

The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement

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I. INTRODUCTION

LATIN AMERICAN COUNTRIES HAVE through the years adopted a number of regional arbitration instruments, signed or ratified the leading international arbitration treaties and entered into a multitude of bilateral investment treaties (BITs). Among the issues reflected in these various instruments are those related to the submission of disputes to foreign jurisdictions, national treatment of foreigners, exhaustion of local remedies, and diplomatic protection. These issues have been raised repeatedly in different ways and before different fora in the context of both public and private proceedings for settlement of investment disputes. A factor to be noted on the background of these developments is that there have been long periods of open hostility towards international arbitration in Latin America.

This article will describe the evolution of Latin American policies regarding international arbitration and foreign investments. From this perspective, it will then examine the current treatment of these subjects in the Chile-United States Free Trade Agreement (Chile-U.S. FTA),¹ in comparison with relevant provisions of the North American Free Trade Agreement (NAFTA). The article will conclude with comments and observations on the practical implications of some innovative solutions adopted by the Chile-U.S. FTA.

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¹ The Chile-U.S. Free Trade Agreement was signed on June 6, 2003 and entered into force on January 1, 2004. The text of the agreement is available at <<http://www.ustr.gov>>.

II. EVOLUTION OF THE LATIN AMERICAN POLICIES RELATING TO ARBITRATION AND FOREIGN INVESTMENTS

1. *Historical Background*

The first regional instrument in Latin America with provisions related to arbitration was a treaty on international procedural law adopted by the Congress of Jurists held in Montevideo on January 11, 1889.² It included rules on recognition and enforcement of arbitral awards.

During the First Pan-American Conference of 1889-1890, held in Washington, an arbitration treaty was concluded, which adopted “arbitration as a principle of American international law.”³ However, a special recommendation was also adopted, which stated that “[a] nation has not, nor recognizes in favour of foreigners, any other obligations or responsibilities than those which in favour of the natives are established, in like cases, by the constitution and the laws.”⁴ The United States objected to this latter provision arguing that practically any change in the existing rules of international law would require “the consent of the civilized world.” As noted by one commentator, the above recommendation has been followed consistently by the United States through the years.⁵ As it will be discussed below, subsequent International and Pan-American Conferences have been an important source of various resolutions and treaties on international arbitration in Latin America.

At the beginning of the Twentieth century, at the initiative of the League of Nations, two major conventions on international arbitration were signed. These were the Geneva Protocol on Arbitration Clauses of 1923 (the Geneva Protocol) and the Convention on the Execution of Foreign Arbitral

² Treaty on International Procedural Law (Jan. 11, 1889), *reprinted in* Organization of American States Treaty Series, No. 9, Rev. 1980. The treaty, which was ratified by five countries, was subsequently amended on March 19, 1940. The treaty is no longer in force. For historical data regarding earlier participation of Marcos Antonio D’Araujo, Baron D’Itajubá, of Brazil in the 1872 arbitration panel established to resolve American Civil War claims under the Treaty of Washington between Great Britain and the United States, see Caleb Cushing, *Le Traité de Washington* 114 (Paris 1874).

³ Article 1 of the draft-treaty, which was also known as “Plan of Arbitration,” reads as follows: “The Republics of North, Central and South America hereby adopt Arbitration as a principle of American international law for the settlement of the differences, disputes, or controversies that may arise between two or more of them.” The full text of the Plan of Arbitration is reproduced *in* Carnegie Endowment for International Peace (ed.), *International Conferences of American States, 1889-1928* (1931), at 40-44.

⁴ See Recommendation on Claims and Diplomatic Interventions, *International Conferences of American States (1889-1928)* (1931), at 45.

⁵ Charles G. Fenwick, *The Organization of American States: The Inter-American Regional System* (1963), at 159.

Awards of 1927 (the Geneva Convention). Brazil was the only Latin American country that ratified the Geneva Protocol. None of the Latin American countries, however, ratified the Geneva Convention.⁶ For different reasons, neither the Geneva Protocol nor the Geneva Convention had significant practical effects.⁷ Only in 1958, this time at the initiative of the United Nations, the efforts of the international community to create a multilateral treaty on international arbitration proved to be successful with the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). To this date, 134 countries have ratified the New York Convention.⁸ However, the Latin American countries, which at the time of the adoption of the New York Convention maintained policies hostile to international arbitration, were among the last ones to ratify it. This was the case of Brazil (2002), Dominican Republic (2002), Nicaragua, (2003) and Venezuela (1995), to take a few examples.⁹

In 1948, the Organization of American States (OAS) was established. One of the first instruments adopted within the OAS system was the American Treaty for the Pacific Settlement of Disputes, also known as the Pact of Bogota.¹⁰ The Pact of Bogota terminated previous agreements concluded in the region regarding the subject.¹¹ Article VII of the Pact of Bogota and the U.S. reservation to the Treaty are examples of the tensions that persisted in respect to agreements on dispute settlement, in general, and international arbitration, in particular. According to Article VII of the Pact of Bogota,

[t]he High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have available the

⁶ See American Arbitration Association, *The International Arbitration Kit* (compiled by Laura Ferris Brown, 1993), at 1-6. Other major global efforts at international dispute settlement were the 1899 and 1907 Conventions on the Pacific Settlement of International Disputes (The Hague Conventions). Latin American Countries adhered to the 1907 Hague Convention much later starting from the 1960s.

