Latin American Investment Protections

Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States, and Counsel

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2012

Chile

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I. *Investment and Arbitration Framework*

A. *State Responsibility*

1. *Organization of the State*

Chile is a democratic unitary republic whose sovereignty lies essentially in the nation.[2] The administration of government belongs to the President of the Republic, who serves as the head of the State.[3]

The Constitution establishes that "the organs of the State must adjust their actions to the Constitution and to those provisions enacted under the same"[4] and that "any person who feels its rights have been injured by the Administration of the State, its organs or the municipalities, can submit a claim before the tribunals established by law, without prejudice of the responsibilities which may affect the official which caused the injury."[5]

The Constitution adds that, an Organic Constitutional Law ("Organic Law") will determine the basic organization of the Public Administration of the State,[6] and that such laws require the vote of four sevenths of the representatives and senators in office for either approval, amendment, or abrogation.[7]

The Organic Law which regulates the administration of the State[8] establishes that the President exercises the governmental and administrative functions

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[1] Partner of the law firm of "Figueroa & Valenzuela" in Santiago, Chile, and member, since 2007, of the Board of Directors of the American Arbitration Association.

[2] Chile Constitution, Arts. 3–5.

[3] Chile Constitution, Art. 24.

[4] Chile Constitution, Art. 6.

[5] Chile Constitution, Art. 38.

[6] Chile Constitution, Art. 38.

[7] Chile Constitution, Art. 66.

[8] Decree with the Force of Law ("DFL") No. 1, of 2000, approved the modified, systematized, and coordinated text of Law No. 18.575, of 5 December 1986 (hereinafter "Organic Law of the State") (Chile) (published in the Official Gazette, 17 Nov. 2001).

of the State with the support of the organs established by the Constitution and the laws. Those organs are the Ministries, Governances, and those entities and public services established for the fulfillment of the functions of the Administration, including, among others, the General Controller's Office, Central Bank, Armed and Public Security Forces, Regional Governments, Municipalities, and public enterprises established by law.[9]

The Legislative Congress is composed of the Chamber of Representatives and the Senate; their responsibilities and functions are established in Chapter V of the Constitution and the corresponding Organic Law.[10] The structure and powers of the judiciary are established in Chapter VI of the Constitution.

A unique institution is the Constitutional Tribunal, which is established by Chapter VIII of the Constitution.[11] This Tribunal is an organ of the State, autonomous and independent from any other authority or power and its decisions are final. Its functions range from controlling the constitutionality of congressional bills, interpreting the Constitution, Organic Laws, and international treaties, to the resolution of various legal matters. These include, among others: resolving i) conflicts of jurisdiction which may arise between the political or administrative authorities and the Judiciary (not assigned to the Senate); and ii) constitutional or legal impediments for the designation of a Minister of State, or the continuation of a person in that position. In these situations, the request may be submitted to the Tribunal by any person.

Other relevant institutions include the Free Competition Defense Tribunal[12] and the Transparency Council. The former is a special and independent jurisdictional organ subject to the direction and superintendence of the Supreme Court. Its function is to prevent, correct, and sanction violations or transgressions against free market competition as established in the applicable laws and regulations.

The Transparency Council is an autonomous public corporation with its own juridical personality and assets. It was established by the Transparency and Access to Public Information Law[13] and its basic functions include, among others, supervising compliance with the Transparency Law, sanctioning its breaches, and resolving claims for non-access to public information. A significant development was the publication by Transparency International of its 2010 perception of corruption index which placed Chile as the least

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[9] Art. 1 of "Organic Law of the State" ibid. (Chile).

[10] Law No. 18.918, Organic Law of Congress (Chile) (5 Feb. 1990).

[11] *See also* DFL No. 5, Approved the Modified, Systematized, and Coordinated Text of Law No. 17.997 (Organic Law of the Constitutional Tribunal) (Chile) (10 Aug. 2010).

[12] Law No. 19.911, Creation of the Free Competition Defense Tribunal (Chile), Art. 1 (14 Nov. 2003).

[13] Law No. 20.285, Access to Public Information Law (Chile), Art. 1 (20 Aug. 2008).

corrupt country in the Latin American region and ahead of the United States and France.[14]

The organs of the State, including public enterprises, must adjust their functions to the Constitution and laws and have no powers other than those expressly conferred to them by the legal system.[15] Law No. 18.575 reiterates that the State is responsible for damages caused by its administrative organs in the exercise of their functions, without prejudice to the responsibilities which may affect government officials.[16]

The institution responsible for the defense of the State on domestic matters is the *Consejo de Defensa del Estado* (State Defense Council).[17] On international claims, the President of the Republic designates the institution responsible for the defense of the State. In the past, it was the Foreign Investment Committee; today, it is the Ministry of Economy.

2. *Financial System*

The Ministry of Finance regulates the operations of the financial and banking system with the assistance of separate autonomous institutions such as, among others, the Central Bank, the Superintendency of Banks and Financial Institutions, the Unit of Financial Analysis ("UAF"), and the Superintendent of Securities and Insurance.[18]

A constitutional amendment established the autonomy and independence of the Central Bank, which is administered by a board of five members appointed by the President of the Republic with the prior approval of the Senate.[19]

The law of the Central Bank states that all persons can freely buy and sell foreign currencies, but that foreign trade operations and foreign investments can only be made through the formal exchange market.[20] Currently, the exchange rate fluctuates in accordance with the supply and demand of the market.

The supervision of financial and banking activities is made by the Superintendent of Banks and Financial Institutions. Notwithstanding that it is a

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[14] *See* e.g. Transparency International Website, *available at* www.transparency.org.

[15] Organic Law of the State, ibid. (Chile), Art. 2.

[16] Organic Law of the State, ibid. (Chile), Art. 4.

[17] DFL No. 1, Approved the Modified, Systematized, and Coordinated Text of Organic Law of the State Defense Council (Chile), Art. 2 (7 Aug. 1993).

[18] Decree Law ("DL") No. 3538, Creation of Superintendent of Securities and Insurance (Chile), Art. 1 (23 Dec. 1980).

[19] Chile Constitution, Arts. 97–98 *and* Law No. 18.840, Organic Law of the Central Bank (Chile), Art. 1 (10 Oct. 1989).

[20] Organic Law of the Central Bank (Chile), Arts. 39 and 42 (10 Oct. 1989).

public institution, it is not integrated with the Organic Administration of the State, nor is it subject to the general or specific rules applicable to the public sector. The Superintendent is appointed by the President of the Republic.[21]

The UAF is a decentralized public service with separate assets and its own legal personality. It is connected to the President of the Republic through the Ministry of Finance and has the responsibility of preventing or impeding the use of the financial system for the perpetration of crimes such as money laundering and asset clearance. The law governing the UAF compels the Central Bank, the Foreign Investment Committee, the commercial banks, and foreign exchange agencies, among others, to report suspicious operations to the UAF.[22]

On 7 May 2010, Chile joined the Organization of Economic Cooperation and Development ("OECD") which has required the adoption of significant policy and legal measures in areas such as bank secrecy, environment, labor, education, penal responsibility of juridical persons,[23] intellectual property, and technology.

3. *State-Owned/Controlled Enterprises*

There are several State-owned and controlled enterprises that have a significant role in the Chilean economy. These include the Copper Corporation ("CODELCO"),[24] the National Petroleum Enterprise ("ENAP"),[25] and others.

CODELCO is the State agency that owns and administers newly acquired or discovered mining properties, as well as the copper deposits formerly owned by American foreign companies which were expropriated in the early seventies. It is the world's top producer of copper and leading part of an industry which accounts for approximately two-thirds of Chile's foreign income.

ENAP is a State-owned company, whose purpose is to explore, exploit, produce, and commercialize hydrocarbons and derivatives. It carries out activities throughout the whole value chain in the oil industry, from hydrocarbons exploration to fuel commercialization.

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[21] DFL No. 3, Approved the Modified, Systematized, and Coordinated Text of the General Banking Law (DL No. 1.097 of 1975) (Chile), Arts. 1, 3 (19 Dec. 1997).

[22] Law No. 19.913, Creation of the Financial Analysis Unit (Chile), Art. 3 (18 Dec. 2003).

[23] Law No. 20.393, Creation of Corporate Criminal Responsibility for Money Laundering, Terrorist Financing, and Bribery (Chile), Art. 3 (2 Dec. 2009).

[24] Decree No. 146, Approved the Modified CODELCO By-Laws (Chile) (25 Oct. 1991). *See also* www.codelco.cl.

[25] DFL No. 1, Approved the Modified, Systematized, and Coordinated Text of Law No. 9618 (Creation of the National Petroleum Enterprise, 1950) (Chile) (24 Apr. 1987). *See also* www.enap.cl. The State of Chile is the sole owner of the deposits of hydrocarbons that may exist within its territory. Chile Constitution, Art. 19, No. 24.

Both CODELCO and ENAP are established by law and have separate legal personalities and their own financial assets. They are governed by a board of directors which, pursuant to their by-laws, is fully responsible for its actions before third parties.

In the case of CODELCO, its board of directors has the authority, among other things, to: i) establish corporations or companies within or outside the country and approve the terms of their participation thereof;[26] and ii) contract foreign loans in foreign currency with the prior approval of the Ministry of Finance.[27] In the exercise of these functions, CODELCO generally recognizes, in the relevant contracts, the jurisdiction of foreign tribunals or international arbitrators.

4. *State Access to International Arbitration*

The availability of international arbitration for government or State entities is regulated by Decree Law No. 2.349, of 1978.[28] This law applies to international agreements or contracts whose principal objective is related to economic or financial businesses or operations undertaken by the State of Chile or its organs, agencies, or enterprises[29] with international or foreign institutions or enterprises. Without prejudice to the requirements indicated below, which include the prior authorization of the Ministry of Finance, the following measures or agreements of the above governmental organs or enterprises are declared valid by Decree Law No. 2.349:

(i) the submission to foreign law;
(ii) the submission to the jurisdiction of foreign tribunals or foreign arbitral tribunals as to disputes that may arise in connection with these agreements; and
(iii) those acts or contracts by which the State or its agencies or enterprises extend guarantees to third-parties in agreements or contracts which include the submission to foreign law, or to the jurisdiction of foreign or arbitral tribunals as to disputes which may arise from those agreements.[30]

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[26] CODELCO By-Laws (Chile), Art. 15(l).

[27] CODELCO By-Laws (Chile), Art. 15(n) supplemented by decree No. 1009 of 23 December 1978, of the Ministry of Finance. Hereinafter, "Decree 1009, of 1978."

[28] DL No. 2.349, Rules for Public Sector International Contracts. Hereinafter "Public Sector International Rules" (Chile), Art. 3 (28 Oct. 1978) (defining and listing the State-owned or controlled enterprises subject to the same), and Decree 1009 of 1978 (ibid.).

[29] Public Sector International Rules, ibid., (Chile), Art. 1.

[30] Public Sector International Rules, ibid., (Chile), Art. 1.

The adoption of the above measures by State organs, agencies, or enterprises must be authorized by a decree of the President of the Republic and the Minister of Finance. Such authorizations may be extended in general terms to a given institution or enterprise or, specifically, for certain contracts. In any event, the authorizations are extended for one-year periods and, pursuant to the last extension, were valid until 2001[31] The above requirements, however, do not apply to the Central Bank or the State Bank of Chile.

B. *Investment and Arbitration Law*

1. *Available Instruments*

Two separate instruments or mechanisms are available for channeling foreign investments into Chile.[32]

The first is Chapter XIV of the Compendium of the International Rules of the Central Bank[33] which applies to financial investments and is administered by the latter.[34] These Rules are not a legal statute but mere regulations adopted by the Central Bank pursuant to its obligation to supervise the stability of the currency and funding of the balance of payments. Its Organic Law, article 49, thus enables the Bank to amend these Rules and adopt foreign exchange restrictions at any moment. Consequently, remittances of Chapter XIV capital investments effected after such amendments, could be subject to restrictions such as the deposit (or "encaje") of a percentage of the investment (not to exceed 40% of the foreign exchange operation).

The second instrument is the Foreign Investment Statute, or Decree Law No. 600 ("DL 600"), of 1974[35] which applies to productive investments and is described ahead. Because DL 600 was adopted during an exceptional period of Chile's political history, views have been raised that foreign investors should not enjoy a privileged legal regime but should instead be subject to the same rules applicable to domestic investors. However, as of this writing, the DL 600 remains in full effect.

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[31] Decree No. 1365 of the Ministry of Finance, published 31 January 2011.

[32] United Nations Conference on Trade and Development, 2010 World Investment Report, at 169, *available at* http://www.unctad.org (listing Chile as the country which, after Brazil, received in 2009 the largest inflow of foreign direct investments (US$ 12,702 million), more than Mexico or Argentina).

[33] Compendium of the International Rules of the Central Bank, Chapter XIV, Agreement No. 1151-01-040916, Circular No. 816 (Chile), hereinafter "Compendium Central Bank" *available at* http://www.bcentral.cl/normativa/cambio-internacional/compendio-normas/index.htm.

[34] Organic Law Central Bank, ibid. (Chile), Art. 47.

[35] DL No. 600, Foreign Investment Statute (Chile) (13 July 1974).

