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Shouldering the Burden of Renewable Energy: Lithium Mining in Chile's Indigenous Communities

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Technology has improved society, from bridging digital divides to increasing efficiency. To power technology, energy sources were traditionally derived from diminishing and exhaustible resources like fossil fuels. The renewable energy revolution emerged to balance the global demand for technology with its impact on natural resources. Lithium is a critical, non-renewable mineral that clean technology relies on. Essentially, lithium makes renewable energy possible. As the pillar for a fossil fuel-free yet technology-driven society, it is imperative to examine the sustainability and impacts of lithium mining.

This Note discusses the legal and socio-political frameworks shaping foreign direct investments in Chile's lithium mining sector. Out of these frameworks arose a complex web of mining and investment doctrine affecting the rights of Chile's indigenous people. As a global supplier of lithium, Chile's indigenous communities—in the heart of the Atacama Desert—are shouldering the burden of renewable energy. This Note explores incorporating environmental, social, and governance ("ESG") policies into Chile's foreign direct investment regime and how ESG-driven policies can mitigate the

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social and environmental repercussions of lithium mining on Chile's indigenous communities.

I. INTRODUCTION

Chile is well positioned to be at the forefront of the global energy transition towards renewable energy.[1] As one of Latin America's most prosperous economies,[2] Chile's traditional foreign investment regime and rich natural resources make it one of the most attractive destinations for foreign direct investments.[3] In particular, its lithium reserves in the Atacama put the country in an advantageous position to be a leading contributor to the decarbonization of the world as demands for lithium-ion batteries grow.[4] However, Chile's market-based economic policies have captivated new foreign investments in its mining industry, raising newfound risks for foreign investors in the country; recent surges of socio-political unrest and economic instability pose impending dangers to the future of foreign direct investment, Chile's natural resources, and its indigenous communities.[5]

Chile's ability to attract foreign capital is derived from its investor-friendly laws rooted in its legal, banking, and tax frameworks.[6] The country's principles of capital transparency and non-discriminatory protections against foreign investors are regarded as one of its most significant fiscal attributes.[7] Specifically, Chile's legal framework governing foreign direct investment in key sectors—like mining—inherently and explicitly grants investors autonomy and protection.[8] Chile's traditional open-door policy to foreign investors

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[1] *See* Beniga Cortés Leiss & Sree Yeluri, *Copper and Lithium: How Chile is Contributing to the Energy Transition*, BAKER INSTITUTE (Sept. 14, 2021), https://www.bakerinstitute.org/research/copper-and-lithium-how-chile-contributing-energy-transition.

[2] Justin Kuepper, *Benefits and Risks of Investing in Chile*, THE BALANCE (Dec. 25, 2021), https://www.thebalancemoney.com/how-to-invest-in-chile-1979047.

[3] *Id.*; *see* Craig Dempsey, *Investing in Chile: FDI Hits Historic Record*, BIZLATIN HUB (Aug. 19, 2021), https://www.bizlatinhub.com/investing-chile/.

[4] Cortés Leiss & Yeluri, *supra* note 1.

[5] *Id.*

[6] *See* Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 LAW & BUS. REV. AM. 203, 203 (2012).

[7] *Id.* at 204-05; *Chile: Foreign Investment*, SANTANDER TRADE, https://santandertrade.com/en/portal/establish-overseas/chile/foreign-investment (last visited Oct. 24, 2023).

[8] *See Chile: New Foreign Investment Regime*, LIB. OF CONGRESS (Dec. 1, 2015), https://www.loc.gov/item/global-legal-monitor/2015-12-01/chile-new-foreign-investment-regime/; *see also* SANTANDER TRADE, *supra* note 7; *Mining*,

was shaped by the country's developmental strategies and its political and economic stability.[9] Despite Chile's potential for continued growth in the mining sector, socio-political protests advocating for indigenous rights in the Atacama pose significant risks to investments in lithium mining.[10]

In addition to lithium, foreign investors extract monetary value from Chile's foreign direct investment infrastructure because its free-market policies provide a pathway to meet the surging worldwide demand for lithium.[11] Investment interests in Chile's mining sector tout many benefits for technology investors seeking a mature and stable mining jurisdiction for sought-after resources like lithium and lithium reserves.[12] Undoubtedly, investors have contributed immensely to the country's economic growth.[13] Yet, foreign direct investment in Chile's mining sector has also covertly fostered and perpetuated the subjugation of Chile's indigenous peoples.[14] As Chile's mining industry strives for collaboration between mining companies, surrounding communities, and suppliers to the industry, this likely requires a recalibration of the traditional foreign investor protections.[15]

Chile's indigenous communities have persistently fought for visibility from policymakers.[16] In Chile's rural communities, indigenous people have little rights to land resources and tend to be

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INVESTCHILE, https://investchile.gob.cl/key-industries/mining/ (last visited Oct. 30, 2023).

[9] Beatriz E. Trillos, *Chile: An Open Door to Foreign Investment*, 3 INT'L TRADE L.J. 31, 32 (1994).

[10] Kuepper, *supra* note 2.

[11] *See* Trillos, *supra* note 9.

[12] INVESTCHILE, *supra* note 8.

[13] *Id.*; *see Study: Chile Top Latin American Country for Foreign Investment*, U.S. NEWS (Feb. 4, 2021), https://www.usnews.com/news/best-countries/articles/2021-02-04/chile-no-1-latin-american-country-for-foreign-investment-study-says.

[14] *See* Graham Holton, *Indigenous Rights Take Center Stage in Chile's New Constitution*, PEOPLE'S WORLD (July 20, 2022), https://peoplesworld.org/article/indigenous-rights-take-center-stage-in-chiles-new-constitution/.

[15] INVESTCHILE, *supra* note 8.

[16] *See* Estanislao Gacitúa-Marió, *Indigenous Peoples in Chile Current Situation and Policy Issues*, in CHILE'S HIGH GROWTH ECONOMY: POVERTY AND INCOME DISTRIBUTION, 1987-1998 214, 221-224 (The World Bank, 2002).

subjected to higher poverty rates and fiscal discrimination.[17] The impact of foreign direct investments in lithium on indigenous communities has contributed to the depletion of natural resources and perpetuated social and fiscal subordination in those communities.[18] For years, Chilean indigenous communities have been faced with water scarcity.[19] The implications of lithium mining on Chile's indigenous communities continue to exacerbate the insufficiency of the Atacama's water supply.[20] As renewable energy gains popularity, dependence on lithium-ion batteries increases; this dependence is directly linked to mining incentives for investors, often at the expense of indigenous communities that lack sustainable governance and socio-environmental investment policies.[21]

In 2019, millions of Chileans took to the streets in protest, demanding the recognition of social rights, equality, and inclusion.[22] Some insisted on a new constitution during the 2019 protests.[23] Before Gabriel Boric won the 2021 election, indigenous community advocates were key to the demands for a new constitution since indigenous communities have been historically excluded and ignored from governance and policymaking.[24] After Boric won Chile's Presidential election in December 2021, he attempted to translate his campaign platform of increasing indigenous people's equality into action by drafting a new Chilean Constitution.[25] President Boric's

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[17] *Id.*
[18] SANTANDER TRADE, *supra* note 7.
[19] *Chile aims to tighten oversight of water utilities*, BNAMERICAS (Oct. 14, 2022), https://www.bnamericas.com/en/news/chile-aims-to-tighten-oversight-of-water-utilities.
[20] Gacitúa-Marió, *supra* note 16.
[21] *Id.*; *see* Stefan Ellerbeck, *Lithium: Here's why Latin America is key to the global energy transition,* WORLD ECONOMIC FORUM (Jan. 10, 2023), https://www.weforum.org/agenda/2023/01/lithium-latin-america-energy-transition/.
[22] Lisa Hilbink, *Constitutional Rewrite in Chile: Moving toward a Social and Democratic Rule of Law?*, 13 HAGUE J. RULE L. 113, 233 (2021).
[23] *Id.*
[24] *Id.* at 226; *see* Katie Surma*, Environmentalists in Chile Are Hoping to Replace the Country's Pinochet-Era Legal Framework with an 'Ecological Constitution,'* INSIDE CLIMATE NEWS (Apr. 3, 2022), https://insideclimatenews.org/news/03042022/chile-ecological-constitution/.
[25] *See* Matthew Malinowski & Valentina Fuentes, *Leftist Millennial Elected President in Chile After Running on Higher Taxes, a Green Economy and Greater*

vision of increased equality and yearning to restore a semblance of indigenous rights was highly polarized and met with pushback from staunch supporters of continued direct foreign investment in the mining sector.[26] In February 2022, Chile's Constitutional Convention approved a clause requiring the Chilean state to get consent from indigenous groups to proceed with any project that may affect their rights.[27] This clause would allow indigenous groups to veto pending projects in the mining sector.[28] The general construction of the proposal would expand the powers and participation of indigenous communities to define what and how specific mining projects affect their rights. Conversely, this clause would also hinder the interests of mining investors if Chileans approved the new constitution under President Boric.[29]

In September 2022, Chileans overwhelmingly rejected President Boric's draft Magna Carta to keep the current constitution written and enacted under the dictatorship of General Augusto Pinochet.[30] Chilean scholars argue that President Boric's attempts to establish autonomous indigenous territories were a crucial factor that resulted in the rejection of his proposed constitution because its passage would have weakened the rights and protections of foreign investors in one of the country's key sectors: lithium mining.[31] Although rejecting a new constitution under Boric proved to be a win for foreign

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Equality, TIME (Dec. 20, 2021), https://time.com/6130126/gabriel-boric-elected-chile-president/; Hilbink, *supra* note 22, at 230–231.