⁷ See John D. Feerick, *Toward a More Peaceful World: The New York Convention*, in *ADR and the Law* (American Arbitration Association, 1997), at 218.

⁸ The New York Convention was prepared and opened for signature on June 10, 1958 by the United Nations Conference on International Commercial Arbitration, convened in accordance with Resolution 604 (XXI) of May 3, 1956 of the U.N. Economic and Social Council. For the current membership of the New York Convention, see <<http://untreaty.un.org>>.

⁹ *Id.*

¹⁰ The Pact of Bogota was adopted on April 30, 1948 and entered into force on May 6, 1949. The full text of the treaty is reprinted in *Inter-American Relations* (Committee on Foreign Affairs, 1973).

¹¹ Article LVIII of the Pact of Bogota listed all previous regional treaties, conventions and protocols on settlement of disputes which would cease to exist when the Treaty would come into effect.

means to place their case before a competent domestic court of the respective state.

The United States reservation stated that,

[t]he Government of the United States cannot accept Article VII relating to diplomatic protection and the exhaustion of remedies. For its part, the Government of the United States maintains the rules of diplomatic protection, including the rule of exhaustion of local remedies by aliens, as provided by international law.¹²

At the regional level, during its Seventh Conference of American States in 1933, the Pan-American Union adopted Resolution No. XLI, which sought to create the Inter-American Commercial Arbitration Commission (IACAC).¹³ The IACAC was established in 1934. Among IACAC's main responsibilities was the establishment of an Inter-American arbitration system. However, this initiative would only materialize some thirty years later. Indeed, in 1967, the OAS approved a draft of an arbitration convention, which later materialized in the Inter-American Convention on International Commercial Arbitration (or the Panama Convention), adopted by the members of the OAS on January 30, 1975.¹⁴

2. *The Panama Convention*

The rationale for the adoption of the Panama Convention has been questioned by several authors on the ground that it merely replicates, or at least overlaps in part, the New York Convention.¹⁵

¹² U.S. Reservation at the time of signature, *reprinted in* Inter-American Relations, *supra* note 11, at 186-89. The contrary position of Latin American States was also reflected in the Convention on Rights and Duties of States, adopted on December 26, 1933 by the Seventh Pan-American Conference (of 1933). *See infra* note 14 and the accompanying text. Article 9 of the Convention on the Rights and Duties of States stated that "nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals." *See* Carnegie Endowment for International Peace (ed.), *International Conferences 1933-1940* (1940), at 121.

¹³ The Seventh Conference of American States was held on December 3-26, 1933 in Montevideo. For the full text of Resolution XLI of December 23, 1933, see *International Conferences 1933-1940, supra* note 12, at 68.

¹⁴ *See generally* Charles Norberg, *Inter-American Commercial Arbitration Revisited*, in 7 *Lawyer of the Americas* (Institute for Inter-American Legal Studies, University of Miami, 1975), at 280 *et seq.*

¹⁵ *See, e.g.*, Richard D. Kearney, *Development in Private International Law*, 81 *AJIL* 724 (1987); *see also* Daniele Favalli, *The Coexistence of the Panama and New York Conventions* (paper submitted at the Miami International Arbitration Conference, held on January 28-30, 2004).

Notwithstanding the validity of the above criticisms, I submit that the following considerations justify the adoption of this Convention:

- i) It was the first collective expression of Latin American countries in favour of an international commercial arbitration instrument;¹⁶
- ii) Latin American countries were parties to this Convention together with the United States: it was, thus, the first hemispheric treaty that would require harmonization of the Latin America civil law tradition with the U.S. common law system for its operation;
- iii) Unlike the New York Convention, which has no institutional structure, the Panama Convention refers to the Inter-American Commercial Arbitration Commission (IACAC) which, in turn, is part of the OAS system;¹⁷
- iv) With the adoption of the Panama Convention multiple problems that were found in the arbitration laws of the Latin American countries were resolved. Among these problems were, for example, the prohibition to arbitrate future disputes, and to accept the participation of foreign arbitrators, or to conduct arbitral proceedings in a foreign country or in a language other than Spanish. The Convention eliminated these various restrictions.

The approval of the Panama Convention was not unanimous within the Latin American countries. Argentina, for example, initially rejected the Convention for being contrary to its Constitution and because the country did not recognize the validity of arbitrations conducted outside its territory or by non-Argentine arbitrators. Later on, however, Argentina signed and ratified the Panama Convention.¹⁸

¹⁶ Before the adoption of the Panama Convention, only two countries from the region were part of the New York Convention (Ecuador and Mexico) and none of them had ratified the International Convention on Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Norberg, *supra* note 14, at 276.