In addition, Law No. 18.657 regulates the Investment Fund of Foreign Capital ("FICE")[36] which must be channeled through either DL 600 or Chapter XIV of the Central Bank Exchange Rules and there are special tax rules for promoting Chile as a platform for foreign investments.[37]

2. *Chapter XIV of the Foreign Exchange Rules of the Central Bank*

a. Description

Chapter XIV regulates international exchange operations related to credits, deposits, investments, foreign currency, capital contributions from abroad, and other foreign obligations. Its General Provisions establish the procedures, time-limits, conditions, and forms which must be used by individuals to report the operations undertaken when investing through Chapter XIV. Revenues in foreign currency from external credits, deposits, investments, and capital contributions from abroad must be effected through entities authorized to operate in the Formal Exchange Market, which include commercial banks and other authorized entities. There are no restrictions on revenue or currency transfer with respect to conversion and/or withdrawals from the country. The interested parties provide commercial banks with the documents and information listed in established forms which the latter, in turn, must transmit to the Central Bank. A similar procedure must be applied to foreign exchange remittances of capital repatriations, interests, readjustments, profits, and other benefits generated by the operations effected under Chapter XIV.[38]

Chapter XIV applies to operations above US$ 10,000 or its equivalent in foreign currency. It provides that:

(i) The entry into the country of foreign currency generated by the operations contemplated in Chapter XIV may only be affected through the formal exchange markets;
(ii) When foreign currency from credits, investments or capital contributions is delivered to their beneficiaries in Chile, the borrower, the investor or

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[36] Law No. 18.657, Creation of Investment Fund of Foreign Capital (Chile), Art. 1 (29 Sept. 1987).

[37] Law No. 19.879, Regulations on Excessive Debt to Finance Projects (Chile), Art. 1 (24 June 2003); Law No. 20.171, Increase to the Credit for Foreign Taxes Paid Available to Investors in Foreign Companies (Chile), Art. 1 (16 Feb. 2007) (both modifying Art. 41D of Law No. 824, Income Tax Law (Chile) (31 Dec. 1974)).

[38] Compendium Central Bank, ibid., Chapter XIV (Chile), Arts. 2.1–2.6 (defining, respectively, credit operations, deposits, investments, capital contributions, foreign exchange from abroad, and disposition of funds).

the recipient company of the funds must submit the relevant information to the Central Bank;

(iii) Once the investment is authorized or registered, there is no obligation to exchange foreign currency into Chilean currency within a given deadline;

(iv) There is no obligation to maintain a deposit, in other words, the totality of the investment may be repatriated at any moment; and

(v) The authorization to remit foreign currency related to capital, interest, readjustment, profits and other benefits originated by the operations effected under Chapter XIV requires submitting the information to the Central Bank.[39]

In connection with the above, Sections 6(a) and (c) of this Chapter discuss the legal remedies available to foreign investors and a dispute which arose between a foreign investor, Carter-Holt, and the Foreign Investment Committee.

3. *The Foreign Investment Statute: DL 600 of 1974*

a. Description

DL 600 is an **optional** instrument to which a foreign investor (an individual or a legal entity, non-profit organization, foreign state, or international organization) or Chilean non-resident can apply. Its rules make no distinction between included or excluded economic sectors. This is consistent with the country's Constitution which guarantees to every person, including foreign investors, the right to develop any economic activity which is not contrary to the morals, public order, or national security, in accordance with its applicable laws.[40] Thus, unless a special law restricts or prohibits foreign investment participation, no economic sector is excluded by DL 600. However, although the law states that a limitation of access by foreign investors to domestic credit may become justified; as of this date, this has not happened.[41]

The following section discusses the structure and responsibilities of the Foreign Investment Committee which administers DL 600; the main provisions of the foreign investment contract and its stabilizing features; the terms of entry, definition, and various forms of foreign investments; the rights of foreign investors; the legal remedies available to foreign investors; the existing restrictions to foreign participation; and the relevant jurisprudence.

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[39] Compendium Central Bank, ibid., Chapter XIV (Chile), Arts. 3–4.

[40] Chile Constitution, Art. 19, No. 21.

[41] Foreign Investment Statute (Chile), Art. 11.

b. The Foreign Investment Committee ("the Committee")

The Committee is a decentralized public legal entity with its own separate assets, and is domiciled in Santiago. The Committee reports to the President of the Republic through the Minister of Economy, Development and Reconstruction ("Minister of Economy") who chairs the Committee or, in his absence, by the Minister of Finance, provided that at least three members attend. The Committee is the only entity authorized to accept the inflow of capital from abroad under DL 600 and to stipulate the terms and conditions of the respective contracts.[42]

The Committee is formed by the Ministers of Economy, Finance, Foreign Affairs, Planning, and Cooperation, the President of the Central Bank and, where required, by the relevant sector Minister.[43] Provided that at least three members attend, decisions of the Committee are adopted by absolute majority of its members; and in case of a tie, the President has the breaking vote.[44]

The Executive Vice-President of the Committee is charged with the management of the Executive Vice-Presidency. He is the head of the office and its legal representative, both in and out of court. He may be removed at any time by the President of the Republic and is appointed by the latter upon the recommendations of the Committee.

c. The Foreign Investment Contract

To access the benefits of DL 600, foreign investors must execute an investment contract with the State of Chile, represented by the Committee. This contract has a standard provision by which the foreign investor and/or his representative must establish their residence in the city of Santiago and submit themselves to the jurisdiction of the courts of Santiago.[45] Consequently, arbitration is not an option.

The purpose of the investment must be clearly identified in the foreign investment contract which is a public bilateral agreement between the foreign investor and the Committee, as the representative of the Chilean State. This contract has the force of law and cannot be amended unilaterally – it can only be amended by the mutual agreement of the parties.

In practice, this means that no laws can be enacted by the State of Chile that amend or modify the rights or benefits provided by DL N°. 600 and that

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[42] Foreign Investment Statute (Chile), Arts. 12, 14.

[43] Foreign Investment Statute (Chile), Art. 13.

[44] Foreign Investment Statute (Chile), Art. 14.

[45] Foreign Investment Statute (Chile), Model of Foreign Investment Contract, *see* www .foreigninvestment.cl.

are incorporated into the investment contract. Authors have stated that the public nature of this contract is related to the legal protection of property rights,[46] and as a consequence, the deprivation by law of such contractual rights would constitute a breach of the expropriation and compensation provisions of the Chilean Constitution.[47] Under those circumstances, the foreign investor would have a justified legal action against the Chilean State. Related to this subject, Section B (4)(f), below, refers to the specific mining taxes applied by the government to those investors which voluntarily agreed to amend their investment contracts.

d. Terms of Entry of Investments

Foreign investment contracts must state the terms under which the foreign investor must enter its capital into the country. This term cannot exceed eight years for mining investments and three years for all others. The Committee may, however, by unanimous agreement of its members, extend this limit up to a maximum of 12 years in the case of mining investments, when previous exploration is required, depending on their nature and estimated duration of those explorations. In the case of investments in industrial and non-mining extractive projects for amounts of no less than US$ 50 million, the Committee may extend the term up to eight years, when the nature of the project so requires.[48]

e. Definition of Investment

The DL 600 does not define investments but defines foreign investors as "the persons contributing foreign capital" who conclude foreign investment contracts with the Chairman or Vice President of the Committee on behalf of the Chilean State.[49] In addition, Chapter XIV of the Central Bank Exchange Rules gives specific definitions which apply to the various types of transactions in foreign currency addressed by those Rules.[50]

A more elaborate definition (followed by a long list of the forms an investment can take), is that of the Chile – US Free Trade Agreement:

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[46] MAYORGA, ROBERTO and MONTT, LUIS. *Inversión Extranjera en Chile* [Foreign Investment in Chile], 84 (Editorial Jurídica Cono Sur 1994). Hereinafter "Mayorga et Montt."

[47] Chile Constitution, Art. 19, No. 24.

[48] Foreign Investment Statute (Chile), Art. 3.

[49] Foreign Investment Statute (Chile), Art. 3.

[50] Compendium Central Bank, ibid., Chapter XIV (Chile), Art. 2. *See also* MAYORGA Roberto, MORALES, Joaquín and POLANCO, Rodrigo. *Inversión Extranjera. Régimen Jurídico y Solución de Controversias* [Foreign Investment, Legal Regime and Dispute Resolution] at 169–170, 476–506. (Lexis Nexis 2004). Hereinafter "Mayorga et al". *Mayorga* et al., ibid., at 96–102.

> Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[51]

f. Forms of Investments

The various forms by which a foreign investor can bring capital into Chile, pursuant to DL 600, include freely convertible currency, tangible physical assets, technology in various forms, capitalization of foreign loans and debts, and capitalization of profits, as described below:[52]

(i) "**Freely convertible currency**, brought into the country through the sale at an entity authorized to operate within the Formal Exchange Market at the most favorable rate of exchange obtained by the foreign investors at any of the aforementioned entities."[53]

This is the most common instrument used by investors to bring capital into Chile. It is regulated by Chapter XIV of the Central Bank Rules. The foreign currency must be transferred to, and liquidated by, a commercial bank or other authorized entity which must then report this information to the Central Bank.

(ii) "**Tangible assets**, in any form or condition, which shall be brought into the country under the general regulations applicable to imports not subject to exchange coverage. These assets shall be valued in accordance with the regular procedures applicable to imports."[54]

The valuation method applied to these assets requires the joint participation and certifications of both the Customs Office and Central Bank.

(iii) "**Technology in its various forms**, provided it may be capitalized and appraised by the Committee within a period of 120 days, taking into account its effective price in international markets; should the above period lapse without the valuation having been made, the value assigned shall be that estimated by the investor in an affidavit. Under no circumstance shall ownership, use or possession of technology forming part of

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[51] Chile – US FreeTrade Agreement. Hereinafter "Chile – US FTA" (Miami, 6 June 2003), *entered into force* 1 January 2004, Art. 10.27.

[52] Foreign Investment Statute (Chile), Art. 2.

[53] Foreign Investment Statute (Chile), Art. 2(a).

[54] Foreign Investment Statute (Chile), Art. 2(b).

a foreign investment contract be transferred separately from the entity to which it was originally contributed, nor shall it be subject to amortization or depreciation."[55]

The absence of a clear legal definition of technology and the difficulties of an objective valuation are among the reasons technology investments have not been used frequently.[56]

(iv) "**Credits associated with a foreign investment**. The general rules, terms, interests and other aspects involved in the negotiation of foreign loans, as well as the surcharges on the total cost to be borne by the borrower for the use of the foreign credits, including commissions, taxes and all expenses shall be those currently authorized or authorized in the future by the Central Bank of Chile."[57]

The above provision raises the question of whether, after the investment contract has been executed, additional credit costs authorized by the Central Bank of Chile would constitute a unilateral breach of the foreign investment contract.

(v) "**Capitalization of foreign loans and debts** in freely convertible currency, provided such contracts have been duly authorized."[58]

The authorization referenced above must be obtained from both the Committee and the Central Bank. The authorization applies when a borrower pays a foreign loan and requests its capitalization in a recipient company, or when a foreign creditor accepts the capitalization of its credit and becomes a partner or shareholder of such a company.[59]

(vi) "**Capitalization of profits qualifying for remittance abroad**"[60]

Profits qualify for remittances abroad only after the corresponding taxes have been paid. Their capitalization in a company in Chile requires the authorization of the Vice President of the Committee (the taxes already paid would be discounted from the amount to be capitalized).[61]

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[55] Foreign Investment Statute (Chile), Art. 2(c).
[56] MAYORGA et al., ibid., at 70.
[57] Foreign Investment Statute (Chile), Art. 2(d).
[58] Foreign Investment Statute (Chile), Art. 2(e).
[59] MAYORGA et al., ibid., at 73.
[60] Foreign Investment Statute (Chile), Art. 2(f).
[61] MAYORGA et al., ibid., at 73.

g. Rights of Foreign Investors

The rights of foreign investors can be grouped into the following six categories: i) repatriation of the materialized investment and remission of net profits, ii) access to the formal exchange market, iii) purchase of foreign exchange, iv) tax exemption on the liquidation of investments, v) nondiscrimination, and vi) the right to tax invariability, which are addressed separately below.

(i) Repatriation of Capital and Foreign Remittances

> Foreign investors shall have the right to transfer their capital and the net profits generated by that capital to other countries.
>
> Capital remittances may be carried out only after one year has passed since the date when such capital was brought in. Capital increases financed by profits that could have been remitted abroad may be remitted at any time after fulfilling the relevant tax obligations.
>
> Profit remittances may be carried out at any time.
>
> The conditions applicable to remittances of capital and net profits abroad shall not be less favorable than those applicable to the payment of imports in general.[62]

(ii) Access to the Formal Exchange Market

> Transfers of capital and net profits abroad shall be made at the most favorable exchange rate obtained from any entity authorized to transact within the Formal Exchange Market.
>
> Access to the Formal Exchange Market, for remitting capital or profits abroad, requires a prior certificate of the Executive Vice-President of the Foreign Investment Committee, stating the amount to be remitted. Such certificates shall be granted or refused for an expressed cause, within ten days from the date the relevant application is filed.[63]

(iii) Purchase of Foreign Currency

> The foreign currency required to remit the capital or part thereof may only be purchased with the proceeds from the sale of the shares or rights representing the foreign investment, or from the sale or total or partial liquidation of the companies bought or related with such investment.[64]

(iv) Tax Exemption on Investment Liquidation

DL 600 also provides a tax exemption for the investment liquidation referred to in the previous article (Art. 5). Specifically, the law establishes that:

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[62] Foreign Investment Statute (Chile), Art. 4.

[63] Ibid.

[64] Foreign Investment Statute (Chile), Art. 5.