[26] *See* Stephen Wicary & Eduardo Thomson, *Chile Argues It Can Bring Change Without Scaring Investors*, BLOOMBERG (June 6, 2022), https://www.bloomberg.com/news/articles/2022-06-07/chile-can-bring-change-without-scaring-investors-economy-minister-says.

[27] *See* Valentina Fuentes, *Indigenous Veto Over Investments Trigger Alarm Bells in Chile*, BLOOMBERG (Feb. 23, 2022), https://www.bloomberg.com/news/articles/2022-02-23/indigenous-veto-over-investments-triggers-alarm-bells-in-chile#xj4y7vzkg.

[28] Cecilia Jamasmie, *Chile's New Constitution may let Indigenous Groups Veto Projects*, MINING.COM (Feb. 21, 2022), https://www.mining.com/chiles-new-constitution-may-let-indigenous-veto-projects/.

[29] *See id.*

[30] *See* John Otis, *Chileans Have Rejected a New, Progressive Constitution*, NPR (Sept. 5, 2022), https://www.npr.org/2022/09/04/1121065756/chile-constitution-referendum (highlighting that approximately 62% of voters rejected President Boric's progressive draft Magna Carta).

[31] *Id*.

direct investors in Chile's mining industry, the risk perception and juridical security of Chile's foreign direct investment regime have demonstrated its vulnerability to socio-political tensions.[32] Since the 2019 protests addressing Chile's gaping socio-economic inequalities, continued demands for changes to Chile's free-market policies have led to foreign investors pulling more than $50 billion from the country as of January 2023.[33]

In search of sustainability and innovation without hindering the interests of foreign investors, Chile has a monumental opportunity to shift its investment landscape by incorporating environmental, social, and governance ("ESG") practices and promoting impact investing.[34] The societal and economic value derived from Chile's promotion of sustainable investment and incentivizing it will likely improve prospects of foreign direct investment as companies globally seek to combat environmental destruction and the rise of corporate responsibility.[35]

This note examines the legal and conceptual framework of foreign direct investment in Chile and interrogates the impact of such investment on Chile's indigenous communities. Accordingly, Part II will introduce the history and long-standing implications of Chile's Pinochet-era dictatorship on indigenous rights and how it has empowered foreign investors to dominate the "white gold" rush to drain lithium from ancestral lands. Additionally, Part II will demonstrate how the Chilean State and foreign investors play an explicit and implicit role in diminishing Indigenous people's autonomy and land rights. Next, Part III will analyze the legal frameworks

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[32] Eduardo Thomson, *Rich Investors Pull Out of Chile, Leaving Behind a $50 Billion Hole*, BLOOMBERG (Jan. 19, 2023), https://www.bloomberg.com/news/articles/2023-01-19/investors-pull-50-billion-from-chile-amid-political-uncetainty.

[33] *Id.*

[34] *See* Bullard Et al., *Environmental, Social and Governance in Latin America—Will the M&A Market Continue to Expand?*, LATIN LAWYER (Dec. 2, 2022), https://latinlawyer.com/guide/the-guide-mergers-acquisitions/third-edition/article/environmental-social-and-governance-in-latin-america-will-the-ma-market-continue-expand; INVESTCHILE, *About Us*, https://investchile.gob.cl/aboutus/#:~:text=We%20are%20the%20government%20agency,in%20line%20with%20the%20country's (last visited Nov. 14, 2023).

[35] Niranjan Chipalkatti, Quan Vu Le & Meenakshi Rishi, *Sustainability and Society: Do Environmental, Social, and Governance Factors Matter for Foreign Direct Investment?*, MDPI (Sept. 23, 2021), https://www.mdpi.com/1996-1073/14/19/6039.

that expand and constrain foreign direct investment while also addressing proposals for how Chile may balance the concerns of indigenous communities—raised in President Boric's proposed constitution—without repelling investors in the lithium mining sector. Finally, Part IV will explore the solution of ESG investing and impact investing through Chile's public agency that promoted foreign investment.

II. BACKGROUND

A. Chile's Pinochet-era Dictatorship

Chile is known as one of the most conservative countries in Latin America.[36] The roots of Chile's conservatism, stemming from the dictatorship of General Augusto Pinochet, shaped its government's attitudes towards foreign direct investment and embracing a free-market approach.[37] Pinochet ruled from 1973 until 1990; during this time, he enacted Chile's Constitution, which remains today.[38] In 1979, the government under Pinochet declared lithium reserves under its control.[39] After this declaration, the government partnered with Foote Mineral, a United States company, to extract and sell minerals from Chilean land.[40] Upon enacting the 1980 Constitution, Pinochet's regime leveraged the Constitution to embed radical free-market models into the country's legal framework.[41] Ultimately, the 1980 Constitution limits the scope of majority decision-making by Chilean policymakers and presents an obstacle to reforms that

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[36] Jack Nicas, *Chile Votes on Constitution That Would Enshrine Record Number of Rights*, N.Y. TIMES (Sept. 3, 2022), https://www.nytimes.com/2022/09/03/world/americas/chile-constitution-vote.html.
[37] *See id*.
[38] *Id.*
[39] Peter Whoriskey & Todd Frankel, *Indigenous People are Left Poor as Tech World Takes Lithium from Under Their Feet*, WASHINGTON POST (Dec. 19, 2016), https://www.washingtonpost.com/graphics/business/batteries/tossed-aside-in-the-lithium-rush/#:~:text=white%20gold'%20rush-,Indigenous%20people%20are%20left%20poor%20as%20tech,lithium%20from%20under%20their%20feet&text=In%20the%20thin%20air%20of,people%20face%20a%20constant%20struggle.
[40] *Id*.
[41] Hilbink, *supra* note 22.

would strengthen the public sector and distribute wealth and power.[42]

Chile's economy has benefitted from immense economic expansion promulgated under Pinochet's rule because the nation pivoted towards open market policies favoring deregulation and privatization.[43] Despite Chile's notable shift to open market policies and its fiscal benefits, the implications of deregulation and privatization under Pinochet have fueled vast inequity that is demonstrated today as social unrest.[44] Environmentalists and progressives in Chile hold Chile's emphasis on free markets and lack of regulation to strengthen the country's export-oriented market responsible for the country's high inequality and environmental problems.[45]

Today, much of the lithium extracted is under the ancestral lands of the Atacama.[46] Since the 1980s, over 300,000 tons of lithium carbonate have been extracted.[47] In sum, Pinochet's legacy comprises the privatization of minerals like lithium and resources like water; by doing so, he gave companies ownership of resources on ancestral lands and within indigenous communities.[48] Accordingly, despite having ten different indigenous groups in Chile, Chile remains the only country in Latin America that does not recognize the indigenous peoples in its constitution.[49] Pinochet's leadership and 1980 constitutional ideals continue to substantively and procedurally limit policymakers' powers to address the effects of mining operations on indigenous communities and water resources.[50]

B. Post Pinochet and the "White Gold" Rush

Vast lithium reserves lie in Chile's desert.[51] Chile is part of the "lithium triangle," in which more than half of the world's lithium

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[42] *Id.*; *see* Surma, *supra* note 24.
[43] Thomson, *supra* note 32.
[44] *Id.*
[45] *See* Surma, *supra* note 24.
[46] *Id.*; *see* Whoriskey & Frankel, *supra* note 39.
[47] *Id*.
[48] *See id.*
[49] *Indigenous peoples in Chile*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, https://www.iwgia.org/en/chile.html (last visited Nov. 21, 2023).
[50] *See* Hilbink, *supra* note 22.
[51] John Otis, *In Chile's Desert Lie Vast Reserves of Lithium – Key for Electric Car Batteries*, NPR (Sept. 24, 2022), https://www.npr.org/2022/09/24/112356

reserves come from Argentina, Bolivia, and Chile.[52] Unlike Argentina and Bolivia, Chile has become an industry leader by leveraging lithium reserves into commercial production.[53] Additionally, Chile's geographical conditions and foreign direct investment regime provide an advantage for Chile and its contributions to the "white gold" rush.[54] As the second largest lithium producer worldwide, Chile supplies the critical component of lithium-ion batteries for electric cars, solar panels, and other green technologies.[55] The projected increasing demand for lithium in Chile will provide unprecedented commercial and financial growth to mining companies in Chile.[56] Simultaneously, indigenous communities face the looming environmental impact of continued lithium extraction.[57]

Demands for lithium are higher than ever as it is one of the commodities most expected to benefit from the electric vehicle and electric-battery boom. [58] Dubbed "white gold" by those in the mining industry, foreign direct investment in Chile's mining sector is developing quickly.[59] As technology advances, lithium is used by large-cap companies like Tesla and Apple.[60] For example, Tesla relies on lithium to power electric vehicles.[61] Lithium is a critical component for smart devices, power plants, and companies that wish to replace fossil fuels with clean energy resources.[62]

4599/chile-lithium-mining-atacama-desert.
[52] *Id.*
[53] Ellerbeck, *supra* note 21.
[54] *Id.*
[55] Nicole Greenfield, *Lithium Mining Is Leaving Chile's Indigenous Communities High and Dry (Literally)*, NDRC (Apr. 26, 2022), https://www.nrdc.org/stories/lithium-mining-leaving-chiles-indigenous-communities-high-and-dry-literally.
[56] *See* Otis, *supra* note 51.
[57] Greenfield, *supra* note 55.
[58] Otis, *supra* note 51 (declaring "The International Energy Agency is projecting a more than 40-fold increase in demand for lithium by 2040."); Cortés Leiss & Yeluri, *supra* note 1.
[59] *See* GlobalData Thematic Intel., *Lithium and Chile: White Gold and the El Dorado of the Twenty-First Century*, MINING TECHNOLOGY (Oct. 12, 2022), https://www.mining-technology.com/comment/lithium-chile-white-gold/.
[60] *See* Greenfield, *supra* note 55.
[61] *Id*.
[62] *Id*.