¹⁷ Article 3 of the Panama Convention establishes that in the absence of agreement between the parties, the arbitration proceeding will be conducted in accordance with the IACAC Rules. The IACAC Rules closely followed the UNCITRAL Arbitration Rules. They were most currently revised in 2002. The amended rules entered into force on April 1, 2002. See Luis Martinez, IACAC and AAA Form Historic Alliance, *Dispute Resolution Times* (American Arbitration Association ed., March-May 2003).

¹⁸ See Norberg, *supra* note 14, at 283. Argentina signed the Panama Convention on March 15, 1991 and ratified it on March 1, 1995.

3. *The Influence of the Calvo Doctrine*

As from the XVIII century, the European countries applied the doctrine of diplomatic protection to those countries that they regarded as “non-civilized.” The doctrine of diplomatic protection, which was developed by the Swiss philosopher and jurist, Emerich de Vattel, was invoked to justify the intervention of one State in the internal affairs of another with the argument that an injury to a citizen of a State constituted an affront to that State.¹⁹ This doctrine was incorporated into the international policies of European countries and, in its most abusive form, served to justify a number of foreign interventions in Latin America and other regions of the world.

The Latin American reaction to foreign interventions was the *Calvo Doctrine*, which invoked the exclusive jurisdiction of states to try and judge the conduct of foreigners within their borders. It was, basically, an early expression of the principles of territorial sovereignty, juridical equality of States, equal treatment of nationals and foreigners, and of non-intervention.²⁰ Its founder, Carlos Calvo,²¹ based his views on the XIX century practice that European countries applied to their relationships. According to Calvo, the same practice ought to be applied to the relationship among European countries and Latin American countries.²² During the XX century, Latin American countries applied the *Calvo Doctrine* to the expropriation and nationalization of private foreign investments, creating some of the major international conflicts known in the region.

Mexico was the first Latin American country to invoke and apply systematically the *Calvo Doctrine*,²³ which rapidly became a generally accepted principle in Latin America and was incorporated into the constitutions and legislations of almost every country of the region.

The negative experience of Latin American countries with respect to the application of the diplomatic protection doctrine contributed to the creation of a general attitude of hostility towards international arbitration in the

¹⁹ Emerich de Vattel, 2 *Law of Nations* 229 (Charles G. Fenwick trans., 1916), at para. 347.

²⁰ See Charles Calvo, *Le Droit International Theorique* (5th ed., 1896).

²¹ Carlos Calvo was an Argentine lawyer and diplomat, recognized as one of the leading international jurists of his time. Established in Paris in mid-1860s, he became one of the founding members of the Institut de Droit International in 1873, and was elected member of the Institut de France. A prolific international publicist, he authored “*Le Droit International Theorique et Pratique*,” which had several editions in French and in Spanish. Carlos Calvo had perhaps the longest and most consistent influence on the international relations and policies of the Latin American countries.

²² See Charles Calvo, *supra* note 20, at 142-58.

²³ See note of November 13, 1873, from José María Lafragua, Mexican Minister of Foreign Relations, to John W. Foster of the United States Legation in Mexico (Lafragua, 1873).

region. This was the case, among others, of the 1899 award issued by an international arbitration tribunal established to resolve the boundary dispute between Venezuela and Great Britain.²⁴ It favored entirely the latter and remains to this day a subject of contention in Venezuela.²⁵ Another example was the award issued by an international panel established by the Permanent Court of Arbitration, which justified the military occupation of the ports of Venezuela to collect the loans of different European countries. The award, rendered in 1904, recognized preferential rights to those States that had exercised force over those that had not.²⁶ These actions were contrary to the doctrine proclaimed in 1903 by the Argentine jurist, Luis Maria Drago, which rejected the use of force for collecting public debts.²⁷

An interesting compromise to the application of the *Calvo* Doctrine was the establishment by Mexico and the United States of a Bilateral Claims Commission, which was granted jurisdiction to decide cases arising from personal or property injuries suffered by American citizens during the Mexican Revolution. An important jurisprudence developed from the work of this Commission, which invoked the requirement of the exhaustion of local remedies prior to the exercise of an international claim. However, it was recognized in the *North American Dredging* case that “a contractual stipulation that the local courts shall have exclusive jurisdiction over all matters pertaining to the contract is valid and binding on the international tribunal.”²⁸

The inclusion, thereafter, of the principles of non-intervention in the charters of the United Nations and of the OAS prevented or reduced the abuses of the diplomatic protection doctrine. The industrialized countries, however, continued to reject the *Calvo* Doctrine, especially with regard to submitting investment and expropriation disputes to the exclusive jurisdiction of the host state.

In 1964, the World Bank proposed the adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which created the International Centre for Settlement of Investment Disputes (ICSID). Its main objective was to remove foreign investment-related conflicts from local jurisdictions and prevent them

²⁴ See John Basset Moore, 6 *International Law Digest* 580 (1906).