> The net proceeds of the sales or liquidation referred to in the previous article shall be exempt from any levy, tax or charge, up to the sum of the materialized investment. Any excess thereof shall be subject to the general rules of the tax legislation.[65]

(v) The Right to Non-Discrimination

Article 19 of the Constitution guarantees to all persons:

> The non-arbitrary discrimination in the treatment the State and its organs provide in economic matters.
>
> Only by virtue of law, and provided that it does apply such discrimination, may specific direct or indirect benefits be authorized in favor of a given sector, activity or geographical zone, or establish special liens or encumbrances which affect one or the other. In the case of indirect benefits or franchises, their cost estimate must be included in the annual Budget Act.[66]

In connection with the above, article 9 of DL 600, states:

> Foreign investment and companies participating therein shall also be subject to the common legislation applicable to domestic investment, and shall not be discriminated against, either directly or indirectly, except as provided in article 11.[67]
>
> Legal or regulatory provisions affecting specific productive activities shall be deemed discriminatory if they become applicable to the whole or the major part of said activities in the country, excluding foreign investment. Likewise, legal or regulatory provisions which create special regimes for certain sectors of the economy or geographical areas of the country shall be deemed discriminatory if foreign investment is refused access thereto, despite their complying with the same conditions and requirements required from domestic investors.
>
> For the purposes of this article, a specific productive activity shall be that performed by companies which fall within the same definitions of internationally accepted classifications and produce goods located in the same tariff classification in accordance with the Chilean Tariff Schedule; the same tariff bracket shall be understood to be one in which goods do not differ by more than one unit in the last digit of the tariff classification.[68]

The above right is protected by a special recourse that applies when holders of foreign investments or companies participating therein consider that discriminatory regulations have been adopted. In that event, DL 600 provides:

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[65] Foreign Investment Statute (Chile), Art. 6.

[66] Chile Constitution, Art. 19, No. 22.

[67] Art. 11 of the Foreign Statute states that, "notwithstanding [the non-discrimination rule], regulations, which explicitly explain the reasons for their issuing, may be adopted which limit access to internal credit by foreign investments covered by DL 600."

[68] Foreign Investment Statute (Chile), Art. 9.

> ... they (such holders) shall be entitled to request the removal of such discrimination, provided that the request is made before the lapse of one year from the date of the enactment of such regulations. The Committee shall rule on the petition within a term not to exceed 60 days from the date on which the application is filed, and either refuse it or take the appropriate administrative measures to remove the discrimination or require that the proper authorities do so, in the event that such measures are beyond the scope of the authority of the Committee.
>
> In the absence of a timely ruling from the Committee, or in the case of an adverse ruling, or if it is not possible to remove the discrimination through administrative measures, the foreign investors or the companies in which they participate may have recourse to the courts of justice in order to obtain a ruling as to whether or not discrimination exists and, if so, that the general rule of law must be applied.[69]

On this subject, see the *Carter–Holt Harvey* dispute discussed later in this chapter.

4. *The Right to Tax Invariability*

a. Description

DL 600 gives foreign investors the right to invariable taxes on income, sales, services, and customs duties applicable to the import of machinery and equipment not manufactured in the country, in force at the time the contract is signed. Special rules also apply to megaprojects, export regimes, and mining projects of no less than US$ 50 million or its equivalent. Without prejudice to the special rules applicable to mining investments referred to in the paragraphs ahead:

> Holders of foreign investments made under the terms of this Decree Law are entitled to include in the respective contracts a clause to the effect that, for a ten year period from the initiation of the company's operations, they shall be subject to an effective overall tax rate of 42% on taxable income, in relation to those taxes established in the Income Tax Law in force at the time the contract is executed. The tax referred to in article 64 *bis* of the Income Tax Law will not be considered for the determination of the effective overall tax rate on taxable income. Even if the foreign investor has opted to request this invariability regime, he may waive this right, only once, and be subject to the application of the common tax legislation, in which case he shall remain subject to the general taxation scheme with the same rights, options and obligations as national investors, consequently forfeiting the contractual invariability.[70]

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[69] Foreign Investment Statute (Chile), Art. 10.

[70] Foreign Investment Statute (Chile), Art. 7. The method of calculation of the effective overall tax rate shall be made by applying to the net taxable income of the First Category tax, as set forth in the Income Tax Law.

b. Comment

If the foreign investor waives the invariability tax option (which is the common practice), and chooses to be subject to the common income tax legislation, the revenues of his company will be subject, pursuant to this legislation, to the First Category Income Tax at the current rate of 17% on the accrued taxable income, whether distributed or not, after deducting expenses. In addition, the dividends or amounts distributed or remitted by the company to its nonresident partners or shareholders will be subject to a 35% withholding tax payable upon distribution or remittance. However, as the company has already paid the First Category Income Tax of 17%, a credit for this amount is given against the 35% additional tax.[71]

c. Indirect Taxes (Sales and Customs Duties on Manufactured Imports)

The guarantees of DL 600 also extend to value added taxes and custom duties on qualified manufacturing imports, as follows:

> Foreign investments and companies participating therein shall be subject to the general indirect taxation regime[72] and to the customs regulations applicable to national investments.
>
> Notwithstanding the above paragraph, holders of foreign investment transferred into the country under the terms of this Decree Law shall be entitled to include a clause in their contracts stating that, for the term authorized to carry out the stipulated investment, the tax regime on sales and services as well as customs duties in force at the time of signing the contract, applicable to the import of machinery and equipment not manufactured in the country included in a list referred to in paragraph 10 of letter B, Article 12 of Decree Law No. 825 of 1974, will remain invariable.[73] The same invariability shall apply to the companies receiving foreign investments, in which foreign investors participate, for the amounts associated with such investments.[74]

d. Benefits for Megaprojects

Article 11 *bis* of DL 600 provides special tax benefits to investments of no less than US$ 50 million or its equivalent in foreign currencies, whose purpose is the development of industrial or extractive projects, including mining projects, transferred into the country pursuant to Article 2 of DL 600.[75]

However, these benefits were suspended by a decision of the Committee, at its 420 session, on 25 October 2004. This decision followed a prior decision of 14 October, 2004, of the Central Bank. The need to adjust the government's

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[71] Decree Law 824, Income Tax Law (Chile) (31 Dec. 1974); Decree Law 830, Tax Code (Chile) (31 Dec. 1974).

[72] DL No. 825, Tax Law on Sales and Services ("VAT Law") (Chile) (31 Dec. 1974).

[73] VAT Law, ibid., (Chile), Art. 12-B 10.

[74] Foreign Investment Statute (Chile), Art. 8.

[75] Foreign Investment Statute (Chile), Art. 11 *bis*, paragraph 3.

foreign investment, economic, and tax policies were the reasons given for this suspension.

e. Export Regimes

Megaprojects of no less than US$ 50 million or its equivalent in foreign currencies which require the export of all or part of the goods produced, may also be granted by the Committee, with the prior approval of the Central Bank, special tax and foreign currency privileges.[76] However, as in the case mentioned above, these benefits have been suspended by the aforementioned 2004 decisions of the Committee and Central Bank.

f. Mining Taxes

Two major events prompted the government, in 2005 and 2010, to establish special taxes on mining. These events were, first, in 2005, the unprecedented increase in the international price of copper which led to the adoption of Law No. 20.026,[77] and, second, the major earthquake which shook the country, on February 2010, and which, to fund the reconstruction of the devastated areas, led to the enactment of Law No. 20.469.[78]

None of the above taxes applied to investors which had outstanding DL 600 foreign investment contracts and which refused to be subject to the provisions of either law. However, as described below, the great majority of foreign mining investors accepted voluntarily to substitute their existing invariability rights by those of Laws 20.026 and 20.469, respectively.

The adoption of these various amendments to the original invariability system of DL 600, which are described ahead, was especially complex. A special effort has been made to summarize and simplify the content of these amendments.

(i) Law No. 20.026, of 2005

This law established, as from January 1st 2006, a tax on the operational income of mining entrepreneurs (as defined in the law). Its rate was of 5% on those annual sales which exceed 50.000 metric tons of fine copper. On annual sales equal or below 50.000 but above 12.000 metric tons of fine copper, the rate fluctuates between 0.5 and 4.5%. Annual sales equal or below 12.000 metric tons of fine copper were exempted.

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[76] Foreign Investment Statute (Chile), Art. 11 *bis*, 3.

[77] Law No. 20.026, Specific Tax on Mining Activity (Chile) (16 June 2005). *See also* Law No. 20.097, of 8 April 2006, which amended Art. 2 of Law 20.026 (Chile) (adding new provisions: Article 64 *bis*, to the Income Tax Law; and article 11 Ter to the Foreign Investment Statute).

[78] Law No. 20.469, Modifications to the Tax on Mining Activity (Chile) (21 Oct. 2010).

Foreign mining investors and enterprises recipient of their investments, which had in force investment contracts signed before December 1st 2004,[79] whose DL 600 invariability rights remained outstanding, were given two options: i) to reject the tax and continue benefitting of their invariability rights for the balance of the ten year terms established in their respective contracts; or ii) to accept the tax and request, before 30 November 2005, the fifteen year invariability and related rights of article 11 Ter of DL 600 mentioned below.

(ii) **Article 11 Ter of DL 600**

This provision was introduced by law No. 20.026. It established that foreign investments of not less than US$ 50 million or its equivalent in foreign currencies, transferred into the country for developing mining projects, could be granted in respect of those projects, the following rights for a term of fifteen years:

1. The invariability of the legal provisions applied at the date of signature of the respective contract regarding the specific 5% tax on mining activities defined in law N°. 20.026 and article 64 *bis* of the income tax law.

   Accordingly, they would not be affected by any new tribute increase in the rate, the extension of the calculation base or any other amendment that might be introduced, that made the specific tax on mining more onerous to the investor.
2. They would not be affected by any new tribute, including royalties, canons, or similar tax burdens, specifically levied on mining activities, established after the signature of the respective foreign investment contract, that is based on or considers when calculating its base or amount, the incomes on mining activities or the investments, assets, or rights used in mining activities.
3. They would not be affected by modifications introduced to the amount or form of calculation of the development and exploration licenses referred to in Title X of Law 18,248 (the Mining Code) in force at the time of the signature of the respective contract and which make those licenses more onerous.
4. The term of fifteen years would be counted in calendar years, starting from the year in which the respective company commences operations. The above mentioned rights considers as the reference point for the invariability granted the rate, tax base, and the other elements of the tax in force at the date of the respective foreign investment contract.

[79] This is the case of investments made under articles 7 and 11 *bis* of DL 600.

The rights established in this article are incompatible with the rights granted by Articles 7 (which describes the tax invariability rights of common foreign investors) or 11 *bis* (which applies to megaprojects) of DL 600. Regarding the latter, only in regards to the rights which may be granted under paragraphs 1 or 2, excluding the right to maintain accounting in foreign currency. Consequently, the foreign investor that requests the granting of the rights referred to in those articles would not be able to request the granting of the benefits of Law 20.026.

(iii) **Law No. 20.469 of 2010**

This law substituted the invariability of Law No. 20.026 of 2005. Foreign investors and recipients of foreign investments which, at the time of the entry into force of Law 20.469, had an outstanding foreign investment contract with the State of Chile under Law No. 20.026 of 2005 (Art. 11 *ter* of DL 600), were given the voluntary option of submitting themselves to a new special mining tax.[80] This option was limited exclusively to the voluntary substitution of the invariability of the specific mining tax established by Law No. 20.026 of 2005, whilst maintaining fully in force the other rights of foreign investors under Article 11 *ter* of DL 600.

On the other hand, foreign investors and recipients of their investments subject to the original tax regime of Article 7 of DL 600, and megaprojects subject to Article 11 *bis* of DL 600, were given the option of voluntarily substituting their existing tax invariability by that of Law 20.469. Investors which exercise this option can, however, continue to keep their books in foreign exchange but must submit their annual financial statements to the corresponding Securities Agency.

The tax rate for enterprises which opt for the invariability of the new law fluctuates between 4% and 9% of their mining operational income during the years 2010, 2011, and 2012. As from 2013, those enterprises will be subject to the regime established in their original contracts until the lapse of their respective terms. After that, they will benefit from six years of invariability with tax rates which will fluctuate between 5% and 14%. As of 19 January 2011, eighteen companies – which represented 81.8% of the foreign mining

[80] Modifications to the Tax on Mining Activity (Chile), Transitory Art. 1 of Law No. 20.469 (establishing that those foreign investors and enterprises recipient of their investments that opt for the application of this law, are given the right to extend its benefits to connected or related mining projects different from those identified in their original contracts. The application of this provision has been interpreted by joint resolutions No. 165 of *Comisión Chilena del Cobre* (Chilean Copper Commission) and No. 1493 of *Servicio Nacional de Geología y Minería* (National Geological y Mineralogical Service), both of 17 December 2010).

companies which had prior invariability contracts with the State of Chile – applied for admission to the new regime, to the great satisfaction of the Chilean government.[81]

5. *Legal Remedies Available to Foreign Investors*

a. Description

This section describes: i) the legal remedies available to foreign investors; ii) the legal restrictions to foreign participation or purchases; iii) the relevant jurisprudence; and iv) the access of foreign investors to public works concessions.

b. The Legal Remedies

Without prejudice to the international arbitration remedies discussed below, foreign investors have the right to request judicial revision of legislative, executive, or judicial acts or decisions that affect their legal rights or constitutional guarantees. These remedies and recourses are: i) the constitutional recourse of general protection; ii) the constitutional recourse of economic protection; iii) recourse against the resolutions of the Central Bank; iv) recourse against the resolutions of the Municipalities; and v) the non-discrimination recourse described above.