Most of Chile's lithium reserves are in the Atacama Salt Flats; the Atacama Desert's lithium reserves have contributed to Chile's spot as a leader in the white gold market and the world's battery economy.[63] Despite Chile's strength in the white gold market, lithium mining in Chile's desert and indigenous communities is depleting freshwater supplies that are already scarce.[64] In addition to the depletion of fresh groundwater, water contamination of the remaining water is a possibility for those residing in the Atacama.[65] Extracting lithium will continue to be essential for transitioning from fossil fuels to renewable energy but comes at grave environmental and social costs for indigenous communities in Chile.[66]

Indigenous communities rely on water supplies like those used for lithium production from the salt flats in the Atacama.[67] Many indigenous communities, including the Atacama, suffer from a water crisis that lithium mining is continually exacerbating.[68] Moreover, indigenous communities are being drained of the resources on their land because of Pinochet's privatization of minerals.[69] The Chilean Water Code, created in 1981 under the Pinochet dictatorship, continues to dilute the government's participation in planning and regulating to protect human consumption; the 1981 Code permits private companies to collect water for their use as it grants water rights to private companies in perpetuity.[70] To worsen matters, lithium mining in Chile is exacerbating the issue of obtaining clean water for rural and indigenous communities.[71] To mine lithium from lithium reserves, miners must extract large amounts of groundwater, which is then brined and placed in an evaporation pool.[72] After a

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[63] *See id.*
[64] *Id.*
[65] GlobalData Thematic Intel., *supra* note 59.
[66] Thea Riofrancos, *The Rush to 'Go Electric' Comes with a Hidden Cost: Destructive Lithium Mining*, THE GUARDIAN (June 14, 2021), https://www.theguardian.com/commentisfree/2021/jun/14/electric-cost-lithium-mining-decarbona sation-salt-flats-chile.
[67] Ellerbeck, *supra* note 21.
[68] *Id*.
[69] Greenfield, *supra* note 55.
[70] Surma, *supra* note 24; *The Chilean Water Code: A Dictatorial Legacy*, CHILE TODAY (Feb. 8, 2020), https://chiletoday.cl/the-chilean-water-code-a-dictatorial-legacy/.
[71] *See* Surma, *supra* note 24.
[72] Otis, *supra* note 51.

year in the evaporation pool, a lithium solution is created, turned into white lithium power, and then exported for use in batteries.[73] By extracting groundwater for lithium production, the Atacama Desert will become hotter and drier.[74] Approximately 500,000 gallons of water are required to extract one ton of lithium.[75] Indigenous people and communities are not meaningfully advantaged by foreign investors targeting their lithium-rich lands for mining.

C. *Chile's Economy and Foreign Direct Investment*

According to the Central Bank of Chile, foreign direct investment is defined as:

> "The Balance of Payments (BP) and International Investment Position (PII) category, which records the investments of a resident entity of an economy (direct investor), in another economy or country, for the purpose of significantly influenc[ing] or control[ling] the management of [the] investment, which implies a long-term relationship . . . FDI ["foreign direct investment"] transactions, which include: capital contributions, reinvestment of profits, debt, as well as the income generated by these investments . . . ."[76]

The importance of foreign direct investments in Chile and the country's mining sector proves successful despite Chile's relatively small domestic market.[77] Foreign direct investments can revitalize and sustain emerging economies and promote economic growth.[78] These investments also promote improvements in national

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[73] *Id.*
[74] *Id.*
[75] GlobalData Thematic Intel., *supra* note 59.
[76] *Foreign Direct Investment (FDI)*, BANCO CENTRAL CHILE, https://www.bcentral.cl/en/web/banco-central/areas/statistics/foreign-direct-investment#:~:text=Foreign%20Direct%20Investment%20is%20the,the%20management%20of%20your%20investment%2C (last visited Nov. 23, 2023).
[77] *Chile-Investment Climate Statement*, INT'L TRADE ADMIN. (Oct. 1, 2022), https://www.trade.gov/country-commercial-guides/chile-investment-climate-statement.
[78] U.S. NEWS, *supra* note 13.

infrastructure and create new jobs which result in a higher income per capita and household savings.[79]

For foreign direct investment, institutions in host countries, such as Chile, play a key role in influencing and incentivizing cross-border capital flows.[80] A country's investment ecosystem is primarily shaped by several socioeconomic and political traits in the host country, like financial liberalization and privatization policies.[81] Further, institutions are pivotal to the production and transaction costs when assessing the benefits and risks of foreign direct investment.[82] The importance of institutional quality becomes increasingly crucial when foreign direct investments and business operating conditions are not insulted by socio-political pressures for human rights and battles over vested interests in resources, which can lead to increased operating costs for foreign investors.[83] However, the uneven distribution of foreign direct investment benefits—in communities and critical industries—can lead to natural resource exploitation and environmental degradation if ethical and legal standards for foreign investments are subject to little oversight.[84]

D. *The Efficacy of Litigation*

In response to the collective social unrest voiced by Chilean constituents in 2019, investors are concerned about future government policies regarding property rights, the rule of law, and the tax structure.[85] The U.S. Department of State's 2022 Investment Climate Statement addresses Chile's ongoing unpredictable risk evaluations for foreign investors because of new environmental permitting processes, indigenous consultation requirements for new projects, and court proceedings regarding socio-political sensitivities.[86] Despite

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[79] Scott Blackmer, *How do FDIs Affect Economic Growth?*, LEXOLOGY (Mar. 1, 2021), https://www.lexology.com/library/detail.aspx?g=fdb0c67f-1f1b-4d84-b49f-8b7370ce25ad.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Chile-Investment Climate Statement*, *supra* note 77.

[86] *Id.* ("Although Chile is an attractive destination for foreign investment, challenges remain. Legislative and constitutional reforms proposed in response to the social unrest . . . .Environmental permitting processes, indigenous consultation

this acknowledgment, the U.S. Department of State recognizes Chile's current administration's willingness to continue to attract foreign direct investment.[87]

Chile's measures to motivate and retain foreign direct investment have granted foreign investors the same rights and conditions as local investors.[88] Since foreign direct investment in Chile has continued potential for increased profitability, foreign investment in the mining sector, specifically lithium reserves in indigenous communities, has disrupted local industries and created a stark disparity in income and resource access.[89] In 1979, lithium was declared of national interest in Chile.[90] This declaration became the center of litigation when Chile's Ministry of Mining published a call to increase the country's lithium production in October 2021.[91] Through this call, the Ministry of Mining sought to facilitate the entry of national and foreign companies into the lithium market, justifying this publication as enabling the energy transition and the fight against global warming through renewable energy.[92] Specifically, the call promoted the exploration, exploitation, and further commercialization of 400,000 tons of metallic lithium.[93]

In January 2022, in *Regional Government of Atacama v. Ministry of Mining*, the regional government of Atacama filed a claim against the Ministry of Mining for carrying out the bidding process of the lithium production application without public participation and assessments of the call's environmental impact in the Atacama region.[94] In its claim, the regional government of Atacama highlights the project's threat to the Atacama Salt Flats' biodiversity,

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requirements, and cumbersome court proceedings have made large project approvals increasingly time-consuming and unpredictable, especially in cases with political sensitivities. The current administration has stated its willingness to continue attracting foreign investment.").

[87] *Id.*

[88] *Chile: Foreign Investment*, *supra* note 7.

[89] U.S. NEWS, *supra* note 13.