²⁵ Various antecedents, including those made public after the death of U.S. counsel to the arbitration, Mr. Severo Mallet-Prevost, would indicate that political pressures influenced the arbitrator's award. See Otto Schoenrich, *The Venezuela-British Guiana Boundary Dispute*, 43 *AJIL* 523 (1949).

²⁶ *Preferential Treatment of Claims of Blockading Powers Against Venezuela*, Award, Feb. 22, 1904, Permanent Court of Arbitration. The parties that exercised force were Great Britain, Germany and Italy. See *The Venezuela Preferential Case*, 9 *Rep. Int'l. Arb. Awards* 99 (1960).

²⁷ See generally Rogelio Moreno, *La Doctrina Drago* (Universidad Nacional de Cordoba, 1961) (Argentina).

²⁸ A.H. Feller, *The Mexican Claims Commission 1923-1924* (1935), at 192.

from becoming conflicts between States. To achieve this objective, the ICSID Convention applied two basic principles. The first was to replace the national jurisdiction of the State receiving the investment with international arbitration. The second was the rejection of the recourse to diplomatic protection in the corresponding arbitral proceedings.²⁹ To encourage the Latin American countries to join ICSID, the possibility for subrogation in the rights of a foreign investor by that investor's home State was eliminated from the original draft.³⁰ However, this was not enough to prevent the Latin American countries to collectively reject the ICSID Convention by what is known as the "No of Tokyo." This collective position was delivered at the 1964 Annual Meeting of the World Bank in Tokyo by the Chilean delegate on behalf of all the Latin American countries.³¹

Similar negative attitudes towards international arbitration and to international investments were reflected in Decision No. 24, adopted in 1970 by the Commission of the Cartagena Board of the Andean Pact. The Decision provided an outright prohibition against the removal from the national jurisdictions of the member States of any dispute arising out of foreign investments or transfer of technology.³² The principles of Decision No. 24 were reiterated in the Charter of Economic Rights and Duties of States (CERDS) adopted by the United Nations General Assembly in 1974.³³ The adoption of this controversial resolution was led by President Echeverria of Mexico and was opposed by most of the industrialized countries.

As it can be seen, the acceptance of international arbitration and foreign investments in Latin America is part of a long process of gradual change. This process began with the accession of Latin American countries, albeit much delayed, to the New York Convention of 1958. It continued with the adoption of the Panama Convention of 1975 and the acceptance by borrowing States in the 1970s of foreign jurisdictions, including international arbitration, to resolve the disputes which could arise in connection with the loans received from international commercial banks.³⁴ It culminated with the acceptance of various international arbitration mechanisms set forth in BITs in

²⁹ Article 27(1) of the ICSID Convention.

³⁰ See Paul C. Szasz, *The Investments Disputes Convention and Latin America*, 11 Va J. Int'l L. 259 (1971).

³¹ See statement of the Chilean delegate, Félix Ruiz, on behalf of the Latin American countries. World Bank Press Release, Washington D.C., Sept. 9, 1964.

³² See Article 51 of Decision 24 of December 31, 1970 of the Commission of the Board of the Cartagena Agreement, which approved the Foreign Investment Statute. At the time, the Board of the Cartagena Agreement included representation by Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela.

³³ Charter of Economic Rights and Duties of States, adopted by Resolution A/3281 (XXIX) of the United Nations General Assembly, December 12, 1974, 28 Y.B.U.N. (1974).

³⁴ See generally Daniel Bradlow et al, *International Borrowing & Negotiation* (International Law Institute, Washington, D.C., 1984).

the 1980s; in the free trade agreements in the 1990s; and by the accession of most of the Latin American countries to ICSID, with the exceptions of Brazil and Mexico. Another major development was the conclusion in 1995 of the Uruguay Round of multilateral trade negotiations, which established the World Trade Organization (WTO) and its dispute settlement procedures which the Latin American countries now use extensively.³⁵

4. *Regulating Foreign Investments and BITs*

Some of the major issues concerning foreign investments have been those related to the conditions for prescribing performance requirements to foreign investments and investors by the host States and the payment of compensation in cases of expropriation or nationalization of those investments. In both of these areas, the policy changes in Latin America have been dramatic. It is also significant that these changes have been undertaken by the countries which effected the most controversial nationalizations of the XX century: Mexico and Chile.

When Mexico nationalized the U.S. and British petroleum enterprises in its territory in 1938, the reaction of the latter two countries was markedly different. Great Britain flatly rejected the mere act of expropriation, whilst the United States accepted it but conditioned it to the payment of “prompt, adequate and effective compensation.” This standard of “prompt, adequate and effective compensation,” was first formulated by Franklin Delano Roosevelt’s Secretary of State, Cordell Hull.³⁶ Considerable controversy ensued thereafter on whether the above standard constituted a recognized principle of international law or was merely an expression of U.S. policies. In any event, a satisfactory settlement was ultimately reached between the United States and Mexico.³⁷ A major dispute also arose between Chile and the United States when the Government of Chile expropriated the copper industry in 1972 asserting the theory of excess profits and rejecting the payment of any compensation.³⁸ A settlement of this dispute was reached in 1974, immediately after the change of government.³⁹

³⁵ The Ministerial Act of Marrakech of 1994, which concluded the Uruguay Round of Multilateral Trade Negotiations, established the WTO and a Disputes Settlement Mechanism.

