

However, the problem to address here is when it is not possible to reach an agreement with the owner. In this context, the accommodation doctrine becomes

97 Diffen (2008), p. 241.

98 Gardner, Sewell & Stahl (2010).

99 Diffen (2008).

100 Diffen (2008).

101 Gardner, Sewell & Stahl (2010).

102 Gardner, Sewell & Stahl (2010), p. 248.

103 Gardner, Sewell & Stahl (2010), p. 251.

relevant.[104] In general terms, the accommodation doctrine consists in if there is an existing use of the surface and the mineral right owner wants to use the same surface to develop his project, the landowner can prove that there is an alternative way to do the same by the mineral right owner without affecting the use of the surface of the land owner.[105]

Since the case in which there is no agreement is the one that I am interested in, in the next section, I will review the history and development of the accommodation doctrine.

4.3 The accommodation doctrine

The accommodation doctrine arose as a mechanism to give some protection or compensation to the surface owner.[106] Hafer, Mathis and Simmons have defined it as 'a common law doctrine used in Texas to restrict mineral owners' right to use the surface in a severed estate.'[107] The development of this doctrine in Texas is not legislative, but judicial.[108] Its first articulation was in *Getty Oil Co v Jones*.[109] In this case, the Texas Supreme Court stated that

> Where there is an existing use by surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[110]

According to this doctrine, the surface owner might preclude a determined use of the mineral rights if there is a reasonable alternative way to develop the same project.[111] This makes that this doctrine is more helpful for auxiliary facilities than the pit itself, since the pit is not movable. The main effect of the application of the accommodation doctrine is that the landowner can compel the mineral right owner to develop his project in an alternative–still reasonable–way without affecting the existing use of the land by the landowner.[112]

The burden of proof to apply the accommodation doctrine relies on the surface owner.[113] Gardner et al state that must be proven both, the deterioration or preclusion

104 Gardner, Sewell & Stahl (2010), p. 251.

105 Gardner, Sewell & Stahl (2010), p. 252.

106 Daintith (2014), pp. 43-44.

107 Hafer, Mathis & Simmons (2014), p. 81.

108 Miller (2003), p. 461.

109 Potter (2014), pp. 83-84.

110 *Getty Oil Co v Jones*, 470 S.W.2d 618, 622 (Tex, 1971).

111 Gardner, Sewell & Stahl (2010).

112 Wenzel (1993).

113 Gardner, Sewell & Stahl (2010).

of the existing use, and the existence of a reasonable alternative to the mineral right owner to develop his project.[114] Hafer, Mathis and Simmons developed a deeper understanding of these requirements stating that there are four elements the surface owner has to prove. First, that the land is currently being used. Second, that such use is the only reasonable means to perform the project of the landowner on his land. Third, that the proposed use of the mineral right owner affects or precludes the use of the land by the landowner. Finally, the landowner has to prove the existence of an alternative method to develop his project that will not affect his existing use.[115]

This latter construction of the accommodation doctrine highlights that even in the case that both conditions indicated by Gardner et al are met; there is still a case in which the accommodation doctrine does not–and shall not–apply. This case is when the surface owner can use the land in other ways without affecting the mineral right owners' project.[116] The second condition of Hafer, Mathis and Simmons' version of the accommodation doctrine allows not applying such doctrine when the landowner can use the land in other ways that do not interfere with the development of the mineral rights owner's project.

About this point, there are two elements that must be said. First, this feature implies a more consistent position regarding the mineral estate dominance,[117] which in Gardner, Sewell and Stahl's version is not clear except for the burden of proof. In Hafer, Mathis and Simmons' version, the landowner must prove that he only can develop the project using the surface in the existing use, so if the landowner is not able to do so, then mineral right owner can develop his project in his proposed way. Gardner, Sewell and Stahl's version focuses only on the reasonable alternatives of the mineral operator.[118]

Second, in the case of the renewable energy projects, this condition is likely to be met, since, as noticed above, wind farms, as well as solar projects, require very specific conditions backed up by several technical studies and minimal changes in the design of the project can have a considerable impact on the generation capacity of the project.[119]

Therefore, in order to keep the notion of mineral estate dominance in a strong way it is preferred to follow the conditions stated by Hafer, Mathis and Simmons. Nevertheless, in the particular case of renewable energies this condition usually is met, since a small change in the technical requirements might have a considerable impact on the generation capacity.

114 Gardner, Sewell & Stahl (2010).

115 Gardner, Sewell & Stahl (2010).

116 Gardner, Sewell & Stahl (2010), p. 61.

117 Gardner, Sewell & Stahl (2010), p. 61.

118 Gardner, Sewell & Stahl (2010).

119 See generally Duvivier & Wetsel (2009).

Notwithstanding the foregoing, there remain open questions regarding the accommodation doctrine. In fact, it is necessary to determine what is an existing use of the surface and also what constitutes a reasonable alternative for the mineral right owner.

Regarding this first, the underlying idea in *Getty Oil Co v Jones* is that there must be something in addition to plans.[120] This, however, is a matter of interpretation, and its application should be analysed on a case-by-case basis. Another criterion that should be followed is that the existing use cannot be reduced to the date in which the permission is granted.[121] The date or existence of the relevant permits can be useful to determine if there is something more than plans, but cannot be the only criterion to follow, because it does not allow to appreciate the existence of real projects.