[90] *Regional Government of Atacama v. Ministry of Mining and Other*, SABIN CENTER FOR CLIMATE CHANGE L. https://climate-laws.org/geographies/chile/litigation_cases/regional-government-of-atacama-v-ministry-of-mining-and-other (last visited Jan. 17, 2023).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

water availability, and wetlands.[95] The regional government of Atacama requests that the court either deem contracts for bids as null and void or consult with the government in a new bidding process.[96] Ultimately, the Court of Appeals of Copiapo granted the regional government's preliminary request to suspend the contracts while the writ of protection was pending.[97] This case demonstrated the efficacy of litigation by the Atacama to become a pivotal actor in the lithium mining industry while granting the community permission to participate in the socio-environmental outcomes of investments in the region's mining sector.[98] However, the Court of Appeals ruling also represents the susceptibility of the foreign direct investment in Chile's lithium reserves to social unrest and inequalities plaguing indigenous communities in the Atacama.[99]

III. ANALYSIS

A. The Legal Framework of Chile's Foreign Investment Regime

Chile is a civil law country.[100] Like many other civil law systems, Chile has three branches of government: the executive, legislative, and judicial.[101] Chile's civil law system is predominantly based on the Civil Code of 1855 and the Commercial Code of 1867.[102] In addition to the capital incentives and growth prospects for foreign investors, socio-political factors have played a role in Chile's favorable ecosystem for foreign investors.[103] Constitutional, legal, and international provisions shape Chile's foreign investment

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[95] *Id.*
[96] SABIN CENTER FOR CLIMATE CHANGE L., *supra* note 90.
[97] *Id.*
[98] *See id.*
[99] *See id.*
[100] *Chile: Overview of Court System,* DLA PIPER, https://www.dlapiperintelligence.com/litigation/insight/index.html?t=01-overview-of-court-system&c=CL (Jan. 14, 2020).
[101] Amber Pariona, *What Type Of Government Does Chile Have?*, WORLDATLAS (Apr. 1, 2019), https://www.worldatlas.com/articles/what-type-of-government-does-chile-have.html.
[102] JUAN TAGLE QUIROZ ET AL., INVESTING IN CHILE (2020), w-017-6214.
[103] Trillos, *supra* note 9, at 31.

regime.[104] In particular, the Foreign Investment Statute and Chapter XIV of the Central Bank's Compendium for Foreign Exchange Regulations govern foreign direct investments in Chile's mining sector.[105]

1. The Constitution

Chile's main body of law governing foreign investment is the Political Constitution of Chile of 1980.[106] Article 19 of the 1980 Constitution guarantees rights to "all persons," which includes foreign investors and provides them Constitutional rights when regulating foreign investment in Chile.[107] Article 1 of the Constitution recognizes intermediate bodies guaranteeing autonomy to business organizations; this grant of autonomy is significant because foreign investment is typically made through a legal entity or foreign enterprise and allows the Chilean state to regulate or deregulate the rights and duties of foreign investors.[108]

The Constitution affords "all persons" to enjoy national treatment when conducting economic activities.[109] The Constitution also establishes total, exclusive, inalienable, and everlasting ownership of the State over mines.[110] Mining for lithium can only be executed by the State, a State-owned enterprise, administrative concessions, or special operation contracts.[111] Chile's constitutional principles of non-discrimination against foreign investors are apparent in Article

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[104] Polanco Lazo, *supra* note 6.
[105] *Why You Should Be Interested in Chile's Mining Industry*, BIZLATIN HUB (Sept 16, 2022), https://www.bizlatinhub.com/snapshot-chile-mining-industry/.
[106] TAGLE QUIROZ et al., *supra* note 102; *see generally* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] (Chile), *translated in* Swett, *Chile 1980 (rev. 2021)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Chile_2021#s1 (last visited Dec. 1, 2023).
[107] Lazo, *supra* note 6; *see also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.], art. 19 (Chile), *translated in* Swett, *Chile 1980 (rev. 2021)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Chile_2021#s1 (last visited Dec. 1, 2023).
[108] Lazo, *supra* note 6, at 215; *see also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.], art. 1 (Chile), *translated in* Swett, *Chile 1980 (rev. 2021)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Chile_2021#s1 (last visited Dec. 1, 2023).
[109] Lazo, *supra* note 6, at 205.
[110] *Id.* at 207.
[111] *Id.*

19 because it declares that the tax burden must be distributed equally among locals and foreign investors, and there may be no arbitrary discrimination by the state in economic matters.[112]

The hierarchy of the law, falling under the purview of the Constitution, can be categorized as follows: (1) laws interpreting the Constitution; (2) Constitutional organic laws; (3) qualified quorum laws; (4) regular laws dealing with matters not governed by the first three categories; and (5) ministerial regulations.[113] For instance, Chile's constitutional framework permits foreign companies and investors to enter contracts with the government to extract resources.[114] Under Law 18,097, a Constitutional Organic Law regarding mining concessions, lithium can be exploited only by the State, directly or indirectly, by civilians or non-governmental organizations in two cases: (1) when the mining concession where the lithium was located was granted before 1979 or (2) when an administrative concession or a special operation contract is granted through the Ministry of Mining.[115]

Since the 2019 protests and civil unrest in Chile, Chile's Constitutional assembly reviewed proposals that, if enacted, could impact the mining operations of foreign investors.[116] Although voters rejected President Boric's proposed constitution, there remains looming uncertainty about the outcome of the redrafting process on foreign direct investment.[117] Due to the socio-political climate and proclamations for a new constitution, President Boric's tenure will

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[112] TAGLE QUIROZ ET AL., *supra* note 102; *see also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] (Chile), *translated in* Swett, *Chile 1980 (rev. 2021)*, CONSTITUTE PROJECT, https://www.constituteproject.org/Constitution/Chile_2021#s1 (last visited Dec. 1, 2023).

[113] TAGLE QUIROZ ET AL., *supra* note 102.

[114] *2019 Investment Climate Statements: Chile,* U.S. DEP'T OF STATE, https://www.state.gov/reports/2019-investment-climate-statements/chile/ (last visited Nov. 21, 2023).

[115] Daniel Weinstein, *Chile: Regulation Of Lithium In Chile and Opportunities For Investors*, MONDAQ (Nov. 17, 2023), https://www.mondaq.com/mining/1271660/regulation-of-lithium-in-chile-and-opportunities-for-investors.

[116] *2022 Investment Climate Statements: Chile,* U.S. DEP'T OF STATE, https://www.state.gov/reports/2022-investment-climate-statements/chile/ (last visited Nov. 21, 2023).

[117] *See id.*

likely continue to address the government's role in the economy and perceived systemic inequality.[118]

2. Chile's Tax Framework

Chile's tax laws often fall within the constraints of ministerial regulations.[119] For example, Chile's tax laws often refer to regulations of the Internal Revenue Service.[120] The current tax structure benefits and invites foreign investors through its moderate corporate tax and guaranteed access to free remittance of capital and profits.[121] When directly investing in Chile's mining sector, foreign investors are not required to have a local partner to create a business or form joint stock companies.[122] Under Chile's Foreign Investment Statute, a guaranteed tax income rate of up to 42% may be granted for ten or twenty years when an investment project exceeds 50 million USD.[123]

Foreign direct investments in Chile's mining center are subject to two stages of taxation: (1) declared profits are taxed at a rate of 20%, and (2) a 35% tax is imposed on dividends distributed to non-Chilean resident shareholders.[124] In addition to the two-stage tax structure on mining, a specific progressive rate tax on mining activities must be paid to the government.[125] In addition to the U.S.-Chile Free Trade Agreement ("FTA"), both countries signed a tax treaty permitting exemption and reduction of withholding taxes in 2010.[126] Additionally, the U.S.-Chile Treaty avoids double taxation, yet it is still pending ratification by the U.S. Senate.[127]

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118 *Id.*
119 TAGLE QUIROZ ET AL., *supra* note 102.
120 *Id.*
121 SANTANDER TRADE, *supra* note 7.
122 *Id.*
123 *Id.*
124 BIZLATIN HUB, *supra* note 105.
125 *Id.*
126 *See* Hugo Hurtado, *The U.S. and Chile Tax Treaty and Its Impact on Foreign Direct Investment*, 13 FLA.
TAX REV. 41, 44-45 (2012).
127 U.S. DEP'T OF STATE, *supra* note 114; *Tax treaty update: Senate Foreign Relations Committee approves income tax treaty with Chile*, KPMG (Mar. 29, 2022), https://assets.kpmg.com/content/dam/kpmg/us/pdf/2022/03/22097.pdf (The U.S.-Chile income tax treaty was signed by the U.S. Senate in February 2010. Since February 2020, it has been pending ratification; as of March 2022, the U.S.

In 2020, Chile passed a tax reform bill coined the "Modernisation Tax Bill."[128] This bill included substantial changes to the Chilean international tax rules and was intended to improve tax efficiency.[129] Changes to Chile's tax regime necessitated government attention in October 2019 when social demands and protests for more significant equity among the Chilean people shed light on how policymakers could alter the Chilean economic and socio-political climate.[130] In this new "modernized" tax regime, domestic and foreign taxpayers might be compelled to adapt their business structures and decisions.[131]

The 2020 changes to Chile's tax framework affect foreign direct investment because the total income tax burden for foreign investors not domiciled or resident in treaty countries is 44.45%.[132] However, foreign investors resident in treaty countries, like the United States and Chile, remain subject to the 35% income tax burden.[133] Additionally, tax rebates will no longer be available as of 2024.[134] To make economic growth more inclusive and equitable across Chile, raising tax revenues through tax reform may add progressivity to Chile's tax framework and allow increased social spending.[135] Yet, this positive step towards addressing societal concerns of economic inequities, tax reform, and raising revenues will likely disrupt the security and raise Chile's risk tolerance for investors in all sectors, including Chile's lithium mining industry.[136]

Senate Foreign Relations Committee approved the U.S.-Chile tax treaty, but there is no scheduled date for when the Senate would consider it.).

[128] *Chilean 2020 tax reform: Modernising the tax system*, INTERNATIONAL TAX REVIEW (Apr. 23, 2020), https://www.internationaltaxreview.com/article/2a6a5pzvrtxgqp8nw660w/chilean-2020-tax-reform-modernising-the-tax-system; *Chile – Individual – Significant developments*, PWC (June 13, 2023), https://taxsummaries.pwc.com/chile/individual/significant-developments.

[129] *Id.*

[130] *See id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] PWC, *supra* note 128.