³⁶ Cordell Hull to Francisco Castillo Nájera, Mexican Ambassador to the U.S., July 21, 1938, Department of State, Press Release, July 23, 1938, Vol. XIX, p. 44.

³⁷ See *La Expropiación petrolera*, Secretaría de Relaciones Exteriores, Tlatelolco, Mexico, D.F. 1974.

³⁸ See Francisco Orrego Vicuña, *Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile*, 67 AJIL 711 (1973).

³⁹ Decree Law N° 601 of 23 July 1974 of the Chilean Military Junta, published in the Official Gazette of 24 July of that year, approved a transitory article to the Constitution which approved the settlement reached on 22 July 1974, by the Chilean State, the Chilean Copper Corporation and the U.S. companies, Chile Exploration, Andes Copper and Anaconda.

Two years later, in 1974, the United Nations adopted the CERDS which, in its relevant parts, stated that: (i) no State shall be compelled to grant preferential treatment to foreign investment; and (ii) that each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation (not “prompt, adequate and effective” compensation) should be paid by the State adopting such measures. In addition, under CERDS, any question of compensation that gives rise to a controversy, shall be settled under the domestic law of the nationalizing State and by its tribunals, “unless it is freely and mutually agreed by all States concerned that other peaceful means be sought.”⁴⁰ Not surprisingly, the above provisions, and the CERDS in general, brought sharp negative reactions from different circles.⁴¹ However, most of the Latin American countries that adopted at the time the CERDS resolution are now members of ICSID and have signed BITs or free trade agreements which in many instances establish substantially different rules.

As it will be recalled, Decision No. 24 of 1970 adopted within the Andean Pact was perhaps the most restrictive foreign investment regulation in the world.⁴² However, major changes have occurred since then, including its radical amendment in 1987.⁴³ Chile withdrew its membership from the Andean Pact (now the Andean Community) in 1978. Many of the policies followed by Decision 24 of 1970 have been in practice repealed by new trade agreements adopted within the region, such as NAFTA and the Chile-U.S. FTA.

The recent global proliferation of BITs, and in Latin America in particular,⁴⁴ have contributed to the promotion of international arbitration as the most expeditious means for settling investment disputes.⁴⁵ Inspired by the Treaties of Friendship, Commerce and Navigation of the Nineteenth Century, the BITs now commonly include not only provisions on settlement of disputes among the contracting states, but also between a national of one of the con-

⁴⁰ See Charter of Economic Rights and Duties of States, *supra* note 33, Article 2(a) and (c), respectively.

⁴¹ See, e.g., Richard B. Lillich, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack, 69 AJIL 359 (1975).

⁴² See Covey T. Oliver, The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment, 66 AJIL 763 (1972).

⁴³ Decision 24 of December 31, 1970, *supra* note 32, was modified by Decision 220 of May 11, 1987, recognizing the freedom of each member country to adopt in its national legislation the most adequate mechanism to resolve foreign investment and technology transfer disputes.

⁴⁴ On this subject, see Nigel Blackaby, Arbitration under Bilateral Investment Treaties in Latin America, in *International Arbitration in Latin America* (Nigel Blackaby et al eds., 2002) at 379.

⁴⁵ A list of the treaties concluded in the period 1959-1996 is available on the website of ICSID at <<http://www.worldbank.org/icsid/treaties/intro.htm>>.

tracting state and the other contracting state.⁴⁶ Since the establishment of ICSID in 1966, the contents of the BITs have considerably changed attaining uniformity in setting up the prior consent of the contracting states to arbitration of the disputes arising out of investments. This prior consent would prevent any of the contracting states from later unilateral withdrawal or from opposing the jurisdiction(s) already agreed upon.⁴⁷ The most frequently arbitration mechanisms designated in the BITs are those of ICSID and its Additional Facility⁴⁸ (which can be used by non-members such as Brazil, Canada and Mexico), and UNCITRAL.

5. MERCOSUR

The Common Market of the Southern Cone (MERCOSUR), was established by the Treaty of Asuncion of March 26, 1991, among Argentina, Brazil, Paraguay and Uruguay. In 1996, Bolivia and Chile joined MERCOSUR as Associate States with the right to participate in meetings and discussions but not as full members.

On December 17, 1991, the four member countries signed the Brasilia Protocol, which established arbitration procedures for the settlement of disputes among its members. The procedures also apply to claims of private parties against measures adopted by State Parties in violation of the Treaty of Asuncion or its various implementing agreements. On December 17, 1994, the member countries adopted the Ouro Preto Protocol, which ratifies the Brasilia Protocol.⁴⁹

On July 23, 1998, the MERCOSUR International Commercial Arbitration Agreement (MAA) was adopted by the member States.⁵⁰ This Agreement will come into force when it is ratified by at least two member States.⁵¹ On the same day, the MERCOSUR member States signed an almost identical

⁴⁶ On the evolution of the dispute-settlement provisions in BITs, see A.R. Parra, ICSID and Bilateral Investment Treaties, *in* 17/1 News from ICSID 11 (2000).