(i) The constitutional recourse of general protection can be exercised against arbitrary or illegal acts or omissions that: discriminate between nationals and foreigners, perturb or threaten the exercise of the right to develop an economic activity as well as the right to purchase goods, or discriminate in economic matters. It also applies against arbitrary and illegal acts of a given person that breach the right to live in a non-polluted environment. This recourse can be submitted by the affected party or by any other person in its name before the respective Courts of Appeals.[82]

(ii) The constitutional recourse of economic protection[83] can be submitted by any person – without having to demonstrate current interest ("standing") – before the respective Court of Appeals to protect the right to develop any economic activity which is not contrary to the morals, the public order, or national security[84] or to challenge the breach of the

[81] Foreign Investment Committee Website, *available at* http://www.inversionextranjera.cl/index.php (explaining that 18 mining companies were interested in the new law and explaining the implementation of Law No. 20.469, which modified mining taxes).

[82] Chile Constitution, Arts. 19, Nos. 8, 20 and 23.

[83] Law No. 18.971, Special Recourse for Chile Constitution Art. 19, No. 21 (Chile), Art. 1 (10 Mar. 1990).

[84] Chile Constitution, Art. 19, No. 21.

subsidiary principle which forbids the State and its organs from developing entrepreneurial activities without the prior authorization of a law of special quorum.[85]

(iii) The Organic Law of the Central Bank[86] establishes the right to complain against illegal decisions, regulations, resolutions, orders, or instructions of the Central Bank. This complaint may be submitted before the respective Court of Appeals within 15 working days from the date on which the objected decision was notified. It requires a deposit equivalent to 1% of the total amount of the operation or prejudice complained of. A favorable decision will justify requesting damage compensation before the local Courts.

(iv) The Organic Law of the Municipalities[87] gives individuals the right to raise complaints against illegal resolutions or omissions of the Municipalities.

c. Legal Restrictions on Foreign Participation or Purchases

Current laws restrict foreign participation in certain economic activities, including: commercial shipping,[88] air transportation,[89] fisheries,[90] territorial borders,[91] radio and television,[92] telecommunications,[93] journalism,[94] labor,[95] and electric power concessions.[96]

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[85] Chile Constitution, Art. 19, No. 21.

[86] Law No. 18.840, Organic Law of the Central Bank (Chile), Art. 69 (10 Oct. 1989).

[87] DFL No. 1/19.653 Approval of the Modified, Systematized, and Coordinated Text of Law No. 18.695 (Organic Law of Municipalities) (Chile), Arts. 141–142 (26 Jul. 2006).

[88] DL No. 3059, Law for the Promotion of Commercial Shipping (Chile), Art. 1 (22 Dec. 1979).

[89] DL No. 2564, Commercial Aviation Laws (Chile), Arts. 1–2 (22 Jun. 1979).

[90] Decree 430, Approval of the Modified, Systematized, and Coordinated Text of Law No. 18.892 (General Law on Fishing and Aquaculture) (Chile), Art. 161, Transitory Art. 10 (21 Jan. 1992).

[91] DL No. 1939, Laws on the Acquisition, Administration, and Disposition of Goods of the State (Chile), Art. 7 (10 Nov. 1977); DFL No. 4, Laws for the Coordination of Activities at the Borders of the State (Chile) (10 Nov. 1967). This legislation imposes restrictions on the acquisition or possession of real property rights close to Chile's territorial border by citizens or legal entities from Argentina, Peru, and Bolivia but gives the government the authority to establish exceptions thereof. *See* MAYORGA et al., at 43.

[92] Law No. 18.838, Creation of the National Television Council (Chile), Art. 18 (30 Sep. 1989).

[93] Law No. 18.168, General Telecommunications Law (Chile), Arts. 21–22 (2 Oct. 1982).

[94] Law No. 19.733, Law on Free Speech and the Practice of Journalism (Chile), Art. 9 (4 Jun. 2001).

[95] DFL No. 1, Approval of the Modified, Systematized, and Coordinated Text of the Labor Code (Chile), Arts. 19–20 (16 Jan. 2003).

[96] DFL No. 1, Ministry of Mining, Art. 13 (1982).

The Labor Code states that, with the exception of employers with no more than 25 workers, 85% of the workers under the same employer must be Chilean nationals. However, this rule does not apply to the specialized technical staff that cannot be replaced by local employees.[97]

d. Relevant Jurisprudence

The Carter-Holt Harvey case ("*Carter-Holt*") illustrates the legal protections available to foreign investors in Chile whose rights are affected by discriminatory legislation.[98]

In *Carter-Holt*, a New Zealand company requested that the Committee eliminate a law requiring that the majority of the board of directors of foreign companies requesting registration of fishing vessels had to be Chilean citizens.[99]

The case resulted in a ruling that the law breached the provisions of Carter-Holt's foreign investment contract and was discriminatory.[100] Initially, the Committee forwarded the complaint to the Legislative Congress which was then revising the challenged legislation, instead of responding.

The claimant, not satisfied with the above procedure, submitted a claim for economic protection before the Court of Appeals of Santiago, asserting that the Committee's lack of response breached due process and was arbitrary.[101] On 28 May 1991, the Court of Appeals ruled in favor of the investor:

> [T]he lack of response by the Foreign Investment Committee to the request of the complainants constituted an illegal omission which deprived them of their legitimate right to seek the elimination of the possible discrimination which has motivated the present recourse and must be corrected by this procedure.[102]

In compliance with the ruling above, the Committee recognized that the challenged provision discriminated against foreign investors who had executed contracts with the State of Chile.

Congress responded by adopting two measures. The first was to amend the Navigation Law[103] and the second was to allow for the registration of fishing vessels of companies with foreign majority capital, provided that Chilean

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[97] Labor Code, Arts. 19–20.

[98] MAYORGA, et al., ibid., at 169–170, 476–506.

[99] General Law on Fishing and Aquaculture (Chile), Transitory Art. 10.

[100] Foreign Investment Statute (Chile), Arts. 9 and 10.

[101] CARTER HOLT, *Recurso de Protección* No. 133–91, Santiago Court of Appeals, Decision of 28 May 1991. Hereinafter, Carter Holt.

[102] Ibid.

[103] DL No. 2.222, Replacement of the Navigation Law (Chile), Art. 11 (31 May 1978) (listing the requirements for the registration of vessels in Chile).

companies were given the same treatment in their country of origin.[104] The second decision settled the dispute in favor of Carter-Holt by adding a transitory Article to the Fisheries Law. The provision waived the Chilean citizenship majority requirement for owners of fishing vessels registered before 30 June 1991, satisfying the complainant.[105]

e. Access of Foreign Investors to Public Works Concessions[106]

From 1993 to August 2010, a total of US$ 11 billion in private funds[107] have been invested in Chile's public works concessions programs. They have funded highway, port, airport, urban infrastructure, agricultural irrigation, hospital, and penitentiary projects. Under the current legislation, any natural or legal person can apply to the Ministry of Public Works ("MOP") for the execution, reparation, or conservation of a public infrastructure project through the system of concessions. The latter are adjudicated by the MOP pursuant to a public bidding process which, depending on the circumstances, can be domestic or international. The concessionaire receives as sole compensation for its services the price, tariff, subsidy, or additional benefits stipulated in the concession contract. The system includes a mechanism for the settlement of disputes between the MOP and the concessionaires which has operated with great success.

In 2009, Law No. 20.410[108] introduced changes to the above system, including the mechanism for the settlement of disputes which can, succinctly, be described as follows:

A distinction is made between technical discrepancies and complaints related to the interpretation or implementation of the concession contract.

Technical discrepancies can be submitted to a Technical Panel which, within thirty days, must issue its nonbinding recommendations to the parties. This Panel is formed by five qualified professionals who, during the twelve months prior to their appointment, have not been related to the MOP or its sub-agencies, or to any public works concessionaire. They are appointed by

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[104] Decree No. 430, Approval of the Modified, Systematized, and Coordinated Text of Law No. 18.892 (General Law on Fishing and Aquaculture) (Chile), Art. 161 (21 Jan. 1992).

[105] General Law on Fishing and Aquaculture (Chile), ibid., transitory Art. 10.

[106] Decree 900, Approval of the Modified, Systematized, and Coordinated Text DFL MOP No. 164, of the 1991 Public Works and Concessions Law (Chile), (18 Dec. 1996).

[107] *Libertad y Desarrollo*, "*Concesiones en Chile: Hacia donde vamos?*" [Concessions in Chile: Where are we Headed], *Temas Públicos* No. 979, Aug. 2010, *available at* http://www.lyd.com/wp-content/files_mf/TP-979-Concesiones%20en%20Chile%20Hacia%20donde%20vamos-18-08-2010.pdf.

[108] Law No. 20.410, Modification to Public Works and Concessions Law (Chile) (20 Jan. 2010).

a high level public Council pursuant to a competitive process established by law and last six years in office.

Concession disputes may be submitted by the parties to an Arbitration Commission or to the Santiago Court of Appeals. Technical matters may also be submitted to those entities after recommendations have been previously issued by the Technical Panel. Arbitration Commissions consist of three professionals, two of which must be lawyers, and the third an engineer or economist, appointed by the parties from two rosters of experts pursuant to a public competitive process. The Supreme Court forms the first roster of 20 lawyers; the Free Competition Defense Tribunal forms the second roster of ten economists or engineers. As with the Technical Panel, none of the above arbitrators may have been related to the MOP or a concessionaire. Members of Arbitration Commissions are designated at the start of the concession process and the Commissions are established within 30 days from that designation. Upon its establishment, the Commission adopts the procedures which will govern the complaint; its powers thereof are those of an arbitrator in equity. However, the final award must be issued in accordance with the applicable laws.[109] As of this writing, no disputes have yet arisen under the above described procedure.

II. *Arbitration Law*

A. *Applicable Laws, Issues, and Jurisprudence*

1. *Description*

Domestic arbitration has been in force in Chile without interruption since 1875, the date on which the Organic Code for the Judiciary was enacted.[110] It is presently regulated by the above-named Code and the Code of Civil Procedure.

In 1992, the Santiago Chamber of Commerce established, with the support of the Inter-American Development Bank, the present Mediation and

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[109] Decree 900, Approval of the Modified, Systematized, and Coordinated Text of DFL MOP No. 164, of the 1991 Public Works and Concessions Law (Chile), Art. 36–36 *bis* (18 Dec. 1996).

[110] BIGGS, Gonzalo. "*Evolución y Singularidad de la Institución Arbitral en Chile*" in *Homenaje a Arturo Alessandri Besa* [The Evolution and Singularity of Arbitral Institutions in Chile] (Editorial Jurídica de Chile 2009).

Arbitration Centre, or "CAM," which has been administering, since that date, institutional domestic arbitration in Chile.[111]

On 22 September 2004, Chile enacted Law No. 19.971[112] on international commercial arbitration which is also being administered by the CAM. Its structure follows the UNCITRAL Model Law and coexists in harmony – although separately – with the domestic arbitration law.[113] Thus, Chile rejected the monist model followed by Spain, Germany, Mexico, and other countries where domestic and international commercial arbitration law are integrated and regulated by a single legal text.

Law No. 19.971 does not apply to disputes where another law forbids arbitration, or to disputes subject solely to domestic arbitration.[114]

2. *Issues*

Some of the issues which may arise in the application of arbitration law in Chile relate to: i) the confidentiality of the proceedings; ii) the nationality of legal counsel; iii) the availability of domestic recourses; and iv) the enforcement of awards that affect real estate.

- **Confidentiality.** As neither the UNCITRAL Model Law nor Law No. 19.971 establish the confidentiality of arbitral proceedings, if parties to a dispute wish to ensure confidentiality, they must agree to it explicitly.
- **Nationality.** Under Law No. 19.971, parties to arbitration may appoint a foreigner as arbitrator. However, the parties must be represented by a Chilean attorney or foreign resident who fulfils the following requirement:

> Only Chileans and foreign residents who have undertaken the totality of their law studies in Chile may practice law. The above is without prejudice to what may be established in international treaties in force.[115]

The above provision contravenes efforts to promote Santiago as a site for international commercial arbitration. In practice, however, parties can partially overcome this restriction by retaining foreign counsel, under the responsibility of Chilean counsel, as advisors to an international arbitration.

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[111] *Cámara de Comercio de Santiago* (Santiago Chamber of Commerce), *available at* www.camsantiago.com. During the 1992–2009 period the CAM has administered approximately 1,200 cases.

[112] Law No. 19.971, International Commercial Arbitration Law (Chile) (29 Sept. 2004) Hereinafter, Law No. 19.971.

[113] On Chile's domestic arbitration law, *see generally Patricio Aylwin. "El Juicio Arbitral"* [The Arbitral Process"] (Editorial Jurídica de Chile 2005).

[114] Law No. 19.971, ibid., Art. 1(5).

[115] Law No. 7421, Organic Law of the Judiciary (Chile), Art. 526 (15 Jun. 1943).

- **Domestic Remedies.** Historically, the practice of Chilean courts has been to respect arbitration awards unless serious departures from the law have occurred. Indeed, the cases in which domestic arbitral awards have been annulled by the Judiciary are still very rare. This trend is not expected to change.