[135] *Chile: Improving Opportunities for All is Key to a More Inclusive and Productive Economy*, OECD (Nov. 25, 2015), https://web-archive.oecd.org/2015-11-25/379269-chile-improving-opportunities-for-all-is-key-to-a-more-inclusive-and-productive-economy.htm.

[136] *See id.*

3. Legislation

Laws governing the interests of foreign investors are found in several statutes, including but not limited to Chile's Commercial Code of 1868, the Código Civil de la República de Chile ("Civil Code"), and the Decree with Force of Law No. 3 by General de Bancos ("General Banking Act").[137] Furthermore, two central bodies of law regulate foreign investment in Chile: Chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile ("Chapter XIV") and the New Foreign Investment Law No. 20,848 ("NFIL").[138]

a. The Commercial Code of 1868 and The Civil Code

The Commercial Code of 1868 and the Civil Code apply to contracts for the sale of goods in Chile.[139] The Chilean Civil Code went into effect in 1857.[140] The subject of sales in Chilean law is treated principally by the Civil Code, with consideration given to the Commercial Code.[141] The Civil Code defines a sale as " . . . .a contract whereby one person becomes the obligated to deliver something, and the other pay money for it. The first is called the seller, and the second is the buyer. The sum of money which the buyer gives for the thing bought is called the price."[142] This definition of a sale is relevant to lithium mining contracts entered into with the Chilean government, and lithium is declared a national interest.[143] For foreign investors, Chile's civil code represents a hinge on the open door to foreign investment because of its non-discriminatory approach to foreigners.[144] Article 57 of the Civil Code asserts that the law does

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137 U.S. DEP'T OF STATE, *supra* note 116.

138 *Chile FDI Control*, LEXISNEXIS (Oct. 20, 2022), https://www.lexisnexis.co.uk/legal/guidance/chile-fdi-control#:~:text=There%20are%20two%20main%20rules.

139 IGNACIO GARCÍA & PORZIO RÍOS GARCÍA, SALE AND STORAGE OF GOODS IN CHILE: OVERVIEW (Mar. 1, 2020), w-016-8289.

140 *See* Charles P. Sherman, *Salient Features of the Chilean Law of Sale*, 67 UNIV. PA. L. REV 75, 75-76 (1919).

141 *Id.*

142 *Id.*

143 *See* Cód. Civ. art. 57.

144 SANTANDER TRADE, *supra* note 7.

not recognize any difference in the civil rights protections between locals and foreigners.[145]

b. General Banking Act

Article 1 of the Constitution established the text of the Constitutional Organic Law of the Central Bank of Chile.[146] Chile's banking system is based on the General Banking Act of 1997.[147] The Central Bank of Chile oversees the external and internal payments made in Chile's capital and financial markets.[148] The Central Bank acts as an autonomous body that regulates and enacts regulations about the functioning of banking and financial institutions.[149] Article 69 of the General Banking Act establishes the activities banks can engage in, such as lending, deposit taking, issuing bonds, entering into derivative transactions, and trading foreign exchange.[150] Further, Article 70 of the General Banking Act authorizes banks to incorporate subsidiaries to manage investment funds and foreign capital investment funds.[151]

c. Chapter XIV

Through the powers granted from Article 39, Organic Law 18,840, Central Bank of Chile, any person—whether a resident or non-resident of Chile—can freely execute foreign exchange transactions.[152] Yet, the Central Bank imposes requirements and limitations on such foreign transactions.[153] Chapter XIV outlines the primary requirements for foreign investors, which include reporting transactions, how to do so, and specifying where foreign exchange transactions must occur.[154] Specifically, Chapter XIV functions as a mechanism to attract and retain foreign investment by ensuring profits generated by capital investments may be repatriated at any time

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145 Cód. Civ. art. 57.
146 *See* CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE CHILE [C.P.].
147 FELIPE MORO & DIEGO LASAGNA, BANKING REGULATION IN CHILE: OVERVIEW (Oct. 1, 2022), w-007-9128.
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id*.
153 TAGLE QUIROZ ET AL., *supra* note 102.
154 *See id.*

and limiting foreign investor access to the Formal Exchange Market to buy currency necessary from abroad, except for investments on loans made under Decree Law No. 600.[155]

In 1974, Chile enacted Decree-Law No. 600 (DL 600) to promote foreign investment to liberalize and open Chile's economy.[156] The Pinochet government passed DL 600, providing undeniable lucrative guarantees to foreign capital and investors.[157] DL 600 contained four key features to incentivize foreign investment: (1) a non-discrimination policy against foreign investors; (2) simple registration procedures; (3) a guarantee of repatriation of capital and profits; and (4) fixed tax schemes.[158] The first key feature of DL 600 stems from Article 9 of the Constitution, which provides foreign investors equal treatment as Chilean investors, and their investments are governed by the same legal regime applied to local investors.[159] Under Article 3 of DL 600, registration of foreign investors entailed filling out a standardized form and permitting investments of less than 5 million USD to be put on a "fast track" program for approval.[160] Pursuant to Article 4 of DL 600, foreign investors were permitted to withdraw capital investments and annual profits to generate a hospitable atmosphere for foreign investors.[161] Finally, DL 600 established a fixed tax rate of 42% for 10 years for those investments to which DL 600 applies.[162]

d. <u>New Foreign Investment Law</u>

In 2015, Chile's lawmakers altered Chile's legal framework for foreign investors by superseding DL 600 with the New Foreign Investment Law ("NFIL"), Law 20,848.[163] Under the NFIL, any

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155 *Id.*
156 Trillos, *supra* note 9.
157 Owen Schalk, *What Will Gabriel Boric Mean for Canadian Mining in Chile?*, ALBORADA (Feb. 3, 2022), https://alborada.net/canada-chile-oric-trudeau-mining-extraction-capitalism/.
158 Trillos, *supra* note 9.
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 Graciela Rodriguez-Ferrand, *Chile: New Foreign Investment Regime*, LIBRARY OF CONG. (Dec. 1, 2015), https://www.loc.gov/item/global-legal-monitor/2015-12-01/chile-new-foreign-investment-regime/.

contracts between foreign investors and the Government executed before 2015 will be governed by the NFIL.[164] Article 3 of the NFIL defines a foreign investor as "an individual or legal entity incorporated abroad, neither resident nor domiciled in Chile, which transfers capital to Chile in compliance with the requirements of NFIL."[165] The NFIL establishes the following rights of foreign investors: (1) to send abroad capital and earnings with no time limitation after applicable Chilean taxes are paid; (2) to purchase currency in the formal foreign exchange market to send investment-related funds; (3) to be exempted from payment of value-added tax on imports of capital goods; and (4) to be governed by the same legal framework applicable to direct investors.[166]

Under the NFIL, foreign investors and entities may request an exemption from value-added tax on importing capital goods for developing, exploring, and exploiting mining in Chile.[167] To qualify for the exemption from the value-added tax on the import of capital goods, the investment at issue must be for an amount of at least 5 million USD.[168] To further attract foreign investors, the exemption from value tax could increase lithium mining operations' efficiency and costs.[169]

e. <u>The Mining Law</u>

The Pinochet government passed the Constitutional Organic Law of Mining Concessions ("The Mining Law") in 1980.[170] Pinochet's Mining Law has provided mining companies with some of the lowest tax rates in the world.[171] In addition to low mining tax rates, the Mining Law is often leveraged through the lens of Pinochet's 1979 Labour Plan, which outlawed unionization for Chile's employment sector and collapsed wages, which provided foreign

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[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *See New Foreign Investment Regime, Law 20.848*, INVESTCHILE, https://investchile.gob.cl/wp-content/uploads/2017/03/NEW-FOREIGN-INVESTMENT-REGIME.pdf (last visited Nov. 13, 2023).
[168] *Id.*
[169] *Id.*
[170] Schalk, *supra* note 157.
[171] *Id.*

investors with options for cheap manual labor.[172] In conjunction with the Labour Plan, the Mining Law has also benefited foreign investors with the 1981 Water Code, where most mining companies privatized water in the Atacama.[173] Since 1980, mining companies have claimed rights to water supplies that exceed industrial requirements, resulting in a hefty profit for these entities.[174]

f. The Indigenous Law

The demand of Chile's indigenous peoples for a new constitution was an expression of their desire to have full participation and control over the institutional and commercial decisions affecting them.[175] The primary law governing Chile's indigenous people was enacted in 1993.[176] Ley Indigena ("Law 19,253") represents a public and national acknowledgment of Chile's legal system's accountability to indigenous people.[177] The passage of Law 19,253 led to the ratification of Convention of 169 ("ILO 169").[178] Law 19,253 does not grant or expand the rights of indigenous people in Chile.[179] In fact, the law focuses on indigenous developments.[180] Law 19,253 defines indigenous development areas as "delimited geographical areas inhabited by indigenous peoples" and has established the San Pedro de Atacama as one of the areas.[181]

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[172] *Id.*
[173] *Id.*
[174] *Id.* ("Since the passing of [the Mining] [L]aw, mining companies have been able to claim the rights to water supplies that far exceed their industrial requirements and sell the surplus for a profit. For instance, when the Canadian-owned Placer Dome was critici[z]ed for acquiring 1200 lit[er]s of (totally free) water per second for a project that only required 400 lit[er]s per second, the company stated, 'Water is a legitimate business, just like any other.'").
[175] *See* Gacitúa-Marió, *supra* note 16 at 235.
[176] *Law 19.253*, INDIGENOUS JUSTICE, https://justiciaindigena.wordpress.com/law-19-253/ (last visited Nov. 25, 2023).
[177] *Id.*
[178] *Id.*; *Effect of the Convention*, INDIGENOUS JUSTICE, https://justiciaindigena.wordpress.com/effect-of-the-convention/ (last visited Nov. 22, 2023) (explaining that upon ratification, the Convention became law with binding force in Chile and imposes duties upon the Chilean government).
[179] INDIGENOUS JUSTICE, *supra* note 176.
[180] *Id.*
[181] Gacitúa-Marió, *supra* note 16, at 226.