⁴⁷ BITs also designate international arbitral jurisdictions to settle disputes which may arise between the Contracting States, regarding the interpretation or application of the treaty.

⁴⁸ On September 27, 1978 the Administrative Council of ICSID authorized the Secretariat to administer, at the request of interested parties, certain categories of proceedings between Contracting States and nationals of another Contracting State that fall outside the scope of the ICSID Convention.

⁴⁹ The four members countries of MERCOSUR ratified the Inter-American Convention on the Extraterritorial Effects of Foreign Arbitral Decisions of 1979 (Montevideo Convention). The Montevideo Convention is of subsidiary application to the Panama Convention and regulates the recognition and enforcement of foreign arbitral awards and foreign court judgments. However, in contrast with the Panama Convention, enforcement under the Montevideo Convention requires that the arbitral award must have attained *res judicata* in the country where it was rendered.

⁵⁰ See David M. Lindsey and Alessandro Spinelli, International Commercial Arbitration in Mercosur, *in* Blackaby, *supra* note 44, at 257-79.

⁵¹ To date only Argentina has ratified the agreement. See *id.* at 258.

agreement with Bolivia and Chile which will come into force when it is ratified by two MERCOSUR member States and either Bolivia or Chile.⁵²

The MAA was drafted after the UNCITRAL Model Law on International Commercial Arbitration, the principles and rules of which supplement the MAA when necessary.⁵³ An alleged problem with this Agreement is the subject of enforceability of the awards. Article 23 of MAA states that the provisions of the Panama Convention, the Montevideo Convention, and the MERCOSUR Protocol of Las Leñas of 1992⁵⁴ shall apply to the enforcement of arbitral awards. However, the agreement does not provide an order of preference for the application of these very different and, in many ways, incompatible conventions. This gives support to the opinion of Doctor Horacio Griguera Naón that “the Member and Associate States [of MERCOSUR] would have undoubtedly been better served had they simply adopted national laws based on the UNCITRAL Model Law and confirmed their commitment to the New York and Panama Conventions rather than create a wholly new regional arbitration convention.”⁵⁵ Within MERCOSUR two separate protocols were adopted concerning investments of the member countries but neither of them have yet entered into force.⁵⁶ These were the Colonia Investment Protocol, signed on January 17, 1994 and the Buenos Aires Protocol, signed on August 5, 1994.

From the above description of the evolution of Latin American arbitration and investment policies, it is clear that the opening of the countries to a market economy and foreign investment have forced a drastic change of policies in the region. A symbolic demonstration of this change has been the acceptance by Mexico and Chile (two of the countries where the most conflictive expropriations of foreign investments took place in the Twentieth Century) of international arbitration and investment protection provisions in their respective free trade agreements.

⁵² *Id.*

⁵³ Article 25(3) of the MAA.

⁵⁴ The Las Leñas Protocol on Cooperation and Judicial Assistance on Civil, Commercial, Labour and Administrative Matters was signed on June 27, 1992. It provides for the enforcement of foreign court judgments rendered in the member states and for enforcement of foreign arbitral awards.

⁵⁵ See David M. Lindsey and Alessandro Spinelli, International Commercial Arbitration in Mercosur, *in* Blackaby, *supra* note 44, at 279.

⁵⁶ See Alejandro Escobar, Investor-to-State Arbitration Under MERCOSUR, *in* Blackaby, *supra* note 44, at 281 *et seq.*

III. THE CHILE-U.S. FREE TRADE AGREEMENT

1. *Introduction*

The North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States and its side agreements on Labour and Environmental Cooperation entered into force in 1994. In December 1994, at the Summit of the Americas in Miami, the three parties formally invited Chile to apply for NAFTA membership.⁵⁷ This invitation, however, did not then materialize because the U.S. Congress did not give the requested fast-track authority to the President of the United States. Instead, two bilateral free trade agreements were negotiated and signed: the first, between Canada and Chile (in 1997); and the second, between Chile and Mexico (in 1998).⁵⁸ The Canada-Chile Free Trade Agreement (Canada-Chile FTA) and its labour and environmental side agreements are basically identical to NAFTA and its side agreements.

In 2002, the U.S. Congress granted the President fast-track authority, and Chile and the United States negotiated and signed a Free Trade Agreement, which entered into force in January 2004. The terms of the U.S. Congress authorization must be highlighted. It recognized that “the United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law.” It, then, stated that the negotiating objective of the United States was “to secure for investors important rights comparable to those that would be available under United States legal principles and practice,”⁵⁹ by “seeking to establish standards for expropriation and compensation, consistent with United States legal principles and practice”⁶⁰ and “reducing or eliminating exceptions to the principle of national treatment.”⁶¹

The above considerations explain the many innovations reflected in the provisions on investment protection and dispute settlement in the Chile-U.S. FTA compared with similar provisions of NAFTA. It is to be expected that the application of the provisions of the Chile-U.S. FTA will be far reaching and may influence future NAFTA jurisprudence and the negotiation

⁵⁷ Ralph H. Folsom, *NAFTA in a Nutshell* (1999), at 241.