In addition to the recourse of annulment offered in Article 34 of Law No. 19.971, discussed below, the following domestic remedies are available and could be raised, in exceptional circumstances, against arbitral awards or decisions: i) the "queja" or complaint recourse against egregious faults or abuses of arbitrators;[116] ii) the recourse of inapplicability of legal provisions contrary to the Constitution;[117] and iii) the protection against arbitrary or illegal acts or omissions which threaten the exercise of some of the basic guarantees provided by the Constitution.[118]

- **Annulment.** Only one annulment recourse under Law No. 19.971 has been raised so far. This was against the award of an ad-hoc arbitrator and was rejected by the Court of Appeals.[119]
- **Property Located in Chile.** The Civil Code states:

> Property located in Chile is subject to Chilean laws, although their owners may be foreigners and non-residents of Chile.
>
> This provision should be understood as being without prejudice to the stipulations in contracts validly executed in other countries.
>
> However, the effects of contracts executed in foreign countries to be enforced in Chile are subject to Chilean laws.[120]

The above provision has been the subject of extensive and contradictory rulings. The main issue is whether a foreign judicial decision or foreign arbitral award affecting property located in Chile (real estate or chattel) is enforceable in Chile. Recent jurisprudence has developed supporting such enforcement. Indeed, invoking the provisions of the 1958 New York Convention and Law

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[116] Organic Law of the Judiciary (Chile), Art. 545.

[117] Chile Constitution, Art. 93(1). The competent tribunal to examine this recourse was, previously, the Supreme Court. Now, it is the Constitutional Tribunal.

[118] Chile Constitution, Art. 20.

[119] *Publics v. Arbitro MJV*, Santiago Court of Appeals, Case No. 9134–07 (4 Aug. 2009). The claimant stated the award relied on a document from a third party not attached to the proceedings. The Court rejected the complaint because the claimant did have access to a database submitted in the proceedings and had ample opportunity to challenge the relevant evidence.

[120] Civil Code (Chile), Art. 16.

No. 19.971[121] and other considerations, the Supreme Court has accepted the enforcement of a foreign judicial decision which condemned a Chilean company to pay the amounts ordered by that decision. In so doing, the Court rejected the argument that because the loan contract and promissory notes were located and executed in Chile, and subject to Chilean law, the foreign decision was unenforceable.[122]

3. *Recognition and Enforcement of Arbitral Awards*

The Code of Civil Procedure, in force since 1 March 1903, regulates the recognition and enforcement of foreign judicial decisions and foreign arbitral awards.[123]

The substantive and procedural (or exequatur) requirements of these rules are the following:

B. *Substantive Requirements*

(i) That the award contains nothing contrary to the laws or domestic jurisdiction of Chile;
(ii) That evidence be submitted demonstrating that the complaint against the party whose award is invoked was duly notified; and
(iii) That the award is final or *res judicata* in accordance with the laws of the country where it was issued.[124]

C. *Procedural (or exequatur) Requirements*

(i) If an international treaty is in force between Chile and the country where the award was issued, the provisions of the treaty apply.
(ii) In the absence of a treaty between the respective countries, the rule of reciprocity applies. Accordingly, the award will receive the same force in Chile that it receives in the country where the award was issued.
(iii) If the arbitral award was issued in a country which does not recognize or enforce Chilean arbitral awards, it will be given no force in Chile.
(iv) The responsibility for the administration of this exequatur procedure lies with the Supreme Court of Chile.

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[121] Law No. 19.971, ibid., Art. 35(1)(b)(ii); and Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), *entered into force* 7 June 1959 ("New York Convention"), Art. V(2)(b).

[122] *State Street Bank and Trust Company v. Inversiones Errázuriz Limitada et al.*, Supreme Court of Chile, Case No. 2.349–2005 (14 May 2007) (recognizing the enforcement of a decision of the Southern District Court of the State of New York).

[123] Code of Civil Procedure (Chile), Arts. 242 to 251.

[124] Code of Civil Procedure (Chile), Art. 245.

(v) A duly legalized official translation of the foreign award must be submitted to the Supreme Court of Chile.[125]

1. *Jurisprudence*

There are three cases which illustrate the criteria applied by the Supreme Court for the recognition and enforcement of arbitral awards.

In *Gold Nutrition v. Garden House*, the defendant sought to prevent the enforcement of a foreign arbitral award issued in Sao Paulo, Brazil, by reopening a discussion on its liability under the agreement. The Supreme Court rejected the request and stated that the purpose of the enforcement review was merely to verify compliance with minimum public policy requirements. The Court invoked the Code of Civil Procedure, the International Commercial Arbitration Act, and New York and Panama Conventions, and added that the procedure was not aimed at examining the justice or injustice of the award or an occasion for reviewing findings of fact or law.[126]

In *Sociedad Naviera Transpacific Steamship LTD. v. Cía. de Seguros Generales Euroamérica*, the Supreme Court refused to recognize an international arbitral award whose same subject matter was pending before judicial proceedings in Chile, which were commenced prior to the initiation of the arbitration. Because the Chilean court had confirmed jurisdiction, the foreign arbitral award could not be enforced as it would run against the *res judicata* decision on jurisdiction issued by the Chilean court, and would thereby violate public policy.[127]

In *Credit Anstalt fur Wiederanfbau v. Inverraz Ltd.*, the Supreme Court rejected the argument that a pending annulment procedure prevented the recognition of an arbitral award not evidenced by its actual annulment or suspension. It added that Chilean law applied to the recognition of arbitral awards and that, therefore, the fact that French law established that the effects of an arbitral award were suspended by the submission of annulment recourses, was irrelevant.[128]

2. *Enforcement of ICSID Awards*

There are no special rules for the enforcement of ICSID awards in Chile. Consequently, subject to the provisions of the ICSID Convention, particularly

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[125] Code of Civil Procedure (Chile), Arts. 242–247.

[126] *Gold Nutrition Industria y Comercio v. Laboratorios Garden House S.A.*, Supreme Court of Chile, Case No. 6615–07 (15 Sept. 2008).

[127] *Sociedad Naviera Transpacific Steamship LTD. v. Cia de Seguros Generales Euroamérica*, Supreme Court of Chile, Case No. 2987–99.

[128] *Kreditanstalt fur Wiederaufbau (KFW) v. Inversiones Errázuriz Limitada (Inverraz)*, Supreme Court of Chile, Case No. 5228–08, (15 Dec. 2009).

Article 56, the above exequatur rules of the Code of Civil Procedure would apply to the enforcement of an ICSID award. As stated earlier, the corresponding request would have to be submitted to the Supreme Court of Chile.

3. *Arbitration Treaties*

The most comprehensive treaty on private international law, which continues to be invoked by Chilean tribunals and other Latin American countries, is the Convention adopted by the Havana Inter-American Conference of 1928, otherwise known as the "Bustamante Code." Chile ratified this Convention with the proviso it would reserve its vote on matters subject to its convenience, in particular those related to its traditional policies or national legislation. In spite of this reservation, the Code has been invoked by Chilean tribunals to reinforce the interpretation of private international law matters.[129]

Both the New York[130] and Panama Conventions[131] are in force in Chile without reservations.

The New York Convention does not have an institutional structure in charge of its implementation. By contrast, the Inter-American Commercial Arbitration Commission ("IACAC"), of which Chile and the rest of the Latin American countries are full members, supervises the application and implementation of the Panama Convention.

In general terms, there are no fundamental differences between the New York and Panama Conventions regarding the recognition and enforcement of arbitral awards. Moreover, the above-mentioned provisions of the Chilean Code of Civil Procedure are basically consistent with those two Conventions.

Chile has signed but has not ratified, the Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. One reason for non-ratification is that it is perceived to be superfluous to the Panama Convention.

D. *Investment & Settlement of Disputes Treaties*

1. *Description*

Chile is a Contracting State of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States

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[129] Decree No. 374, Code on Private International Law (Chile) (25 April 1934). This Code is the most comprehensive legal instrument ever adopted on private international law.

[130] DL No. 1.095, Approval of the New York Convention of 1958 (Chile) (31 July 1975).

[131] DL No. 1.376, Approval of the Inter-American Convention on International Arbitration (Chile) (8 April 1976).

(the "ICSID Convention") which, on 14 October 1966, established the International Centre ("the Centre") for the Settlement of Investment Disputes, otherwise known as ICSID.

In addition, Chile has signed, or has in force, bilateral investment treaties ("BITs"), Free Trade Agreements ("FTAs") and economic association or complementation agreements with a large number of countries. These treaties and agreements often designate ICSID as the venue for the settlement of investor-State disputes.

2. *ICSID*

Chile signed the ICSID Convention on 25 January 1991. Following ratification, the ICSID Convention entered into force on 24 October 1991 and remains in force as of this writing.

Unlike certain other countries, Chile has not notified the Centre pursuant to ICSID Convention Article 25(3) of any constituent subdivision or agency as to which no further approval of the State would be needed in order for it to consent to the jurisdiction of the Centre. Nor has Chile notified the Centre, pursuant to ICSID Convention Article 25(4), that it would or would not consider submitting a certain class of disputes to the jurisdiction of the Centre.

As of this writing, Chile has been a respondent in three ICSID disputes.[132]

3. *BITs*

As of July 2010, Chile had signed 49 BITs. Out of these, 16 were with Latin American countries, 23 with European countries, 7 with countries from Asia, the Middle East and Oceania, and 3 with African countries. All include chapters on the treatment of investments and settlement of investor-State disputes through international arbitration. These chapters are discussed in greater detail below.

Out of the 49 BITs, 36 treaties have entered into force, and 13 have been signed but not been ratified. The BITs which have not been ratified include: in Latin America: Brazil, Colombia, and the Dominican Republic; in Europe: Hungary, the Netherlands, and Turkey; in Asia, Oceania, and the Middle East, Indonesia, Lebanon, New Zealand, and Vietnam; and in Africa, South Africa, Egypt, and Tunisia.[133]

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[132] Those cases are i) *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2; ii) *Mtd Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7; and iii) *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7.

[133] For a list of Chile's BITs, see Foreign Investment Committee Website, *available at* http://www.inversionextranjera.cl/index.php?option=com_content&view=article&id=230&Itemid=61.

4. *FTAs*

As of July 2010, Chile had signed a total of 21 international trade agreements or treaties. These have included FTAs, Economic Associations, Complementary Economic Agreements, and Partial Economic Agreements with both individual countries and trade associations.

FTAs are presently in force with Australia, Canada, China, Korea, the United States, Japan, Mexico, Panama, Central America, and the European Free Trade Association ("EFTA"). The first FTA signed by Chile was with Canada,[134] whose provisions on investor-State disputes follow closely those of the North American Free Trade Agreement ("NAFTA").[135] The investor-State dispute provisions of the FTA with the United States also follow the NAFTA model but with the important differences discussed below.[136]

The FTA with Central America,[137] is special in that it applies bilaterally with each of the five countries individually, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, and not with Central America as a separate legal entity. In addition, this treaty explicitly incorporates the BITs Chile has in force with each of these five countries.[138]

Chile's FTA with the EFTA countries (Switzerland, Norway, Lichtenstein, and Iceland) is similar to that with Central America in that it also applies bilaterally with each of the four countries individually and not with the EFTA as a legal entity. However, in contrast with the Central American FTA, Chilean BITs in force with three of the EFTA members – Iceland, Norway, and Switzerland[139] – are not incorporated into the EFTA.

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[134] Canada – Chile Free Trade Agreement (Santiago, 5 Dec. 1996) *entered into force* 2 June 1997.

[135] North American Free Trade Agreement, NAFTA (17 Dec. 1992) *entered into force* 1 Jan. 1994.

[136] BIGGS, Gonzalo. *"The Latin American Treatment of International Arbitration and Foreign Investments and the Chile – US Free Trade Agreement."* In: ICSID Review, Foreign Investment Journal Vol. 19 No. 2 (2004), and BIGGS, Gonzalo: "Investment and Trade in Latin America: Settling Investor-State Disputes." In "Visions From Finis Terrae. Chilean Voices in The United States" Inter-American Dialogue. Washington, D.C. 2008.

[137] Chile – Central America Free Trade Agreement (Guatemala City, 18 Oct. 1999) *entered into force* 30 Nov. 2000 (El Salvador), 14 Feb. 2002 (Costa Rica), 19 July 2008 (Honduras), 23 March 2010 (Guatemala), pending (Nicaragua) (collectively, "Chile – Central America FTA").

[138] Chile – Central America FTA, Annex 1, Art. 10.0.1 *See* www.direcon.cl.

[139] Agreement between the Government of the Republic of Chile and the Government of the Republic of Iceland for the Reciprocal Promotion and Protection of Investments (Kristiansand, 26 June 2003) *entered into force* 12 Aug. 2006. Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Norway for the Reciprocal Promotion and Protection of Investments (Oslo, 1 June 1993) *entered into force* 7 Sept. 1994. Agreement between the Swiss Confederation and the Republic of Chile for the Reciprocal Promotion and Protection of Investments (Bern, 24 Sept. 1999) *entered into force* 22 Aug. 2002.

It should be noted that third parties which fulfill the rules of origin established in Chile's FTAs, can export to Chile's commercial partners with the reduced tariffs established in those FTAs.

5. *Economic Associations, Complementary Agreements, and other Agreements*

Chile has concluded Economic Association Agreements with the following countries or groups of countries:

- **Pacific Four ("P4").** This agreement includes Chile, New Zealand, Singapore, and Brunei Darussalam. It was signed on 18 July 2005 and entered into force on 8 November 2006.[140]
- **European Union ("EU").** The agreement was signed on 18 November 2002 and entered into force on 1 February 2003.[141]

Chile's agreements with both the P4 and the EU establish *ad hoc* dispute settlement procedures which apply to any matter that may arise in connection with the interpretation and implementation of those agreements. However, they do not provide investors the right to bring arbitration directly against State parties to these agreements. In any case, the majority of the members of the EU already have BITs with Chile. In the case of the P4 countries, New Zealand has a BIT with Chile which has been signed but not ratified; Singapore and Brunei Darussalam have not signed a BIT with Chile.

