

THE EVOLUTION OF THE PRECAUTIONARY PRINCIPLE IN LATIN AMERICA

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Legal Briefings - By **Christian Leathley** and **Elena Ponte**

Recent events in Maricunga are a good example of the evolution of the precautionary principle in Chile.

It will be interesting to see what the language of the Chilean Environmental Tribunal in its Resolutions No 234/2016 and No 571/2016 means for the development of the principle.

KEY TAKEAWAYS

- The precautionary principle calls for the prevention of environmental damage and requires the state to take anticipative measures not only when the risks are certain and imminent, but also when there is a lack of full scientific certainty.
- The precautionary principle has emerged over recent decades as an increasingly accepted general principle of environmental and international law. In Latin America, many countries have incorporated precaution as a guiding principle in their national environmental laws, including Brazil, Costa Rica, Argentina, Peru and Ecuador.
- In Chile, though the right of every person to live in a pollution-free environment is enshrined in the Constitution, Law No. 19.300, the basis of the environmental legal and regulatory framework, is based on the principle of prevention and does not explicitly recognize the precautionary principle.
- The Chilean Environmental Tribunal, in its Resolutions No 234/2016 and No 571/2016, explicitly state and bold in the Tribunal's order that the environmental impact of mining operations at Maricunga considers the risk of expansion of the harmful effects, using precautionary language.

On 25 August 2016, Kinross Gold Corporation announced that it had decided to suspend mining operations at its gold mine in Maricunga, Chile. This suspension would take effect in the fourth quarter of 2016. The suspension, coming into effect earlier than planned, follows the latest judicial decision of Chile's Environmental Tribunal in a contest between the Canadian mining giant and the Chilean environmental authorities that dates back to beginnings of 2015.

In its Resolutions *N° 234/2016* and *N° 571/2016*, the Environmental Tribunal found that Chile's environmental regulatory authority, the *Superintendencia del Medio Ambiente's* 23 June 2016 sanction to close Maricunga's water pumping wells was enforceable. The events in Maricunga are a good example of the development of the precautionary principle in Chile.

BACKGROUND

There are three key players here: Compañía Minera Maricunga ("**CMM**"), which operates the Maricunga mine and is owned by Kinross Gold Corporation's ("**Kinross**"); the *Superintendencia del Medio Ambiente* ("**SMA**"), Chile's environmental regulatory authority; and the Tribunal Ambiental of Santiago (the "**Environmental Tribunal**"), a specialized judicial organ of Chile's Environmental Ministry responsible for resolving environmental disputes. The Maricunga mine is located in the Laguna del Negro Francisco y Laguna Santa Rosa, in the Atacama Region, an area that encompasses the Pantanillo-Ciénaga Redonda biological corridor. This area is a designated wetland of international importance, incorporated by Chile to the "Ramsar Convention on Wetlands", the international treaty for the conservation and sustainable use of wetlands.

Earlier this year, the SMA sought closure of Maricunga's water pumping wells. The SMA relied on scientific findings that Maricunga's mining operations had caused the desiccation of at least 70 acres of wetlands and contributed to a drop in groundwater levels across the region. Further, SMA asserted that an additional 73 acres of wetlands were at high risk of desiccation in the short term should CMM's mining operations continue. In its report, SMA analysed satellite images of the region over the period from 1985 to 2015.

Resolutions *N° 234/2016* and *N° 571/2016* constitute the third time the Environmental Tribunal has authorised an SMA sanction against CMM. In April, the Environmental Tribunal authorised a partial closure of CMM's water pumping wells for fifteen days. Then, a month later, in May, the Environmental Tribunal again authorised SMA's call for a partial closure of [close to a month]. Throughout this period, SMA maintained the seriousness of the desiccation, advancing against CMM the most severe sanctions granted to it by its mandate.

CMM has appealed the Environmental Tribunal's decision, stating that it disagrees with the SMA's original March resolution, contesting SMA's scientific findings. Kinross has publicly reiterated its commitment to responsible environmental management and notes Maricunga has undertaken all the requisite environmental impact assessments and holds all requisite environmental permits.