⁵⁸ *Id.* at 242.

⁵⁹ U.S. Trade Act of 2002, Section 2102(b)(3).

⁶⁰ *Id.* Section 2102(b)(3)(D).

⁶¹ *Id.* Section 2102(b)(3)(A).

process of the Free Trade Area of the Americas,⁶² as well as the WTO multi-lateral investment negotiations.

2. *Comparison of the Investment Provisions of the Chile-U.S. FTA with Those of NAFTA*⁶³

Among the important provisions regarding investment set forth in the Chile-U.S. FTA are those concerning: (i) the definitions of investment and covered investment; (ii) expropriation and compensation; (iii) customary international law; (iv) minimum standard of treatment; (v) compensation for losses suffered as a result of armed conflicts and civil strife; (vi) performance requirements; and (vii) mechanisms for settlement of disputes between the Contracting Parties and between national investors and a Contracting Party.

a) *The Concept of Investment*

Instead of providing, as in the NAFTA, a long list of the activities that constitute an investment,⁶⁴ the Chile-U.S. FTA gives an all-inclusive broad definition of investment. In addition, it lists the different forms that an investment can include. The agreement also explicitly clarifies that an “investment does not mean an order or judgment entered in a judicial or administrative action,” and introduces the concepts of “investment agreement” and “investment authorization.”⁶⁵

The Chile-U.S. FTA defines the concept of investment as follows:

[I]nvestment 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.⁶⁶

⁶² The Free Trade Area of the Americas (FTAA), is the hemispheric regional economic integration initiative launched by President George Bush in June 1990.

⁶³ For an excellent analysis of the arbitration and investment provisions of the NAFTA, see Henri C. Alvarez, *Arbitration under the North American Free Trade Agreement*, 16 *Arb. Int'l* 393 (2000).

⁶⁴ NAFTA Art. 1139.

⁶⁵ Article 10.15 (1)(a)(i)(B) and (C) of the Chile-U.S. FTA allows a disputing party to file a claim for breach of an investment authorization or investment agreement, which are defined in Article 10.27 of the Agreement.

⁶⁶ Chile-U.S. FTA, *supra* note 1, Art. 10.27.

In addition to being a major expansion over the comparable definition in the NAFTA, the concept of “investment” as defined under the Chile-U.S. FTA can be expected to raise various questions of interpretation, including: (i) what would constitute indirect ownership or indirect control of assets; (ii) what would be the nature and standards under which expected gains or profits or assumed risks⁶⁷ would constitute an asset or capital of the investor; and (iii) what kinds of resources, other than capital, would qualify as an investment.

b) Covered Investments

The meaning of “covered investments” is a key concept in the Chile-U.S. FTA, which is not defined in the NAFTA. According to the Chile-U.S. FTA, “covered investments” means:

[W]ith 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.⁶⁸

The significance of defining the concept of covered investment is reflected in the fact that the Investment Chapter of the Chile-U.S. FTA only applies to measures⁶⁹ adopted or maintained by a Party relating to “covered investments.”⁷⁰ In other words, *existing* investors, whose investments were made prior to the entry into force of the agreement, can invoke, or benefit from, its provisions. More importantly, however, the provisions of the agreement on national treatment,⁷¹ most-favoured-nation treatment,⁷² minimum standard of treatment,⁷³ and expropriation and compensation,⁷⁴ extend to all

⁶⁷ It has been suggested that the standards for assumed risk would be those of *Penn Central Transportation Co. v. City of New York*, 438 U.S.104 (1978). This would be consistent with the U.S. Congress’ authorization, cited earlier for securing U.S. investors with rights comparable to those available under U.S. law.

⁶⁸ Chile-U.S. FTA, *supra* note 1, Art. 2.1.

⁶⁹ *Id.* Art. The term “measure” is defined to include “any law, regulation, procedure, requirement or practice.”

⁷⁰ *Id.* Art. 10.1(1)(b).

⁷¹ *Id.* Art. 10.2(2).

⁷² *Id.* Art. 10.3(2).

⁷³ *Id.* Art. 10.4(1).

⁷⁴ *Id.* Art. 10.9.

“covered investments,” including investments under the Chilean Foreign Investment Statute which are explicitly included.⁷⁵

c) Expropriation and Compensation

The Chile-U.S. FTA rules on expropriation and compensation are included in Article 10.9 and Annexes 10-A and 10-D of the treaty. Without prejudice to the subtle changes in language, such as the substitution of the word “tantamount” by “equivalent,” some major differences in the legal treatment of the subject under the Chile-U.S. FTA, compared to NAFTA Article 1110, are described below.

