Chile and Foreign Investment: An Example in the Latin American Context

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The relationship between Latin America and foreign investment has been difficult. We are not only famous for the Calvo doctrine. We are also famous for the adequate standard of compensation of the 1930s, and for "el No de Tokyo" to which our governments greeted the ICSID Convention in the 1960s. We are famous, as well, for the espousal of the principle of permanent sovereignty over natural resources and the new international economic order during the 1960s and 1970s. Things changed, however, a couple of decades ago. International politics and economics were overtaken at the end of the 20th century by liberal, free-market policies. In this context, Latin American governments, traditionally reluctant towards foreign investment, enacted domestic statutes, concluded treaties to promote and protect it, and ratified the ICSID Convention. Chile is one of these countries. And this is its story in brief.

While our country was part of the Spanish empire, trade was restricted to the metropolis and its colonies. After our independence in the 1810s, the new republican government opened Chile to international trade and foreign investment. Both policies survived up to the 1930s, when restrictions on trade and investment began to emerge progressively in Chilean law. The Andean Pact and its Decision 24 crowned this process in the early 1970s. Decision 24 imposed screening procedures and other controls on foreign direct investment and technology transfer on its members, one of which was Chile. Decree Law Nr. 600 changed all this. Enacted in 1974, this statute opened our country to foreign investment once again. It also meant our withdrawal from the Andean Pact and its nationalistic policies, derived from the economic theory of dependency. Later in the 1990s, Chile was a pioneer among Latin American countries in promoting the negotiation of free trade and investment agreements with other countries throughout the world. The conclusion and ratification of bilateral investment treaties (BITs) and free trade agreements (FTAs) was one of the main instruments by which this policy of integration with the globalized world was achieved.

Entering into BITs has also been a way for Chile to protect foreign investors' rights and to attract foreign investment. Chile became a signatory of the Washington Convention that created the International Center for Settlement of Investment Disputes (ICSID) in

1991. Since then, Chile has negotiated a large number of BITs. As of 2006, Chile had negotiated 51 BITs, 37 of which were in force at that time[1].

As is customary in this kind of international agreements, each contracting State commits itself to provide fair and equitable treatment to investments legally materialized in its territory by investors of the other contracting State. They also guarantee the principles of "national treatment" and "most favored nation status". Moreover, BITs protect private property rights through the establishment of basic principles and minimum standards in case of expropriations. Likewise, they guarantee that any expropriation or measure with similar effect will be adopted in accordance with a law based on public good or national interest, in a non-discriminatory manner. They state that expropriatory measures must be accompanied by the provisions of prompt, adequate and effective compensation. Through BITs, the contracting States guarantee the free transfer of capital, of profits or interest generated by foreign investments, and, in general any transfer of funds related to investments. Some restrictions may apply, in accordance with national laws.

BITs and FTAs include mechanisms for the settlement of investment disputes. These mechanisms are generally similar to one another. They allow the foreign investor to lodge a claim directly before an international arbitral tribunal. As a consequence, the foreign investor does not need to wait for the exercise of the right of diplomatic protection by his state of nationality. Investment arbitrations under BITs and FTAs are normally settled through the procedure set-up by the ICSID Convention or the UNCITRAL Arbitration Rules. Chile or Chileans have been involved in seven ICSID arbitrations, so far. *Víctor Pey* is one of the oldest arbitrations under ICSID and is still pending. *MTD* was settled in 2004. Our government was found responsible in it for breaching the Chile-Malaysia BIT. *Lucchetti*, on the other hand, referred to a Chilean investor in Perú. The panel in this case concluded that it lacked jurisdiction. No decision on the merits was awarded, therefore. *Enersis*, *Metalplar*, and *Química e Industrial del Borax* also refer to Chilean investors abroad and are all pending before ICSID tribunals. *Sociedad Anónima Eduardo Vieira* involved our state and was recently settled. The panel concluded that it had no jurisdiction under the applicable BIT.

