An Overview of Chile’s International Investment Agreement Program

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Chile is one of the most dynamic states in Latin America. The World Bank has observed that “Chile has been one of Latin America’s fastest-growing economies in recent decades”. And foreign direct investment has increased significantly in recent years. As investment interest in Chile grows, it is important for both investors and international law practitioners to understand Chile’s international investment agreement (“IIA”) program, particularly as it has evolved in recent years.

Notably, on February 5, 2019, the Amending Agreements to the Canada-Chile Free Trade Agreement (“CCFTA”) entered into force, updating several key provisions of the CCFTA, including in its investment chapter. For example, the amended CCFTA now contains a dedicated article on corporate social responsibility (“CSR”) that reaffirms the parties’ commitment to globally endorsed CSR standards. It also includes procedural enhancements to the investor-state dispute settlement mechanism with respect to a host of modern considerations, including preliminary objections, awarding of costs, ethical considerations, third-partying funding, and transparency.

The amendment of the CCFTA was in line with Chile’s IIA program in recent years. Historically, Chile’s IIA program centered on bilateral investment treaties (“BITs”). Between 1991 and 2000, Chile signed more than 50 BITs with states such as Bolivia, France, Germany, Malaysia, Spain, the UK, and Venezuela. However, since 2000, Chile has signed only a handful of BITs, opting instead to concentrate on comprehensive FTAs with investment chapters. In fact, Chile has signed at least 10 FTAs with investment chapters since 2000 with states such as Argentina, Colombia, Korea, and the United States, as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) with Australia, Brunei, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

The differences between Chile’s BITs and FTAs are important and worth considering. The investment chapters in Chile’s FTAs are much more detailed than Chile’s BITs. There also are several substantive differences that become apparent when evaluating Chile’s BIT and FTA regimes holistically.

Dual Nationals: The vast majority of Chile’s BITs protect dual nationals. However, a notable exception is the Germany BIT, which provides in its Protocol that the treaty “shall not apply to investors who are nationals of both Contracting Parties”. Another exception is the Switzerland BIT, which provides that the treaty “shall not apply to investments of natural persons who are nationals of both Contracting Parties unless such persons have at the time of the investment and ever since been domiciled outside the territory of the Contracting Party in which the investment was made”. The France BIT also contains a unique provision in its Protocol which specifies that the treaty “shall not

apply to investments made by natural persons who are nationals of one of the Contracting Parties and who, at the date of investment in the . . . other Contracting Party, have their domicile in the territory of that other Contracting Party for more than five years, unless the necessary funds for the investment come from abroad".

Several of Chile's FTAs protect dual nationals but only if the investor satisfies the dominant and effective nationality test. For example, the U.S. FTA provides that a "a dual national shall be deemed to be exclusively a national of the state of his/her dominant and effective nationality".

Fair and Equitable Treatment: Nearly all of Chile's BITs contain fair and equitable treatment ("FET") protections unqualified by the minimum standard of treatment under customary international law. For example, the Croatia BIT provides that "[e]ach Contracting Party shall extend fair and equitable treatment to investments made by investors of the other Contracting Party on its territory". However, there are a few notable exceptions. For example, the Uruguay BIT provides that "[e]ach Party shall accord covered investments treatment in accordance with customary international law, including fair and equitable treatment".

By contrast, nearly all of Chile's FTAs expressly limit the FET standard to the customary international law standard. For example, the U.S. FTA provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment". The U.S. FTA specifies that "[f]or greater certainty . . . the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments" and that FET does "not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights".

Umbrella Clause: Chile generally has included umbrella clauses only in its BITs with European states. For example, the Greece BIT provides: "Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the other Contracting Party".

None of Chile's FTAs contain umbrella clauses, reflecting a broader trend in investment treaty practice.

Most Favored Nation ("MFN") Clause: The vast majority of Chile's BITs include an MFN clause but do not specify whether the clause applies to the dispute settlement provisions in the treaty. That said, there are two notable exceptions. The Uruguay BIT provides that "[f]or greater certainty, the Parties agree that [the MFN clause] is not applicable to procedural or jurisdictional matters". Conversely, the UK BIT provides that "[f]or the avoidance of doubt it is confirmed that the [MFN] treatment . . . shall apply to the provisions of Articles 1 to 10 of this agreement".

Several of Chile's FTAs expressly provide that the MFN clause does not apply to dispute settlement. For example, the Argentina FTA provides that "[f]or greater certainty, the [MFN] treatment . . . is not applicable to procedural or jurisdictional matters".

Statute of Limitations: Chile's BITs rarely contain a statute of limitations. The notable exception is the Uruguay BIT, which provides that "[n]o claim may be submitted to arbitration . . . if more than three (3) years have elapsed from the date on which the claimant had or should have been aware of the alleged violation . . . and known that the claimant . . . suffered losses or damages".

In contrast, all of Chile's FTAs contain a statute of limitations. The most common term is 3 years. The only exceptions are the Colombia FTA (39 months) and the CPTPP (3 years and 6 months).

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Investors and international law practitioners involved with Chile related investments should understand Chile's IIA program. While it is foremost critical to assess and apply the language of the specific BIT or FTA at issue, understanding Chile's IIA practice – and in particular whether Chile deviated from its IIA practice – can be an important supplementary means of interpretation to ascertain the meaning of the BIT or FTA.