Law 19,253 does not provide constitutional recognition or protections for indigenous people as a distinct group with special rights.[182] Similarly, ILO 169 was not ratified.[183] The passage of Law 19,253 and the lack of constitutional acknowledgment and visibility for indigenous people in Chile has only been exacerbated by water and mining regulatory frameworks.[184] Issues pertaining to water, land, and mining rights requisites arguably further suppress indigenous representation and consideration of issues that directly impact indigenous communities and their land.[185] Law 19,253 provides an innovative way to ensure indigenous participation in the socio-political and economic process through the indigenous development areas.[186] However, Law 19,253 does not offer or suggest any direct mechanisms for the expression and advocacy of indigenous groups at the local, regional, or legislative levels.[187]

4. International Agreements

Chile has signed more FTAs than any other country.[188] International agreements that apply to foreign direct investment in Chile include FTAs, double taxation avoidance agreements, economic association agreements, economic complementation agreements, and partial scope agreements.[189] Furthermore, the international agreements relevant to foreign investors or entities from the United States and Canada are subject to FTA and double taxation avoidance agreements.[190] It is imperative for global investors to understand Chile's international investment agreement program ("IIA") before investing in Chile.[191] It is critical for investors to examine and apply the

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[182] *Id.* at 237.
[183] *Id.* at 221.
[184] *Id.* at 233.
[185] *Id.*
[186] *Id.*
[187] Gacitúa-Marió, *supra* note 16.
[188] *Why Chile*, INVESTCHILE, https://investchile.gob.cl/why-chile/alatinamericanhub/ (last visited Nov. 12, 2023).
[189] TAGLE QUIROZ ET AL., *supra* note 102.
[190] *Id.*
[191] Charles ('Chip') B. Rosenberg & Eduardo Bruera, *An Overview of Chile's International Investment Agreement Program*, WOLTERS KLUWER (July 8, 2019), https://arbitrationblog.kluwerarbitration.com/2019/07/08/an-overview-of-chiles-international-investment-agreement-program/.

language and specificities in the applicable FTA to interpret the investor's or entity's rights, obligations, and duties.[192]

a. The United States and Chile

Through FTAs, foreign companies and investors have benefitted from privileged access to Chile's regional markets and resources.[193] Signed in 2004, the U.S.-Chile FTA is a comprehensive agreement modeled after the North American Free Trade Agreement ("NAFTA").[194] As of January 2004, Chile executed and enforced the investment chapter in the U.S. and Chile bilateral FTA.[195]

The U.S.-Chile FTA promotes investment and trade between both countries and eliminates barriers posed by inter-American tariffs.[196] In addition to handling trade between the U.S. and Chile, the FTA contains guidelines for treating investors and procedures for settling disputes.[197] Articles 10.2 and 10.3 of the U.S.-Chile FTA also ensure investors will be reasonably compensated should their investments be expropriated.[198] The U.S.-Chile FTA provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including the fair and equitable treatment" and specifies that "[f]or greater certainty . . . the customary international law minimum standard of treatment of aliens . . . to be afforded to covered investments."[199] If parties between countries fail to resolve an investment dispute during negotiation, they must submit to binding arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID").[200]

The U.S.-Chile FTA faced criticism because the agreement was interpreted as protecting the commercial interests of the United States and its entities at the sacrifice of Chile's public policy

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192 *Id.*
193 SANTANDER TRADE, *supra* note 7.
194 Andrew Hill, *Foreign Infrastructure Investment in Chile: The Success of Public-Private Partnerships through Concessions Contracts*, 32 NW. J. INT'L L. & BUS. 165, 183 (2011).
195 *See* U.S. DEP'T OF STATE, *supra* note 114.
196 Hill, *supra* note 194, at 183.
197 *Id.*
198 *Id.* at 184.
199 Rosenberg & Bruera, *supra* note 191.
200 Hill, *supra* note 194, at 184.

autonomy.[201] An accompanying concern of critics of the FTA was that indigenous people and communities were not consulted before the approval of the agreement by the Chilean Congress.[202]

b. Canada and Chile

Like the United States, Canada entered its first FTA in Latin America in 1997.[203] In 1997, Canada and Chile signed an FTA to protect Canadian investment; Canada primarily invested in key sectors, including mining.[204] The provisions in the Canada-Chile FTA predominantly addressed investments, with some clauses modeling the U.S.-Chile FTA.[205] From 1974 through 2006, Canadian corporations owned approximately 61% of Chile's twenty-three most significant mining projects.[206]

Latin America is the most prominent region for Canadian foreign direct investments in mining.[207] Canadians predominantly contributed to foreign investment in Chile's mining sector as it was the third largest single investor in the country, after the United States and Spain, from 1974 to 2003.[208] In February 2019, amendments to the Canada-Chile FTA were entered into force; these amendments directly addressed and updated key provisions in its investment chapter.[209] The 2019 updates included an amended provision dedicated to the commitment to endorse corporate social responsibility ("CSR") standards.[210]

c. Implications of FTAs on Indigenous Peoples

The opposition of indigenous people to FTAs in Latin America and Chile likely stems from their need for more participation and consultation during the negotiation and execution process.[211] In

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[201] José Aylwin, *Indigenous Peoples' Land and Resource Rights in Latin America*, LAND PORTAL (Feb. 28, 2016), https://landportal.org/fr/node/28389.
[202] *Id.*
[203] *Id.*
[204] Schalk, *supra* note 157.
[205] Aylwin, *supra* note 201.
[206] Schalk, *supra* note 157.
[207] Aylwin, *supra* note 201.
[208] Schalk, *supra* note 157.
[209] Rosenberg & Bruera, *supra* note 191.
[210] *Id.*
[211] Aylwin, *supra* note 201.

Chile, the fiscal benefits of foreign direct investment in mining, promoted by the U.S.-Chile and Canada-Chile FTAs, have negatively impacted the land and resources in indigenous communities.[212] Such agreements were ratified by different states without consulting or obtaining consent from indigenous people regarding extracting natural resources on their ancestral lands and territories.[213]

Permitted by Chile's FTA with the United States and Canada, foreign direct investments and lithium mining extraction pose a novel and increasingly urgent problem to indigenous communities because of the grave environmental implications such extraction has on the ancestral lands of indigenous communities.[214] The implications of Chilean lithium mining are an example of foreign direct investments impacting indigenous people for two reasons: (1) mining activity has grown and will continue to grow at high rates because of the rising demand for lithium, and (2) Chile's competitiveness because of its low labor costs, environmental, and tax framework.[215]

5. Chile's Regulatory Oversight

Chile's legal regime and institutional structures do not comprise a regulatory oversight body.[216] This leaves most of the regulatory oversight up to the national government, aside from matters related to land use which are considered local-level concerns.[217] According to the Organisation for Economic Co-operation and Development ("OECD") April 2016 "Regulatory Policy in Chile" report, Chile took measures to improve its rule-making process.[218] However, Chile still lags behind the OECD's average in assessing the impacts of regulations.[219] The World Bank's Global Indicators of Regulatory Governance project concluded that Chile had not improved its regulatory governance framework since 2017.[220] Nevertheless, Chile's

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[212] *See id.*
[213] *Id.*
[214] *See id.*
[215] *See id.*
[216] U.S. DEP'T OF STATE, *supra* note 114.
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] U.S. DEP'T OF STATE, *supra* note 116.

compliance rates are generally high because Chile takes a reactively punitive approach to violations.[221]

B. Balancing Foreign Direct Investment with Indigenous Participation and Rights

The Atacama Salt Flat is home to the indigenous Lickanantay, who deem water and brine sacred and an inextricable part of their territory.[222] The issue for all stakeholders in the Chilean economy is whether Chile, a country rich in lithium, can maintain its economic prominence without sacrificing social and environmental sustainability outcomes for all citizens.[223] Indigenous groups need to have a method of participation in shaping policy options for social, economic, and cultural integration and rights.[224] It is essential to incorporate indigenous perspectives and participation to develop innovative ways to ensure such indigenous communities benefit from lithium mining in their communities.[225]

Chile has two lithium operators: Albemarle and Sociedad Quimica y Minera de Chile ("SQM").[226] Both Albemarle and SQM monitor groundwater in the Salar de Atacama.[227] Albemarle is a U.S.-based mining firm, while SQM is Chilean.[228] Indigenous communities in the Atacama Salt Flat have observed the issue of lithium mining brine depletion, which is exacerbated by the absence of environmental and mining regulations; this depletion has significant implications for the availability of fresh groundwater.[229] In recent years, the rising demand for lithium and electric battery vehicles has resulted in Albemarle and SQM expanding their operations, with other foreign companies looking to establish new commercial operations