The protection provided by these agreements applies both to investments made after the agreement comes into force as well as to those made before that date. These BITs, however, do not apply to disputes which arise prior to their entry into force or to disputes directly related to events which occurred prior to their entry into force.

Also, Chile has also entered into a number of free trade agreements which usually contemplate provisions in protection of foreign investment, even though these agreements are mainly focused on trade issues.

As a matter on internal law, the Political Constitution of the Republic of Chile of 1980 (the "Chilean Constitution") provides for clear, non-discriminatory and non-discretionary rules. According to the Chilean Constitution, no authority may have other attributions than those stated in the Chilean Constitution or in the law. Moreover, It grants a number of civil rights to "all the persons", without distinction as to whether they are Chilean or foreigners. This way, foreigners have the same rights than Chilean citizens. The Chilean Constitution also provides a strong protection to private property and to the right to develop any economic activity that is not against moral, public order or national security.

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1 Source: Chile Foreign Investment Committee

It also states that the Chilean state cannot arbitrarily discriminate anybody in economic matters. Any person has a constitutional action against any act that threatens or violates any of these rights. This is a special action that may be filed in an Appellate Court and that must be solved in an especially short term.

According to Chilean law, contained in different statutes and in constitutional principles, foreign investors in Chile can own up to 100% of a Chilean-based company, and there is no time limit on property rights. They also have access to all productive activities and sectors of the economy, except for a few restrictions in areas that include coastal trade, air transport and the mass media. The State has a very minor productive role in Chile. Only a few strategic activities –such as exploration and exploitation of lithium, liquid and gaseous hydrocarbons deposits in coastal waters under national jurisdiction or located in areas classified as important to national security, and the production of nuclear energy– are restricted to the State. However, under certain circumstances, foreign companies can invest even in these sectors.

For purposes of materializing their investments in Chile, foreign investors may choose to submit themselves to the so called Foreign Investment Statute (Decree Law 600 of 1974 or "D.L. 600") or to make the investment under the rules of Chapter XIV of the Central Bank's Compendium of Foreign Exchange Regulations. More than 81% of materialized foreign investment between 1990 and 2004 entered the country through D.L. 600, for a total of US$ 53.6 billion[2]. Based on constitutional principles, the Foreign Investment Statute guarantees non-discriminatory and non-discretionary treatment of foreign investors.

D.L. 600 is a very simple piece of legislation based on two principles: non discriminatory treatment to foreign investors and free access to various markets and economic sectors. D.L. 600 establishes certain rights and obligations of the investor, which are evidenced in a foreign investment contract executed among the foreign investor and the State of Chile in the form of a public deed. The State of Chile cannot unilaterally modify the content of the contract, accordingly called "Contract Law", through which the investor gets the maximum reassurance of fixed rules during its investment in Chile. Investors may, at any time, request the amendment of the contract to change its purpose or assign its rights to another foreign investor.

Among other rights, such contract guarantees:

a) the right to bring capital into Chile in different forms including goods and technology.

b) the right to repatriate invested capital after one year from the date in which it was brought into Chile, with the proceeds of the total or partial sale or liquidation of the investment. (Note: Once all relevant income taxes have been paid, investors are assured access to freely convertible foreign currency without any limits on the amount, for both capital and profit remittances);

c) the right to remit or reinvest profits, when obtained, at any time and without any limit;

[2] Source: Chilean Foreign Investment Committee.

d) the right to acquire foreign currency in the Formal Exchange Market (see Foreign Exchange Aspects) in order to repatriate profits and capital; and

e) an optional fixed general income tax rate, in the terms discussed under "General Tax Aspects", hereafter.

Chile was the first country to call for a new international economic order in the 1950s. Today, it is active member of the old order that prevailed. The days when foreign investment was seen with suspicious by our governments are long gone. As in the other areas of the law of nations, Chile is now completely re-integrated to the international society.