THE PRECAUTIONARY PRINCIPLE IN CHILE

The dispute between CMM and the Chilean authorities may shed some light on the evolution of the precautionary principle in Latin America. The principle calls for the prevention of environmental damage and requires the state to take anticipative measures not only when the risks are certain and imminent, but also when there is a lack of full scientific certainty.

The SMA resolution urging for a sanction of CMM's operations in Maricunga cites scientific findings and the risk of irreversible damage to an additional 73 acres of wetlands. As noted above, CMM has contested these scientific findings.

CHILE'S ENVIRONMENTAL LEGAL AND REGULATORY FRAMEWORK

In Chile, the right of every person to live in a pollution-free environment is enshrined in Article 19.8 of the Chilean Constitution. Law No. 19.300, modified by Law No. 20.417 in 2010, (the "**Law**") is the basis of the environmental legal and regulatory framework. The Law sets out the environmental impact assessment procedure and rules on emission and quality standards for air and water quality. Under Law No. 19.300, anyone who causes environmental damage could be required to restore the environment through an environmental restoration action for environmental damage or to compensate any monetary damages through an environmental civil tort action.

Under Law No. 20.417, the SMA is responsible for executing, organising and coordinating environmental approval resolutions ("**EARs**"). Three Environmental Tribunals located in Antofagasta, Santiago de Chile and Valdivia in charge of reviewing the decisions adopted by the SMA, were created by Law No. 20.600 in June 2012.

EARs can operate as global environmental permits and certify that a project complies with all environmental requirements and regulations. Risk assessments of conservation threats frequently utilize biological indicators of threats such as special environmental or protected area designations and species status. An EAR can be considered an umbrella environmental license, since, once granted, no specific environmental permit can be denied for environmental reasons. However, while there is no specific penalty under the Law for projects carried out without environmental approval and there is no general statute on criminal environmental felonies in Chile, noncompliance with an EAR can lead to imposition of fines, sanctions and revocation of the EAR.

TOWARDS A PRECAUTIONARY PRINCIPLE IN CHILE?

In Chile, Law 19.300 is based on the principle of prevention, but does not explicitly recognize the precautionary principle. (See Congressional Bulletin No. 387-324, dated September 1992). As explained, while the principle of prevention calls for the prevention of environmental damage, the precautionary principle goes further, calling the state to take anticipative measures not only when the risks are certain and imminent, but also when there is a lack of full scientific certainty.

Uncertainty is inevitable in biodiversity conservation and natural resource management. In response to this, the precautionary principle can be understood as a mechanism to balance the need for development with lack of clear evidence about its impacts. According to this principle, scientific uncertainty should not postpone action necessary for the environment.

The precautionary principle has emerged over recent decades as an increasingly accepted general principle of environmental and international law. The precautionary approach was explicitly incorporated under Principle 15 of The Rio Declaration in 1992.¹ Since then, the principle has been referenced in numerous international legal instruments, including the *Treaty on European Union (TEU)*, the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, and the *Stockholm Convention on Persistent Organic Pollutants*. In Latin America, many countries have incorporated precaution as a guiding principle in their national environmental laws, including Brazil, Costa Rica, Argentina, Peru and Ecuador. Since adopting Law 19.300 in 1992, Chile has signed onto the *Cartagena Protocol* and the *Stockholm Convention* in 2005, both of which enshrine the precautionary principle in their tenets.

The recent ruling of Chile's Environmental Tribunal may be an indication that Chile is likely to go further in the future and enforce decisions of environmental regulators even where there is a lack of scientific certainty as to the environmental risk. The SMA's resolution references the irreversible risk of CMM's mining operations on an additional 73 acres of wetlands, relying on a contested scientific report. The ruling of the Environmental Tribunal upholding SMA's resolution and closing the Maricunga mine explicitly states, and bolds in the Tribunal's issued order, that the environmental impact of CMM's mining operations does not only consider past effects, but also the risk of expansion to the "additional approximately 73 acres".

Moving forward, it will be interesting to see what the explicit wording of the Environmental Tribunal means for the evolution of the precautionary principle in Chilean environmental law.

ENDNOTES

1. The Rio Declaration, Principle 15, "*In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*"

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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