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[221] *See id.*
[222] Sophie Shemas, *Atacama, Chile*, EARTHWORKS (June 25, 2020), https://earthworks.org/blog/atacama-chile-lithium/.
[223] Surma, *supra* note 24.
[224] *See* Gacitúa-Marió, *supra* note 16, at 231.
[225] *See generally* Gal Luft et al., *Is Chile Losing Ground to Other Lithium Producers?*, THE DIALOGUE (Sept. 1, 2022), https://www.thedialogue.org/analysis/is-chile-losing-ground-to-other-lithium-producers/.
[226] Cortés Leiss & Yeluri, *supra* note 1.
[227] *See* Grace Livingstone, *The Farmers Who Worry About Our Phone Batteries*, BBC (Aug. 15, 2019), https://www.bbc.com/news/business-49207042.
[228] *Id.*
[229] Cortés Leiss & Yeluri, *supra* note 1.

in the Atacama salt flat.[230] Indigenous resistance to the continued depletion of water and lithium mining has been demonstrated in various tactics, from mobilization to litigation.[231]

1. Mobilization and Organization

Without constitutional recognition and the establishment of indigenous rights, the mobilization and organization of indigenous communities will continue to be a hotbed socio-political and economic issue.[232] As the green wave burdens the Atacama and exploits its lithium reserves, there is an urgent need for organizational development through Chile's institutions.[233] Defense mobilization to mining projects is more likely to face opposition when the projects threaten agrarian and indigenous communities where threats to water and land use are especially salient.[234] The pressures on Chile to lead the renewable energy transition based on lithium battery responses will undoubtedly be met with concerns and opposition to advocates for the intra-community water and climate crises.[235]

With institutional strengthening, indigenous representation will improve by opening opportunities for participation in Chile's political and economic arenas leading the world's renewable energy revolution.[236] Indigenous involvement in Chile's role in the green energy wave and global decarbonization would be improved if indigenous communities could participate in local government decisions such as the issue raised in the *Regional Government of Atacama v. The Ministry of Mining*.[237] Increases in indigenous mobilization and organization against lithium mining in the Salar de Atacama might be the best method to obtain global awareness of the plights of

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230 Shemas, *supra* note 222.
231 *See id.*
232 *See* Gacitúa-Marió, *supra* note 16, at 229.
233 *Id.*
234 Maria Akchurin, *Mining and Defensive Mobilization: Explaining Opposition to Extractive Industries in Chile*, 6 SOCIOLOGY OF DEVELOPMENT 1, 1 (2020), https://online.ucpress.edu/socdev/article-abstract/6/1/1/109355/Mining-and-Defensive-MobilizationExplaining?redirectedFrom=fulltext.
235 *See* Mauricio Lorca et al., *Mining indigenous territories: Consensus, tensions and ambivalences in the Salar de Atacama*, SCIENCE DIRECT (Mar. 11, 2022), https://www.sciencedirect.com/science/article/pii/S2214790X22000053.
236 Gacitúa-Marió, *supra* note 16, at 231.
237 *Id.*; *See* SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 90.

indigenous communities in Chile living on and near "white gold" mines.[238]

2. Indigenous Land Reform and Restitution

The Chilean legal framework grants the government authority to expropriate property, including the property of foreign investors, only on public interest or national interest grounds, on a non-discriminatory basis and in accordance with due process.[239] Arguably, the lithium mining that is consuming and contaminating the already scarce water in Chile's Atacama Salt Flats is of both public and national interest.[240] Land restitution has been proposed as ascertaining a resolution to indigenous conflicts with foreign companies and the Chilean government over land and water rights.[241] For Chile's government, indigenous land restitution poses many obstacles without sacrificing and disrupting the interests of foreign investors and entities.[242] Issues include defining the criteria of what land and how it will be restituted and the procedures for doing so, such as how compensation will be determined.[243]

From the proposed and rejected new constitution, indigenous issues and rights were at the forefront of socio-political and economic debates.[244] In 2022, President Boric planned to restore lands claimed by the Mapuche in Araucania.[245] President Boric also created and convened a commission to resolve conflict regarding land

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[238] *See* Lorca, *supra* note 235.
[239] *2021 Investment Climate Statements: Chile,* U.S. DEP'T OF STATE, https://www.state.gov/reports/2021-investment-climate-statements/chile (last visited Nov. 21, 2023).
[240] *See* Maeve Campbell, *In pictures: South America's 'lithium fields' Reveal the Dark Side of Our Electric Future*, EURO NEWS (Nov. 11, 2022), https://www.euronews.com/green/2022/02/01/south-america-s-lithium-fields-reveal-the-dark-side-of-our-electric-future#:~:text=In%20Chile's%20Atcama%20salt%20flats, 21%20million%20litres%20per%20day.
[241] Gacitúa-Marió, *supra* note 16, at 215.
[242] *Id.* at 232-33.
[243] *Id.*
[244] *See* Nick Burns, *Chile Could Become "Plurinational." What Does That Mean?*, AMERICAS QUARTERLY (Aug. 29, 2022), https://www.americasquarterly.org/article/chile-could-become-plurinational-what-does-that-mean/.
[245] *Chilean President: Plan to Restitute Lands Claimed by Mapuche*, TELESUR (Nov. 11, 2022), https://www.telesurenglish.net/news/Chilean-President-Plan-to-Restitute-Lands-Claimed-by-Mapuche-20221111-0019.html.

ownership in Chile's Araucania region.[246] The land historically demanded by the Mapuche is owned by private companies.[247] In an attempt to maintain a measure of neutrality regarding indigenous land restitution, President Boric warned that "[i]t will not be possible to return all land . . . ."[248] Promises of land restoration have yet to materialize but act as a semblance of hope for indigenous communities such as those impacted by lithium mining in the Atacama.

Conversely, in Chile's water rights market, indigenous communities will likely benefit from the regulated use of tradable water rights in the absence of full land restitution.[249] By allocating scarce water resources and encouraging trade, Chile can maximize the economic value of water and diminish the controversies around the practicality of further draining lithium reserves and its impact on indigenous communities.[250] However, this would mean ownership of the lands or mining would need to be given to indigenous communities, negatively impacting foreign direct investment in mining.[251]

3. Recognizing Chile as a "Plurinational" State

Proposals for land restitution and plurinationalism in Boric's rejected constitutional draft highlight the conflicts between balancing indigenous rights with commercial and extractive foreign direct investment interests in the backdrop.[252] In President Boric's rejected constitution, provisions to recognize Chile as a "plurinational" state were thwarted.[253] A "plurinational" state recognizes that a state is

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[246] *Chile President Creates Commission to Resolve Indigenous Land Issues*, FRANCE24 (Nov. 12, 2022), https://www.france24.com/en/live-news/20221112-chile-president-creates-commission-to-resolve-indigenous-land-issues.
[247] *Id.*
[248] *Id.*
[249] *See* Monica Rios Brehm & Jorge Quiroz, *The Market for Water Rights in Chile*, WORLD BANK (Aug. 12, 2013), https://elibrary.worldbank.org/doi/abs/10.1596/0-8213-3307-0.
[250] *See id.*
[251] *See id.*
[252] *See* Burns, *supra* note 244.
[253] *See* Patricia Garip & Juan Forero, *Voters in Chile Reject a Constitution Targeting Economy, Indigenous Rights*, WALL ST. J. (Sept. 4, 2022, 9:05 PM), https://www.wsj.com/articles/voters-in-chile-overwhelmingly-reject-a-draft-constitution-11662336970.

composed of various nations.[254] With roots in indigenous activist movements, plurinationalism can be interpreted through the organizational framework of policies and systems of rights for indigenous groups.[255]

Article 1 of Boric's proposed constitution would have declared Chile a country with multiple nations to be recognized within Chile's borders.[256] The Article would have also enshrined quotas for indigenous participation at all institutional levels, required indigenous consultation on projects and granted indigenous people autonomy over their territories and the natural resources within such territories.[257] However, since constituents overwhelmingly rejected the constitutional proposal, concerns for indigenous communities, natural land resources, and foreign investors in Chile's mining sector remain.[258]

Since indigenous communities will continue to be plagued with uncertainties about private commercial interests cashing in at the expense of their environments in the name of low-carbon tech and electric cars, an alternative solution may be to provide indigenous communities with a profit for extraction.[259] The Chilean government has signed over its mining concessions to SQM, and this deal predicts extraction to triple by 2030 to meet lithium production demands.[260] Without constitutional reform to land ownership rights of indigenous people or declaring Chile as a plurinational state, an environmental catastrophe in the Salar de Atacama due to lithium exploitation is likely to happen because of the country's privatization of water resources and water management.[261] Without regulations

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[254] Burns, *supra* note 244.
[255] *Id.*
[256] Ana Lankes, *The Contentious Vote in Chile That Could Transform Indigenous Rights*, N.Y. TIMES (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/world/americas/chile-constitution-vote-indigenous.html.
[257] *Id.*
[258] *See* Vanessa Buschlüter, *Chile Constitution: Voters Overwhelmingly Reject Radical Change*, BBC (Sept. 5, 2022), https://www.bbc.com/news/world-latin-america-62792025.
[259] *See* Sophia Boddenberg, *Chile's Lithium—Blessing or Curse?*, DW (May 11, 2018), https://www.dw.com/en
/chiles-lithium-blessing-or-curse/a-43721539.
[260] *Id.*
[261] *Id.*

monitoring the rising production quotas of lithium mining in the Salar de Atacama, changes to Chile's foreign investor tax regime would help restore indigenous communities' social and fiscal inequalities.[262] However, providing communities where lithium extraction is executed a fixed profit from tax revenues will not solve the environmental issues associated with boosts in lithium mining production in the Salar de Atacama.[263]