- **Japan.** This agreement is titled, Agreement for a Strategic Economic Partnership.[142] However, it also establishes an FTA and its Chapter Eight provides the rules on investments, settlement of investor-State disputes and basic definitions thereof.[143] Both the format and substance of these provisions follow closely those of the NAFTA and the Chile – US FTA.[144]
- **Other Agreements.** In addition, Chile has in force Complementary Economic Agreements with Argentina, Bolivia, Cuba, Ecuador, Mercosur (Argentina, Brazil, Paraguay, and Uruguay), and Venezuela; a Partial

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[140] Trans-Pacific Strategic Economic Partnership Agreement (Wellington, 18 July 2005), *entry into force* 8 Nov. 2006.

[141] Agreement Establishing an Association Between Chile and the European Community and its Member States (Brussels, 18 Nov. 2002), *entry into force* 1 Feb. 2003.

[142] Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership (Tokyo, 27 Mar. 2007) *entered into force* 3 Sept. 2007.

[143] BIGGS, Gonzalo. *"Investor State Disputes Under the Chile – Japan Agreement."* In: The Japan Commercial Arbitration Association, No. 19 (2007). Hereinafter "Biggs."

[144] Chile – US FTA, ibid. (Miami, 6 June 2003) *entered into force* 1 Jan. 2004.

Economic Agreement with India; and Special Trade Agreements with Colombia and Peru.

E. *Protection Standards in Investment Treaties*

1. *Description*

This section discusses the rules under ICSID, BITs, and FTAs, and under Chilean law, on investor nationality, fair and equitable treatment and full protection and security, expropriation, and contract observance and performance requirements.

There is no common model for the investor-State dispute settlement provisions included in Chilean BITs. Although roughly similar, each has its own particular nuances and a case-by-case analysis is always required.

2. *Investor Nationality*

The individual and corporate nationality rules under the ICSID convention, the BITs, FTAs, and Chilean law must be distinguished from one another.

- **ICSID.** The individual and corporate nationality of foreign investors is governed by Articles 25(1) and (2), respectively. The prevailing opinion is that the nationality of corporations under Article 25(2) is determined by its place of incorporation or social seat.[145] In addition, foreign shareholders, including those with minority interests and no control over local companies, have been recognized as foreign investors for ICSID purposes.
- **BITs.** As noted earlier, Chile has 36 BITs in force. In most of them, the place of incorporation determines the nationality of the foreign corporation. The BITs with Argentina and Greece, which establish additional requirements, are an exception. In the treaty with Argentina, the social seat of the corporation must be in the territory of one of the Contracting Parties,[146] and in that with Greece, the foreign investor must have developed effective economic activities in its place of incorporation.[147]

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[145] SCHREUER, CHRISTOPHER. *The ICSID Convention: A Commentary*, 468 (Cambridge University Press 2001).

[146] Agreement between the Government of the Republic of Chile and the Government of the Republic of Argentina for the Reciprocal Promotion and Protection of Investments (Buenos Aires, 2 Aug. 1991) *entry into force* 27 Feb. 1995 ("Chile – Argentina BIT") Art. 1(4).

[147] Agreement between the Government of the Republic of Chile and the Government of the Republic of Greece for the Reciprocal Promotion and Protection of Investments (Athens, 10 July 1996), *entry into force* 7 Mar. 2003 Art. 1(b).

- **US – Chile FTA.** In contrast with the BITs or FTAs Chile has with other countries, the US – Chile FTA regulates, in detail, the nationality of individuals, enterprises, and investors of one of the Parties and makes several exceptions. A similar pattern is followed by the FTA provisions of the Chile – Japan Agreement of 27 March 2007.[148]

Under the Chile – US FTA a person of a Party "means a national or an enterprise of a Party" and an enterprise of a Party "means an enterprise constituted or organized under the law of a Party" (Article 2.1); and an investor of a Party "means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality."[149]

However, the following denial of benefits clause must be observed:

> (1) A Party may deny the benefits of this Chapter (Investment) to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if an investor of a non-Party owns or controls the enterprise and the denying Party:
> (a) does not maintain diplomatic relations with the non-Party; or
> (b) adopts or maintains measures with respect to the non-Party or an investor of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.
>
> (2) Subject to Article 22.4 (Consultations), a Party may deny the benefits of this Chapter to:
> (a) an investor of the other Party that is an enterprise of such other Party and to investments of that investor if an investor of a non-Party owns or controls the enterprise and the enterprise has no substantial business activities in the territory of the other Party, or
> (b) an investor of the other Party that is an enterprise of such other Party and to investments of that investor if an investor of the denying Party owns or controls the enterprise and the enterprise has no substantial business activities in the territory of the other Party.[150]

[148] BIGGS, ibid., "Investor State Disputes Under the Chile – Japan Agreement".
[149] Chile – US FTA, Art. 10.27.
[150] Chile – US FTA, Art. 10.11.

Chile

- **Individuals.** Pursuant to the Chilean Constitution and without prejudice to four other situations, all persons born in Chile are Chilean nationals except sons of foreigners at the service of their government or sons of foreigners in transit who nevertheless, can opt for Chilean nationality.[151] In addition, under the Treaty on Double Nationality with Spain which entered into force on 15 November 1958, nationals of Chile and Spain can acquire the nationality of the other State without losing their original nationality.
- **Corporations.** Chilean Corporations are constituted by a public deed, an extract of which must be registered in the Registry of Commerce of the corporation's domicile and published in the Official Gazette.[152] Two categories of foreign corporations can operate in Chile. The first includes those established or incorporated abroad that open offices, execute contracts with, or become shareholders of Chilean corporations but need not register with the Registry of Commerce. The second category includes the branches of foreign corporations that formally request authorization to operate in Chile and that, among other requirements, must maintain assets to cover their obligations in Chile.[153]

3. *Fair and Equitable Treatment and Full Protection and Security*

- **BITs.** In contrast with the Chile – US FTA mentioned below, the fair and equitable treatment provisions of Chile's BITs are inseparable from those on national treatment and most-favored-nation treatment.

For example, Chile's BITs with Malaysia (Art. 2(2)),[154] Argentina (Art. 2(1)),[155] Peru (Art. 4(1)),[156] and Spain (Art. 4(1))[157] provide that investments made

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[151] Chile Constitution, Art. 10(1); Decree No. 5.142, Approval of the Modified Text of Dispositions Regarding the Nationalization of Foreigners (Chile) (29 Oct. 1960).

[152] No. 18.046, Law on *Sociedades Anónimas* (Corporations) (Chile), Art. 5 (22 Oct. 1981).

[153] Law on *Sociedades Anónimas*, ibid., Arts. 121–122.

[154] Agreement between the Government of the Republic of Chile and the Government of the Republic of Malaysia for the Promotion and Protection of Investments (Kuala Lumpur, 11 Nov. 1992) *entry into force* 4 Aug. 1995, Art. 2(2).

[155] Chile – Argentina BIT, Art. 2(1).

[156] Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Reciprocal Promotion and Protection of Investments (Lima, 2 Feb. 2000) *entry into force* 11 Aug. 2001 ("Chile – Peru BIT"), Art. 4(1).

[157] Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Spain for the Reciprocal Promotion and Protection of Investments (Santiago, 2 Oct. 1991) *entry into force* 27 Apr. 1994, Art. 4(1).

by investors from either Contracting Party shall receive fair and equitable treatment but their content is not described. Each agreement then adds that this treatment shall be not less favorable to that extended by each Contracting Party to the investments of its own investors within its territory or that extended by each Contracting Party to similar investments of investors of third parties, if the latter were to be more favorable. Pursuant to a standard provision in these agreements, each Contracting Party undertakes to protect the effected investments of the other Party, in accordance with its legislation, and not to obstruct with unjustified or discriminatory measures, the enjoyment, sale or liquidation of those investments.

However, as an exception, the above provisions state that this treatment is not extended to the privileges that one Contracting Party grants to investors of a third state by virtue of its participation in free trade zones, customs unions, economic organizations or tax agreements.

- Chile – US FTA

> This Agreement states that: "Each Party shall accord, to covered investments, treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[158]

According to the Contracting Parties, the interpretation of the minimum standard of treatment of the above provision includes the following clarifications:

- "[A] determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article";[159]
- that the treaty "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments";[160]
- that "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights";[161]

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[158] Chile – US FTA, Art. 10.4(1).
[159] Chile – US FTA, Art. 10.4(3).
[160] Chile – US FTA, Art. 10.4(2).
[161] Ibid.

- that "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in ccordance with the principle of due process embodied in the principal legal systems of the world";[162] and
- "[F]ull protection and security" requires each Party to provide the level of police protection required under customary international law.[163]

The above provisions have been supplemented by Annex 10-A of the FTA, according to which "the customary international law minimum standard of treatment of aliens ***refers to all customary international law principles that protect the economic rights and interests of aliens.***"[164]

4. *Expropriation*

- BITs

The expropriation rules under the BITs must be distinguished from those under the FTAs, notably the Chile – US FTA.

Notwithstanding the differences noted below, the rules and standards on expropriation and payment of compensation established in the aforementioned BITS of Chile with Malaysia, Argentina, Peru, and Spain have the following common pattern:

In all four cases, expropriations or nationalizations of investments[165] must be for a public purpose established by law; pursuant to due process;[166] be non-discriminatory; and payment of compensation must be prompt, adequate, and effective.

In the event of a dispute, the parties will, if possible, resolve it through friendly consultations. If the dispute is not resolved within six months (or three months under the BIT with Malaysia), the investors have the option of submitting their claims to ICSID, ICSID's Additional Facility, or the domestic or administrative courts of the other Contracting Party. However, in the

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[162] Chile – US FTA, Art. 10.4(2)(a).

[163] Chile – US FTA, Art. 10.4(2)(b).

[164] Chile – US FTA, Annex 10-A (emphasis added).

[165] Chile – Peru BIT, Art. 6(1) (prohibiting the Contracting Parties from adopting "any measure which deprive, directly or indirectly, investors of the other Contracting Party of their investment").

[166] Chile – Argentina BIT, Art. 4(2) (stating that the legality of the expropriation or nationalization and amount of the compensation may be reviewed by the domestic courts).

BITs with Spain and Argentina,[167] but not in those with Malaysia or Peru, investors have the additional option of submitting their claims to an *ad hoc* tribunal established under the rules of UNCITRAL. In all four cases, once the individual or corporate foreign investor has submitted its claim to the jurisdiction of the concerned Contracting Party or to international arbitration, the selection of one or the other procedure becomes definitive and irrevocable (a so-called "fork in the road").[168]

In the BITs with Malaysia (Art. 6(4)), Argentina (Art. 10(6)), and Spain (Art. 10(6)), but not with Peru, Contracting Parties may not attempt to resolve their disputes through diplomatic channels unless the other Party fails to comply with an ICSID award or an ICSID tribunal determines that the controversy is outside its jurisdiction.

All four BITs establish the principle of subrogation which applies when one Contracting Party makes a payment to one of its investors in the territory of the other Contracting Party pursuant to an investment or financial guarantee. In that event, without prejudice to the right of the first Contracting Party to submit the settlement of the controversy to the jurisdiction established in the respective investment agreement, the other Contracting Party must recognize the transfer of any of the rights or titles of the investor to the first Contracting Party.

The BITs with Argentina (Art. 4(3)) and Peru (Art. 6(2)), but not those with Malaysia and Spain, require that investors of each Contracting Party whose investments have suffered losses caused by armed conflict, including war, a state of national emergency, civil disturbances, or other similar events in the territory of the other Contracting Party, receive from the latter, as reparation, compensation, indemnification, or other arrangement, treatment no less favorable than that which the other Contracting Party provides to its national investors or those of a third State.

- Chile – US FTA

Because – in contrast with the BITs described earlier – the provisions of this FTA ("the Agreement") are more extensive and detailed, only a summary is given here.

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[167] Chile – Spain BIT and Chile – Argentina BIT, Art. 10(3).

[168] *See e.g.* Chile – Argentina BIT, Art. 10(2).

The Agreement states that **direct**[169] **or indirect**[170] expropriations or nationalizations of **covered investments**[171] must be for a public purpose, in accordance with due process of law, in a non-discriminatory manner and accompanied by the payment of a prompt, adequate, and effective compensation in accordance with the standards stated in the Agreement.[172]

In addition, the FTA states that: i) the expropriation or nationalization must comply with a minimum standard of treatment in accordance with **customary international law** including fair and equitable treatment and full protection and security as defined in Article 10.4;[173] and ii) the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.[174] The same rules apply when an investor of a Party suffers losses to its investments owing to an armed conflict or civil strife in the territory of the other Party, including requisitioning of its investment or part thereof by the other Party's forces or authorities or destruction of its investment which was not required by the necessity of the situation.[175]

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[169] Chile – US FTA, Annex 10.D(3) (defining "Direct expropriation" as "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure").

[170] Chile – US FTA, Annex 10.D(4) (defining "Indirect expropriation" as "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure"). The text further provides:

a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
   i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
   ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectation; and
   iii) the character of the government action.
b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, does not constitute indirect expropriations.

[171] Chile – US FTA, Art. 2.1 (defining "covered investment" as "with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter").

[172] Chile – US FTA, Art. 10.9(1).