Regarding the reasonableness of the alternative for the mineral owner, one relevant aspect is that the alternative can be more expensive than the original plan as long as it is still reasonable.[122] Also, practices and uses of the industry shall guide the reasonableness of the alternative.[123] Then, the reasonableness of the alternative relies on the general practices of the particular industry, rather than the costs of it.

One additional question is whether or not the accommodation doctrine can be applied to hard minerals. In this regard, Wenzel expressed that there is no reason to restrict the accommodation doctrine only to oil and gas industry and, consequently, it can also apply to hard minerals.[124]

As noticed, the Texas Supreme Court developed the accommodation doctrine to address a similar problem that Chile is currently facing. This doctrine reflects a more equitable relation between the development of mineral projects and surface projects.[125] It recognises the relevance of the mineral estate dominance but gives an option to assess and ponder the development of a project on the surface and mainly the coexistence between the surface and mineral interest rights.[126] The next part will analyse how to adopt and adapt the accommodation doctrine into the Chilean legal system.

120 Hafer, Mathis & Simmons (2014).

121 Gardner, Sewell & Stahl (2010).

122 Wenzel (1993).

123 Alspach (2002).

124 Wenzel (1993).

125 Wenzel (1993), p. 630.

126 Wenzel (1993), p. 630.

V. HOW THE ACCOMMODATION DOCTRINE CAN BE INCORPORATED TO THE CHILEAN LEGAL SYSTEM AND ITS EFFECTS

5.1 Benefits of the Accommodation Doctrine in the Chilean Context

As was noted above, the amendment of the current regulatory framework of mining concessions in Chile seems to be the step to take to improve the outcomes of the system and to face the problems of renewable energies. However, as demonstrated, it is very complex to amend this regulatory framework without falling into the discussion of the constitutionality of such amendment. The alternative proposed in this article is to adopt–and adapt–the accommodation doctrine to the Chilean legal system.

This doctrine reflects a more equitable relation between the use of the land and mining activities,[127] keeping the mineral estate dominance. The above, is still consistent with the system currently stated in the *Chilean Constitution*. Also, this proposal avoids the constitutional issues that such an amendment with retroactive effect would have.

Also, the accommodation doctrine addresses the conflict of speculation in Chile. Since the owner of the surface can compel the owner of the mining right to develop his project without affecting his land if certain conditions are met, the mineral right owner would be forced to show an original plan of development of a mining project. By definition, 'speculators' have no mining projects plans.

5.2 How to adopt the Accommodation Doctrine into the Chilean Legal System

In this section, I will describe the main aspects to consider adopting the accommodation doctrine in Chile. Since it is a proposal, many of these points will require further discussion.

First, the accommodation doctrine cannot be only a judicial construction. In Chile, judgements are not binding for further cases.[128] Therefore, it must have the backup of legislation to be effective. In this regard, it is important to mention that it would be necessary an organic law. Regarding this, the accommodation doctrine should be incorporated as a defence in the process of constitution of easements and in the courts order to suspend the works procedures. This means that -in order to systematically adopt this possibility- it will be required to pass a law and meet certain quorum. Also, the mineral right owner should file along with the suit in both cases, the work plan to be assessed by the judge and the landowner. This should be an admission requirement.

Second, the accommodation doctrine might be a defence not only for the owner, but also for the tenants of the lands. Normally, the developers of renewable

127 Wenzel (1993), p. 630.

128 Código Civil de La República de Chile [Chilean Civil Code], article 3.

energy projects are not owners of the lands in which they are developing the projects. They have an agreement with the owner to use the land. Such agreements might be legally sufficient to oppose the defence of the accommodation doctrine.

Third, the 'existing use' might be proved or determined by linking to the 'beginning of works' stated in the environmental legislation.[129] According to this legislation and the instructions of interpretation of such regulation,[130] the holder of an environmental permit can prove the beginning of the works if he can show the performance of any action or work systematically, uninterrupted, and permanently of the construction stage of the project.

Finally, the reasonableness of the alternatives might follow the same principle developed in the Texas accommodation doctrine. This is the general practice of the particular industry.

VI. CONCLUSION

In the article, I have described structure of the mining concessions in Chile, showing the problems that it generates for the development of renewable energy projects. Then, I analysed the constitutional issues that arise in trying to amend the current regulatory framework. Also, I described how Texas addressed the same conflict creating and developing the accommodation doctrine. Then, I gave some ideas about how the accommodation doctrine could be incorporated in Chile and how it can solve the problems between land use for renewable energy projects and the rights of mining concessionaires. Based on the above, I conclude that the accommodation doctrine is a useful tool to produce a more equitable relation between the land uses and mining rights and its incorporation to the Chilean legal system would be beneficial for the development of renewable energy projects, avoiding the problems that currently this industry is facing in connection to mining concessions.

129 Ley de Bases Generales Del Medio Ambiente [Chilean Environmental Act], article 25 ter.

130 Servicio de Evaluación Ambiental, 'Ord. No. 142034/2014. Imparte instrucciones en relación al artículo 25 ter de la ley 19.300, al artículo 73 del reglamento del sistema de evaluación de impacto ambiental y al artículo 4 transitorio del referido reglamento [Gives instructions to interpret article 25 ter of the general environmental act, article 73 of the regulation of the environmental impact assessment and article 4 transitory of such regulation]'.

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