4. InvestChile and ESG Investing

In conjunction with altering the foreign investment landscape in Chile, NFIL created the Foreign Investment Promotion Agency ("InvestChile").[264] All foreign direct investments in Chile are subject to pro forma screenings by InvestChile.[265] InvestChile is a government agency that promotes facilitating and retaining foreign direct investments in Chile.[266] It is responsible for implementing initiatives to coordinate the entry of foreign direct investment in Chile and works within the country's economic, social, and legal frameworks to nurture increases in investment.[267] Specifically, InvestChile provides services such as information about investment opportunities, pre-investment procedures, certifications and funding, and investment after-care.[268]

Recently, sustainable investments have risen in popularity across the globe, largely due in part to the widespread awareness of climate change, accompanying environmental concerns, and sociopolitical unrest bringing awareness to environmental deterioration.[269] Environmental, social, and governance ("ESG") investing criteria into Chile's foreign companies and forging direct investment

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[262] *See id.*
[263] *See* Campbell, *supra* note 240 (describing the inevitable harms to soil and air caused by lithium extraction).
[264] *About InvestChile*, INVESTCHILE, https://investchile.gob.cl/aboutus/ (last visited Sep. 6, 2023).
[265] U.S. DEP'T OF STATE, *supra* note 114.
[266] INVESTCHILE, *supra* note 264; U.S. DEP'T OF STATE, *supra* note 116.
[267] INVESTCHILE, *supra* note 264.
[268] *Id.*
[269] *See* Sanket Wajge et al., *Constructing an ESG Index for the Chilean Market—Strategies, Challenges, and Performance*, EVALUESERVE, https://www.evalueserve.com/blog/constructing-an-esg-index-for-the-chilean-market/ (last visited Oct. 4, 2023).

portfolios can likely enhance investors' risk and return profiles regardless of the uncertainty from socio-political and economic unrest from changes to Chile's foreign investment framework, and calls for minimizing the exploitation of lithium in the Atacama by indigenous communities.[270]

Chile's gross domestic product ("GDP") has three main components: consumption, investment, and government spending.[271] Although Latin America falters behind other regions in adopting ESG policies, Chile's economy and indigenous communities would likely benefit from the government regulating and pushing companies towards an ESG-driven approach, specifically to foreign companies investing in its mining sector. Embracing ESG criteria is increasingly important as a foreign direct investment driver.[272] ESG investing is akin to investing with a different lens through the purview of environmental and socially responsible criteria and subsequent commercial implications.[273]

The criteria for ESG investing typically encompasses environmental criteria used to consider how a company can reduce its impact on the natural environment (e.g., water).[274] In addition to environmental impacts, the social component of ESG assesses how companies manage their relationships with all stakeholders.[275] In Chile, such stakeholders would include investors, suppliers, and communities where mining operations are executed, such as in the Atacama Desert.[276]

a. <u>Leveraging ESG Investing as a Solution for Indigenous Communities</u>

A shift towards ESG investing has the potential to quell fears of resource deprivation and continued social inequalities by mitigating governance and social risks accompanying mining operations for

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[270] *Id.*
[271] Hurtado, *supra* note 126, at 43.
[272] Viola Caon and Sofia Karadima, *FDI Drivers in 2022: ESG*, INVESTMENT MONITOR (Aug. 10, 2022), https://www.investmentmonitor.ai/features/fdi-drivers-in-2022-esg-sustainability/.
[273] Bullard et al., *supra* note 34.
[274] *Id.*
[275] *Id.*
[276] *Id.*

lithium.[277] In 2015, the Chilean Financial Market Commission ("CMF") created the Social Responsibility and Sustainable Development Report.[278] In November 2021, the CMF published General Rule No. 461, placing an obligation on companies to report on ESG factors in all sections of their annual reports.[279] Specifically, every registered entity in Chile should describe its approach to ESG and sustainability factors in its business strategies to minimize adverse environmental impacts.[280]

General Rule No. 461 demonstrates the power of Chilean policymakers to covertly usher in an era and reshape commercial perceptions of impacts on indigenous communities and resources while reducing risks associated with post-acquisition operations for foreign investors in the mining sector.[281] Institutional investors and financial intermediaries are not legally required to consider ESG factors when investing in Chile.[282] Currently, there is no legal or institutional framework designed explicitly for purpose-driven investing like ESG.[283]

b. The Advantages of InvestChile Promoting ESG Investing

The global interest in Chile's vast amounts of lithium to lead the renewable energy movement is logical from a commercial perspective because of the country's longstanding foreign investment ecosystem.[284] InvestChile should promote ESG investment models to new investors as the agency generates investment projects that will contribute to Chile's sustainability.[285] Without resorting to

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[277] *See id.*
[278] Cristián Eyzaguirre et. al., *ESG & Impact Investing 2022: Chile*, LEXOLOGY 1, 1 https://www.carey.cl/download/filebase/2022_esg_and_impact_investing_Chile.pdf (last visited Dec. 1, 2023).
[279] Bullard et al., *supra* note 34.
[280] *Id.*
[281] *See id.*
[282] Eyzaguirre et. al., *supra* note 278, at 1.
[283] *Id.* at 2.
[284] *See Foreign Investment in Chile Exceeds US$10 Billion in the First Half*, INVESTCHILE (Aug. 10, 2022, 3:00 PM), https://www.globenewswire.com/en/news-release/2022/08/10/2496130/0/en/Foreign-Investment-in-Chile-Exceeds-US-10-Billion-in-the-First-Half.html.
[285] *Id.*

breaching government contracts with lithium mining companies, InvestChile can continue to serve as a liaison between foreign investors and Chile's institutional interests by leveraging ESG investing's company-by-company basis model.[286]

How would InvestChile develop incentives to renew government contracts for lithium mining or other industries that directly and indirectly rely on harmful environmental impacts to profit?[287] The issue of measurability accompanies the identification of ways to implement ESG investing without adversely impacting Chile's reliance on foreign direct investment.[288] Requiring stakeholders in Chile's lithium mining industry and reliance on the industry for the transition towards renewable energy would require foreign investors and entities to consider Chile's socio-political externalities while still pursuing a profit.[289] After all, Chile's most potent allures to foreign direct investors and entitlements would be at stake because foreign investors would no longer be intrigued by Chile's embrace of free-market policies, juridical security, and conducive foreign investment climate from various geopolitical risks.[290]

Arguably, Chile's government should be the most pivotal and prominent actor in balancing the rights of indigenous communities and the retention of foreign direct investment in mining.[291] Indigenous communities cannot solely rely on policymakers to alter Chile's investment regime as the global demand for lithium surges.[292] However, InvestChile's potential reforms to embrace and implement ESG-driven investments will likely increase the recruitment and retention of foreign investors seeking to achieve ESG goals in Chile's lithium mining sector.[293]

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[286] *See* Jonathan R. Macey*, ESG Investing: Why Here? Why Now?*, 19 BERKELY BUS. L.J. 258, 271 (2022).
[287] *See id.* at 286-87.
[288] *Id.* at 291.
[289] *Id.*
[290] *See* Kuepper, *supra* note 2.
[291] *See id.*
[292] *Id.*
[293] *See* Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 14 WIS. L. REV. 1368, 1406 (2023).

IV. CONCLUSION

In the face of constituent opposition to President Boric's proposed constitution, InvestChile is the optimal body to promote impact and ESG investing. Unlike the requisite of government involvement in enacting a new Constitution, achieving indigenous land restitution, or altering Chile's tax regime to provide indigenous communities part of profits (and ownership) of lithium mining profits. InvestChile has the power to incentivize foreign direct investors to engage in ESG investing in Chile's mining sector as a remedy to mitigate the burdens on the shoulder of Chile's indigenous communities. Further, InvestChile does not require a majority vote of constituents to progressively transform the overall foreign direct investment landscape.

Similar to the benefits of InvestChile's promotion of impact and ESG investing, InvestChile could temper the future implications of draining lithium reserves in indigenous communities because global demands for lithium will not wane within the foreseeable future. Without sacrificing the allures of Chile's traditional foreign direct investment regime, the promotion of ESG investing will secure the retention of foreign direct investments in Chile's mining industry and the recruitment of environmentally and socially conscious investors. ESG and impact investing in Chile's mining sector can shift indigenous peoples' primary reliance on elected government officials and initiatives to direct dependence on public agencies as the source of solutions to the depletion of natural resources caused by lithium mining. Although ESG is not an absolute remedy for indigenous communities, InvestChile shifting towards promoting and retaining ESG investments in Chile's other sectors that are not subject to immense privatization, like mining and lithium, can mitigate the superiority of governmental response to plights of indigenous communities in the Atacama.

Finally, InvestChile wields more power than the indigenous people who have been politically and socially disadvantaged. InvestChile has the authority and resources to lobby the government to work with the communities directly impacted by lithium mining and utilize the participation and voices of such communities to keep up with the increasingly global demands for renewable energy. By doing so, Chile will maintain its anticipated leadership position in the global transition towards renewable energy while trailblazing ESG and impact investing in Latin America.