[173] Chile – US FTA, Art. 10.9(1) and 10(4).

[174] Chile – US FTA, Art. 10.9 and Annex 10-A.

[175] Chile – US FTA, Arts. 10.4 (4)–(5).

In the event that an investment dispute cannot be resolved, an investor of a Contracting Party ("claimant") can, on its own, or on behalf of an enterprise incorporated in the host State that the claimant directly or indirectly owns or controls, submit to arbitration a claim that the respondent has breached an obligation under the investment section of the Agreement or the investment contract entered with Chile under DL 600 – or an investment agreement or investment authorization (as defined therein).[176] Claimant must detail that it has incurred loss or damage by reason of, or arising out of that breach.[177]

At least 90 days before submitting any claim to arbitration, the claimant must deliver a written notice to the respondent of its intention to submit the claim.[178] Provided that six months have elapsed since the events giving rise to the claim, the claimant may submit its claim either to ICSID, ICSID's Additional Facility (if applicable), UNCITRAL or, if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.[179]

When the claim is submitted for breach of an obligation under the investment section of the Agreement or an investment contract under DL 600, the tribunal shall decide the issues in dispute in accordance with the Agreement and the applicable rules of international law.[180]

An original feature of these disputes is the responsibility given to the Free Trade Commission ("FTC").[181] Its decisions interpreting a provision of the Agreement is binding on a tribunal established under the above rules, and any award must be consistent with that decision.[182]

Chile

The substantive rules on expropriation and compensation are established in Chile's Political Constitution.[183] The Constitution guarantees to all persons, Chilean or foreign, the right of property in its various forms over corporal or non-corporal goods. It also provides that nobody, under any circumstances, can be deprived of ownership, except in accordance with a general or special law which authorizes the expropriation for a public purpose or pursuant to the national interest as established by law. The expropriated party can challenge the legality of the act of expropriation before the domestic courts and

[176] Chile – US FTA, Annex 10-E.
[177] Chile – US FTA, Arts. 10.15(1)(a)(ii).
[178] Chile – US FTA, Art. 10.15(4).
[179] Chile – US FTA, Art. 10.15(5).
[180] Chile – US FTA, Art. 10.21.
[181] The FTC is established by Chapter XXI of the Chile – US FTA. It is formed by ministerial representatives of both parties and is responsible for the administration of the Agreement.
[182] Chile – US FTA, Art 10.21(3).
[183] Chile Constitution, Art. 19(24).

shall always have right to compensation for the effective economic injury suffered, which shall be established by mutual agreement or by a court decision in accordance with law. In the absence of an agreement, the compensation shall be paid in full and in cash.

The physical possession of the expropriated goods shall only be taken after full payment of the compensation which, in the absence of an agreement, shall be determined provisionally by experts in accordance with the law. In the event of a complaint on the justification of the expropriation, the judge may, on the basis of the invoked antecedents, order the suspension of the taking. A special law regulates the procedure for expropriation.[184]

5. *Observance of Contracts and Obligations*

- BITs

Chile's BITs with Malaysia (Art. 2.1), Argentina (Art. 2.2), Peru (Art. 3.3), and Spain (Art. 3.1) state, in general terms, that each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors from the other Contracting Party, and shall not prejudice the management, maintenance, use, sale or liquidation of those investment by unjustified or discriminatory measures.

Chile

Chile's Civil Code states that "every legally executed contract is a law for the contracting parties and may not be invalidated except by mutual consent or legal cause."[185] There is a consensus that this basic rule of private contractual law also applies to public contracts when one of the parties is the Chilean State. This is the case with foreign investment contracts executed under DL 600 by the Foreign Investment Committee with foreign investors. In practice, this means that the rights, franchises, exemptions and privileges granted to a foreign investor by such contracts cannot be unilaterally amended or terminated by Chile. Any abridgment or encroachment of those contract rights by subsequent legislation is equivalent to an expropriation and entitles the investor to demand the corresponding indemnification in accordance with the country's Constitution and applicable expropriation laws.[186]

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[184] Decree Law No. 2.186, Organic Law on Expropriation Procedures (Chile) (9 June 1978) (amended by Law No. 18.932 (10 Feb. 1990)).

[185] Civil Code of Chile, Art. 1545.

[186] MAYORGA et al., ibid. at 60–63.

6. *Performance Requirements*

- **Investment Treaties**

The BITs with Malaysia, Argentina, Peru, and others do not include provisions on performance requirements. By contrast, the Chile – US FTA assigns particular importance and long detailed provisions to such requirements. Article 10.5 of the FTA restricts or prohibits the imposition of import, export, local purchases, or transfer of technology requirements. However, exceptions are made regarding environmental measures necessary to secure compliance with laws and regulations that are consistent with the FTA and that are necessary to protect human, animal, and plant life; or that relate to health concerns or the conservation of living or non-living exhaustible resources, provided that they are not applied in an arbitrary manner or do not constitute a disguised restriction on international trade.[187]

On a related note, neither Party to the Chile – US FTA may require that an enterprise of that Party, that is a covered investment appoint to senior management positions individuals of any particular nationality. However, a Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be it of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.[188]

F. *Investment Disputes*

1. *Description*

As described below, at the time of this writing three foreign investors have brought claims against Chile under the ICSID Convention and Chilean BITs. No known foreign investment claims have been submitted against Chile under the UNCITRAL Rules, a foreign investment law, or the investment provisions of an FTA.

The three cases include the following:

(i) Victor Pey Casado and President Allende Foundation v. Chile (ICSID Case No. ARB/98/2);[189]

[187] Chile – US FTA, Art. 10.5(3)(c).

[188] Chile – US FTA, Art. 10.6.

[189] *Victor Pey Casado and President Allende Foundation v. Chile* ("Pey & Allende"), ICSID Case No. ARB/98/2, Award (8 May 2008).

(ii) MTD Equity Sdd. Bhd & MTD Chile S.A. v. Chile (ICSID Case No. ARB/01/7);[190] and
(iii) Eduardo Vieira S.A. v. Chile (ICSID Case No. ARB/4/7).[191]

Of the three investment cases brought against Chile, the MTD and Vieira cases have terminated. The third, Pey & Allende, is pending, subject to annulment proceedings. For this reason, the references to the latter are more succinct.

2. Pey & Allende v. Chile

The Claimants submitted before ICSID, on 2 October 1997, an arbitration and compensation request against the Respondent State for the alleged illegal and forceful occupation of their publishing and newspaper company, Clarin, followed by the confiscation of its assets, rights, and credits. The above events were undertaken by the military government which took office on 11 September 1973, after the demise of the Allende government, and which ruled until the return of democracy on 11 March 1990.

On 4 November 2002, the Claimants filed an additional claim demanding compensation for the government's confiscation of 10 February 1975, of the rotary press GOSS.

The total claims were estimated at US$ 397,347,287 plus moral damages suffered by Mr. Pey, and penalty interests as from 4 November 2002 (the rotary GOSS claim) until completion.

The Claimants based their claims on the ICSID Convention which Chile ratified on 24 October 1991, and the BIT between Chile and Spain which entered into force on 29 March 1994.[192]

a. Uniqueness of this Case

This case remains unique for several reasons:

(i) In contrast with other ICSID cases conducted in English, the procedural languages of this case were Spanish and French. Thus, when the Respondent requested, on 8 September 2008, the annulment of the award in

[190] *MTD Equity and MTD Chile, S.A. v. Republic of Chile* ("MTD"), ICSID Case No. ARB/01/7, Award (25 May 2004).

[191] *Sociedad Anónima Eduardo Vieira v. Chile ("Vieira")*, ICSID Case No. ARB/04/7, Award (21 Aug. 2007).

[192] The Claim alleged that, among other provisions, the Respondent breached the Chile – Spain BIT's provisions on fair and equitable treatment (Art. 4), and expropriation (Art. 5). *Pey & Allende v. Chile*, Award ¶ 638.

English, the Claimants objected.[193] An understanding was reached, thereafter, and the annulment proceedings are now being undertaken in English and French.

(ii) This is likely the longest arbitration in ICSID history. It started on 2 October 1997, the award was issued on 8 May 2008, and, as of this writing, annulment proceedings remained outstanding.

(iii) The Tribunal was constituted on 14 September 1998 but suffered continued changes. A few weeks after his appointment, arbitrator Witker was replaced by Ambassador Galo Leoro Franco of Ecuador.[194] On 16 March 2001, upon the resignation of Arbitrator Rezek of Brazil, Professor Pierre Lalive of Switzerland succeeded him as President.[195] On 25 August 2005, Chile challenged the three members of the Tribunal but only that of arbitrator Bedjaoui was accepted.[196] The challenge against President Lalive was rejected and the situation of the third arbitrator was unusual because Chile withdrew its challenge, but a few days later arbitrator Leoro Franco resigned. However, because the tribunal felt he had breached the rules of confidentiality and secrecy of the deliberations, his resignation was rejected and was, instead, replaced by arbitrator Emmanuel Gaillard of France.[197]

(iv) The award ruled that Chile's actions represented a manifest denial of justice and did not provide fair and equitable treatment because, instead of addressing the Claimants' multiple confiscation complaints, Chile, without stating reasons, paid compensation to third parties which, according to the Tribunal, never owned the confiscated assets.[198]

(v) The double nationality of Claimant Pey Casado and the timing and source of his investment raised extremely complex and novel jurisdictional issues that the Tribunal resolved in accordance with the applicable rules of international law, including the ICSID Convention and the Chile – Spain BIT.

b. Outcome of the Case

The Tribunal issued its award on 8 May 2008, holding that:

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[193] *Pey & Allende v. Chile*, Claimant's Letter to the Secretary General (10 July 2009).

[194] *Pey & Allende v. Chile*, Award ¶ 9.

[195] *Pey & Allende v. Chile*, Award ¶ 20.

[196] *Pey & Allende v. Chile*, Award ¶ 39.

[197] *Pey & Allende v. Chile*, Award ¶¶ 35, 36. The power to replace the arbitrator was exercised by the President of the Bank acting as ex officio Chairman of ICSID's Administrative Council pursuant to Arts. 5 and 6 of the ICSID Convention.

[198] *Pey & Allende v. Chile*, Award ¶¶ 613, 674. *See also* Decision No. 43 of the Ministry of National Property (28 April 2000).

(i) the Respondent breached its duty to provide fair and equitable treatment and to abstain from the denial of justice;
(ii) the Claimants were entitled to compensation in the amount of US$ 10,132,690.18 plus compound annual interest of 5% as from 11 April 2002, until the date of the award;
(iii) the Respondent should contribute to the fees and expenses incurred by the Claimants up to the sum of US$ 2 million;
(iv) the procedural costs should be allocated in the following proportions: ¾ of the total (US$ 3,136,893.34) to be paid by the Respondent, and ¼ of the total (US$ 1,045,631.11) to be paid by the Claimants; and
(v) Chile must pay the above sums within 90 days from the date of the award or else a 5% compounded annual interest would be added from the date of the award until final payment.[199]

c. Subsequent Developments

On 2 June 2008, the Claimants requested a partial revision of the award pursuant to Article 51 of the ICSID Convention. On 20 June 2008, the Tribunal was reconstituted to hear this request and was composed by the same members of the Tribunal that rendered the award: Messrs Pierre Lalive (Switzerland), President; Mohammed Chemloul (Algeria); and Emmanuelle Gaillard (France). On 18 November 2009, the Tribunal rejected the above request and confirmed the dispositive elements of the award.

On 6 July 2009, the Respondent requested the annulment of the arbitral award and, on 22 December 2009, an *ad hoc* Annulment Committee was constituted which held its first hearing on 29 January 2010.[200] Then, on October 15, 2010, the claimants filed a counter memorial on annulment. However, because the annulment request has not yet been made public, references to its details are not possible at this time.

3. MTD Equity and MTD Chile v. Chile

a. Subject Matter

MTD Equity, a Malaysian company, and MTD Chile, a Chilean company ("the Claimants"), filed a request for arbitration on 26 June 2001, against Chile ("the Respondent") before ICSID. The request invoked the ICSID arbitration clause of the 1992 BIT between Malaysia and Chile.

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[199] *Pey & Allende v. Chile*, Award, Dispositions 1–7.

[200] The Committee's members are Yves Fortier (Canada), Piero Bernardini (Italy) (President), and Ahmed Sadek El-Kosheri (Egypt).

The dispute arose from the refusal of the Chilean government to amend zoning regulations that would enable the Claimants to execute a township project located within the Metropolitan area of Santiago. The project was to be funded with an investment by the Claimants that had been previously approved, on behalf of the State of Chile, by the Foreign Investment Committee ("Committee").

On 14 January 1997, MTD Equity filed an application before the Committee for the approval of an initial investment of US$ 17,136 million to: "develop a township of 600 hectares of Fundo El Principal de Pirque."[201] The investment would fund a 51 percent stake of MTD Chile in the Chilean company "El Principal S.A." ("EPSA") which would own the land and develop the project. The purchase of the land was affected on 18 March 1997, after the signature of the foreign investment contract with the Committee.

On 22 April 1997, the Ministry of Public Works notified the Claimants that, in order to execute the project, it would be necessary to amend the applicable zoning regulations.

