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New Rules for Foreign Investment In Chile

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One of the most important developments this year in Latin America is the Chilean Act N°20.848, which sets forth a new framework for foreign investment in Chile (hereinafter, the “New Foreign Investment Act” or the “Act”), replacing the regime contained in the Decree Law N°600 of 1974 (hereinafter, the “DL 600”).

According to the DL 600, foreign investors bringing capital, physical goods or other forms of investment into Chile had to apply for an authorization before the Foreign Investment Committee on behalf of the State of Chile.

Upon receiving approval from the Foreign Investment Committee, the foreign investor would enter into a Foreign Investment Contract with the State of Chile, establishing the rights and obligations of the parties.

Under the DL 600 regime, the main rights and guarantees of the foreign investor were:

- Guaranteed access to the formal foreign exchange market, both for incoming capital and for acquiring the currency to remit capital or profits.
- The right to carry out capital remittances after one year has passed since such capital was brought into Chile. Profit remittances could be carried out at any time.
- The right to choose between the Common Tax Regime and a Special Tax Regime, under which a final and invariable income tax rate of 42% was paid, covering all income taxes, for a period of ten years. The investor could exit from this regime at any time in favor of the Common Tax Regime but, once made, that choice was irrevocable.

The New Foreign Investment Act will enter into force on January 1, 2016 or after the issuance of certain rules that will regulate the operations of the new Foreign Investment Promotion Agency, whichever occurs first.

The Act defines “*direct foreign investment*” as the transfer to Chile of foreign capitals or assets owned by a foreign investor, or an investor controlled by it, for an amount equal to or greater than US\$5 million, or its equivalent in other currencies, executed through freely convertible foreign currency, tangible assets, reinvestment of profits, capitalization of loans, technology (provided it may be capitalized) or credits associated with a foreign investment made by related companies.

Additionally, the Act deems as “*direct foreign investment*” one that, within the minimum required amounts previously referred, is executed by the acquisition or participation in the assets or in the

capital of a Chilean company, directly or indirectly, granting control of, at least, 10% of the voting shares of the said company or of an equivalent percentage of participation in the company's capital.

With respect to the definition of “*foreign investor*”, the Act provides that a foreign investor is an individual or legal entity incorporated abroad, neither resident nor domiciled in Chile, which transfers capitals to Chile in accordance with the terms and conditions indicated above.

In order to get access to the rights and guarantees of the foreign investment regime created by the Act, the foreign investor must request a foreign investment certificate from the Foreign Investment Promotion Agency. The application to obtain the said certificate must prove the execution of the foreign investment and must contain a detailed description of the said investment, including its amount, destination and nature. As we can see, in contrast with the DL 600 regime, the new Act does not require the execution of a contract between the foreign investor and the State of Chile.

The rights of a foreign investor that has obtained a foreign investment certificate from the Foreign Investment Promotion Agency are the following:

- The right to remit abroad the capital and the net earnings, without time limitation. In other words, contrarily to the DL 600, the remittance can be executed from the day of the execution of the foreign investment, provided that all the applicable tax obligations in accordance with Chilean regulations have been fulfilled.
- Access to the formal foreign exchange market in order to liquidate currency corresponding to the investment or to acquire the necessary to remit the invested capital or the net earnings.
- Exemption from VAT on imports of capital goods that comply with the requirements of the Chilean VAT Act.
- In general, access to the legal regime applicable to national investors, without arbitrary discrimination.

Notwithstanding the above, the rights and obligations contemplated in the Foreign Investment Contracts executed between foreign investors and the State of Chile under the rules of the DL 600 will not be affected.

Finally, according to the transitory sections of the Act, for a maximum period of four years after the Act is in force, the foreign investors will be able to request authorizations for foreign investment under the terms and conditions of the DL 600. However, in the case of those foreign investors choosing the Special Tax Regime, the final and invariable income tax rate will be 44.45%.

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