After protracted negotiations, on 4 November 1998, the Claimants were notified that the government had formally rejected the project and would not "initiate a change to the Regulating Plan for the Santiago Metropolitan Area to make this project possible."[202]

MTD's response of 2 June 1999, was to notify the Government that an investment dispute had arisen under the BIT.[203]

b. Basis of the Claim

The claims were based on Article 6(1) of the BIT which states that each Contracting Party consents to submit to ICSID:

> [A]ny dispute arising between that Contracting Party and investor of the other Contracting Party which involves: (i) an obligation entered into by that Contracting Party with the investor of the other Contracting Party regarding an investment by such investor, or (ii) an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor.[204]

The Claimants alleged that the Respondent breached the provisions of the foreign investment and expropriation provisions of the Chile – Croatia and Chile – Denmark BITs, which they considered applicable by the operation of the MFN clause of Article 3(1) of the Chile – Malaysia BIT.

Accordingly, they alleged that: i) by treating their investment unfairly and inequitably, the Respondent breached its obligations under its BITs with

[201] *MTD v. Chile*, Award ¶ 51.
[202] *MTD v. Chile*, Award ¶ 80.
[203] *MTD v. Chile*, Award ¶ 83.
[204] *MTD v. Chile*, Award ¶ 92.

Malaysia, Croatia, and Denmark and the Foreign Investment Contract; ii) by impairing through unreasonable and discriminatory measures the use and enjoyment of the Claimant's investment, and by failing to grant the necessary permits to carry out the investment already authorized, the Respondent breached the Croatia BIT; and iii) by expropriating the investment, the Respondent breached Article 4 of the Malaysia BIT.[205]

On the basis of the above, the Claimants sought full compensation for the damage sustained as a consequence of Chile's alleged treaty violations, including "(i) the full cost of their investment (minus any remaining value), (ii) pre-award compound interest at a commercially reasonable rate, and (iii) costs and expenses associated with this proceeding."[206]

MTD Equity, as a "national of another Contracting State," Malaysia, qualified as an investor under Article 1(c)(ii) of the BIT. MTD Chile, as a corporation wholly owned by MTD Equity, was deemed a Malaysian national for purposes of arbitration under Article 25(1) of the ICSID Convention.[207]

c. Arbitral Award

In its award of 25 May 2004,[208] the Tribunal held:

(i) The Respondent breached its obligations of fair and equitable treatment under Article 3(1) of the BIT by the fact that an organ of the Chilean State, the Foreign Investment Committee, approved a specific investment by reference to a location where the investment could not be implemented.
(ii) By choosing a partner and advancing the full value of the partner's land without taking the ordinary business precautions, the Claimants heightened the risks in the transaction for which they bore exclusive responsibility, regardless of Chile's treatment of the Claimants.[209]
(iii) The Respondent must pay 50% of the assessed damages: US$ 5,871,322.42 plus compound interest from 5 November 1998, until such amount is paid in full.
(iv) The parties should bear their respective expenses and fees related to the proceedings and share equally the fees and expenses incurred by ICSID and the Tribunal.

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[205] *MTD v. Chile*, Award ¶ 105.
[206] *MTD v. Chile*, Award ¶ 215.
[207] *MTD v. Chile*, Award ¶¶ 93–94.
[208] *MTD v. Chile*, Award ¶ 253.
[209] *MTD v. Chile*, Award ¶ 242.

d. Annulment

On 20 September 2004, the Respondent requested the annulment of the award and, on 18 January 2005, an *ad hoc* Committee was established to rule on this request.

The Respondent sought annulment on three of the five grounds set out in Article 52(1) of the ICSID Convention, specifically that: i) the award failed to state the reasons on which it was based; ii) the Tribunal manifestly exceeded its powers by failing to apply international law or Chilean law and by its arrogation without authority to decide *ex aequo et bono* (thus breaching ICISID Article 42); and iii) on seriously departing from a fundamental rule of procedure.[210]

In its general considerations for rejecting the annulment, the *ad hoc* Committee stated that it was not a court of appeals and its role was limited: it could extinguish a *res judicata* matter on a question of merits but could not create a new one.[211] It also distinguished between the failure to apply the proper law, which could involve a manifest excess of powers, with failure to explain its applications, and concerning the failure to state reasons. Regarding the award's failure to state reasons, the Committee's view was that the reasons given by the award were sufficiently clear and involved no contradictions. Similarly rejected was the charge of a serious departure from a fundamental rule of procedure which, according to the Committee, was not developed further in Chile's Reply or in its oral arguments.[212]

Regarding the charge of manifest excess of powers and failure to apply international or Chilean law, the Committee signaled that the Tribunal applied international law when it determined the scope of the MFN clause in relation to other Chilean treaties and in its interpretation of the BIT, particularly of its fair and equitable treatment clause.[213] The Committee agreed that the standard of "treatment in an even-handed and just manner" applied by the Tribunal was acceptable and, hence did not exceed its powers.[214] Regarding the application of Chilean law, the Committee noted that the Tribunal applied it to the scope of the Investment Committee's authority and there was no foundation to the claim that the Tribunal had decided *ex aequo et bono*.[215]

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[210] *MTD v. Chile*, Annulment Decision (21 March 2007) ¶ 43.
[211] *MTD v. Chile*, Annulment Decision ¶¶ 52, 54.
[212] *MTD v. Chile*, Annulment Decision ¶ 56.
[213] *MTD v. Chile*, Annulment Decision ¶ 62.
[214] *MTD v. Chile*, Annulment Decision ¶ 71.
[215] *MTD v. Chile*, Annulment Decision ¶ 77.

In conclusion, the *ad hoc* Committee dismissed the Respondent's request for annulment and ruled that each party would bear one half of the costs of the proceedings and each party its own costs of representation.

4. Eduardo Vieira S.A. v. Chile

a. Subject Matter

The Claimant, a Spanish company and shareholder of the Chilean company, Concar, submitted a request for arbitration of a dispute with Chile before ICSID on 30 October 2003. It based its claim on the BIT between Chile and Spain, in force as of 29 March 1994.

The Claimant demanded compensation for the Respondent's alleged refusal to allow Concar to fish in the external waters of parallel 47 degrees South, and alleged that Chile treated its investment discriminatorily, unfairly, arbitrarily, and inequitably by:

(i) not responding to its requests for rectification of Resolution 291, of 28 February 1989, which disallowed fishing in Chile's external waters;
(ii) indirectly expropriating its fishing rights when, in 2001, it was assigned a zero fishing quota; and
(iii) adopting procedures that breached Chile's obligations under the BIT on fair and equitable treatment, national treatment, and most favored nation treatment.[216]

The Claimant asserted that the above events were tantamount to expropriation and demanded payment of a sum equivalent to the compensation due on the totality of the damages suffered since 1990 of its investment, including loss of profits. These damages were suffered by the Claimants, as shareholders of CONCAR, when the latter was prevented from fishing in external waters.

The Respondent objected to the jurisdiction of the Tribunal, arguing that the alleged dispute arose before the entry into force of the BIT. As a result, the Tribunal suspended the proceedings on the merits to first examine the objection to jurisdiction.[217]

According to the Respondent, the above events involved a single continuing controversy that arose before the BIT entered into force. These included the above-referenced Resolution 291 of 1989 and Resolution 398 of 12 September 1990 that respectively applied the restrictions of the Fisheries

[216] *Vieira v. Chile*, Award ¶ 101.
[217] *Vieira v. Chile*, Award ¶¶ 14–16.

(Law No. 18.892 of December 1989) and rejected the Claimant's request to expand its fishing rights to external waters.[218] The Respondent also referred to Article 2.3 of the BIT which differentiates between the concepts of "controversy" and "complaint," meaning that, as the "controversy" arose either in 1989 or 1990, the Tribunal lacked jurisdiction *ratione temporis* over the dispute.[219]

According to the Claimant, the dispute arose on 17 June 1997, when Chile rejected its request to amend Resolution 291 of 1989 (which prohibited fishing in external waters) and when, on 8 May 2001, its fishing rights were eliminated.[220] As these events occurred after the BIT entered into force, the Tribunal, according to the Claimant, would have jurisdiction over the case.

b. Outcome of the Case

In support of its claim, the Claimant added that by participating in consultations under Article 10(1) of the BIT, Chile recognized the jurisdiction of the Tribunal. Chile, however, countered that its consent to jurisdiction could not be inferred from a pattern of conduct, acquiescence or silence but, in accordance with Article 25(1) of ICSID, had to be in writing. The Tribunal agreed.[221]

After analyzing Articles 2(2) and 2(3) of the BIT, the Tribunal held that:

(i) the BIT applied to investments effected as from the date it entered into force or prior to that date; but
(ii) the BIT did not apply to controversies or complaints raised or resolved prior to its entry into force.[222]

The Tribunal ruled that Chile's refusal to allow Concar to fish in external waters or to amend or modify Resolution No. 291, created a controversy which arose prior to the BIT's entry into force,[223] and that the imposition of a zero fishing quota on 15 March 2001, was a consequence of the earlier dispute and not a new dispute.[224]

Based on the above, the Tribunal, with the partial dissent of Arbitrator Susana Zalduendo, concluded that it lacked jurisdiction *ratione temporis*.

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[218] *Vieira v. Chile*, Award ¶¶ 27, 108, 142.
[219] *Vieira v. Chile*, Award ¶¶ 115–17.
[220] *Vieira v. Chile*, Award ¶ 182.
[221] *Vieira v. Chile*, Award ¶ 206.
[222] *Vieira v. Chile*, Award ¶ 219.
[223] *Vieira v. Chile*, Award ¶¶ 264–65.
[224] *Vieira v. Chile*, Award ¶ 285.

In her partial dissent, Arbitrator Zalduendo differed from the majority by finding that the zero fishing quota and the conduct of Chile were part of the same dispute.[225] She highlighted that on 23 February 2001, the government issued Resolution 371, which amended Resolution 291 and expressly authorized Concar to fish in external waters. This authorization was subsequently revoked and was followed by the zero quota decisions of March and May 2001 which, according to Zalduendo, constituted a legal dispute entirely different to that which arose in 1989 or 1990. Consequently, in her opinion, the Tribunal had jurisdiction to examine the new dispute based on that ground.

c. Annulment Proceedings

On 15 December 2007, the Claimant requested the partial annulment of the award. The request alleged that the Tribunal had manifestly exceeded its powers, had incurred a serious departure from a fundamental rule of procedure and its award had failed to state the reasons on which it was based and, thus, had breached the provisions of article 51(1)(b), (d), and (e) of the ICSID Convention, respectively.[226]

An *Ad-hoc* Committee was constituted on 1 May 2008 with members Crister Soderlund, Piero Bernardini, and Eduardo Silva Romero. The Committee held its first hearing on 24 June 2008 and on 10 December 2010, rejected the annulment request.[227]

Regarding the justification of the partial annulment of the award the Committee, after an analysis and, in view of its final conclusion, decided it was unnecessary to examine this matter further.

d. Manifest Excess of Powers

According to the Claimant, the Tribunal would have manifestly exceeded its powers because: i) it did not apply the correct law; ii) it did not analyze the legal qualification of the controversies as they were submitted by the Claimant; iii) it took into consideration matters related to damages which pertained to the substantive aspects of the controversy; and iv) applied Chilean domestic law to resolve the challenges to its jurisdiction

After an exhaustive and elaborate analysis of the legal and contractual basis of each of the above charges, the Committee rejected the claim of "manifest excess of powers" for the following reasons: i) that the Tribunal did not deviate from the correct application of Article 2(3) of the Chile – Spain BIT

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[225] *Vieira v. Chile*, Award, Zalduendo Dissent ¶¶ 1, 13.

[226] *Vieira v. Chile*, Annulment Decision (10 Dec. 2010), ¶ 6.

[227] *Vieira v. Chile*, Annulment Decision ¶ 383.

and did not create new law but, on the contrary, interpreted this provision using the criteria of the Lucchetti decision for determining whether it was confronted with the same or a new controversy; ii) that, by applying the Lucchetti test for interpreting the BIT and determining whether the succession of events which arose after its entry into force constituted or not a "new controversy", discarding the other arguments was not an extra limitation of its powers; iii) that the Tribunal's considerations of the damage structure and domestic judicial procedures of the Claimant had no decisive impact on its decision and was irrelevant to the existence or not of jurisdiction; and iv) that the evaluation by the Tribunal of the Parties' discussions of the regulatory and judicial measures of the Chilean authorities in connection with the Claimant's attempts to obtain a fishing permit for external waters, did not exceed its powers and could also not be manifest.[228]

e. Failure to State the Reasons on Which the Award is Based

The Committee noted that, under ICSID article 48(3), the award must "state the reasons upon which it is based." It, then, added that "the Tribunal had motivated its considerations in a clear, consistent, and detailed manner throughout its award."[229] In support of this conclusion, it cited the analysis of the three leading issues of the dispute. First, when the Tribunal interpreted Article 2(3) of the BIT and resolved that the dispute preceded that agreement; second, in connection with the controversy caused by the zero fishing quota; and third, with regard to the Claimant's protection recourse.

f. Serious Departure from a Fundamental Rule of Procedure

The Committee stated that, generally, these fundamental rules of procedure are those which relate to impartiality, the right to be heard and which protect the integrity of the deliberations. It also noted that under Rule 27 of the Arbitration Rules, a party which fails to state promptly its objections, is deemed to have waived its right to object.[230]

It then noted the three major instances in which the Claimant had the opportunity to raise his objections and failed to do so. On this basis, it concluded that the Tribunal did not breach any fundamental law of procedure.

July 12, 2011

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[228] *Vieira v. Chile*, Annulment Decision ¶¶ 351–352.
[229] *Vieira v. Chile*, Annulment Decision ¶ 359.
[230] *Vieira v. Chile*, Annulment Decision ¶ 379.