The Chile-U.S. FTA distinguishes and defines direct and indirect expropriation. Whilst the definition of direct expropriation follows the NAFTA, the definition of indirect expropriation opens new grounds for discussions in regard to what has always been a highly controversial area. In this regard, the provisions of the Chile-U.S. FTA sharply differ with the first paragraph of NAFTA Article 1110(1), which reads:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment....

By contrast, the first paragraph of Article 10.9(1) of the Chile-U.S. FTA reads:

Neither Party may expropriate or nationalize *a covered investment* either directly or indirectly through measures equivalent to expropriation or nationalization ...[emphasis added].

The content and the scope of coverage of the above provision are reflected in the Parties’ understanding in Annex 10-D of the Agreement, which explains that it is intended “to reflect the customary international law concerning the obligation of States with respect to expropriation.”⁷⁶ In addition, the Annex 10-D states that direct expropriation occurs “where an investment is nationalized or otherwise directly expropriated through formal trans-

⁷⁵ *Id.* Annex 10-F. The Annex refers to the “DL 600,” which is the Chilean Foreign Investment Statute.

⁷⁶ *Id.* Annex 10-D, Art. 1.

fer of title or outright seizure.”⁷⁷ On the other hand, indirect expropriation would occur “where an action or series of actions by a Party has an effect equivalent to direct expropriation without transfer of title or outright seizure.”⁷⁸ Whether an action or a series of actions will have an effect in a specific factual situation equivalent to direct expropriation, or will constitute an indirect expropriation, is a matter that requires a case-by-case fact-based inquiry which would need to consider, among other factors:

- the economic impact of the government action;
- the extent to which the government action interferes with distinct reasonable investment-backed expectations;
- the character of the government action.⁷⁹

The reference to the “investment-backed expectations” is related to the concept of expected gains or profits which, under Article 10.27 of the Chile-U.S. FTA, would constitute an asset or capital of the investor. The inclusion of expected gains or profits as an investment expectation would seem to follow closely the concept of assumed risk invoked in the *Penn Central* case.⁸⁰ A major difference, however, is that in the *Penn Central* case, the investor had to first exhaust local remedies. Under the Chile-U.S. FTA, by contrast, if an investor of the United States submits a claim to a court or an administrative tribunal of Chile, alleging that Chile has breached an investment obligation under Section A or Annex 10-F of Chapter Ten of the Agreement, or under an investment agreement or investment authorization, the investor’s selection would be definitive and irrevocable and the investor would forfeit his access to international arbitration.⁸¹ It could be argued, however, that such outcome would be in contradiction with the customary international law rule on exhaustion of local remedies as a prior condition for establishing State responsibility for injury to aliens.⁸²

⁷⁷ *Id.* Annex 10-D, Art. 3.

⁷⁸ *Id.* Annex 10-D, Art. 4.

⁷⁹ *Id.* Annex 10-D, Art. 4(a).

⁸⁰ See *Penn Central* case, *supra* note 65.

⁸¹ Chile-U.S. FTA, Annex 10-E, Arts. 1 and 2.

⁸² The Draft Articles on Responsibility of States for International Wrongful Acts was adopted by the International Law Commission on August, 9, 2001. Article 44 states:

The responsibility of a State may not be invoked if:

(a)...

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

See James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 70.

A form of indirect expropriation is the so-called “regulatory expropriations,” which occur when as a result of government policies investments and property are affected. In this respect, the rules of the Chile-U.S. FTA are the following:

*[E]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*⁸³

On the other hand, “an action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.”⁸⁴ What the above exception to an indirect expropriation does not do, however, is to determine the “rare circumstances” under which public regulatory actions would constitute an indirect expropriation.

Unlike NAFTA, which in cases of expropriation and nationalization requires that investors be treated in accordance with “international law,”⁸⁵ the Chile-U.S. FTA applies the narrower concept of “customary international law,” which is strictly defined and interpreted for all purposes of treatment of investments, expropriation and compensation. Pursuant to this definition, the Contracting Parties understand that “customary international law” generally and specifically “results from a general and consistent practice of States that they follow from a sense of legal obligation.”⁸⁶

From this perspective, the Chile-U.S. FTA then interprets the subject of the minimum standard of treatment.

d) Minimum Standard of Treatment

The Chile-U.S. FTA has incorporated two fundamental differences of far reaching consequences compared to the NAFTA provisions on this subject. The first is to add the obligation for compliance with a minimum standard of treatment to the traditional international law requirements applicable to expropriation or nationalization. The second difference relates to the substan-

⁸³ Chile-U.S. FTA, Annex 10-D, Art. 4(b) (emphasis added).

⁸⁴ *Id.* Annex 10-D, Art. 2.

⁸⁵ NAFTA Art. 1105(1) in connection with Art. 1110.

⁸⁶ Chile-U.S. FTA, Annex 10-A.

tiation of what constitutes a minimum standard of treatment under customary international law.

As a result, the Chile-U.S. FTA requires that the Contracting Parties refrain from expropriation or nationalization of investments except for a public purpose, in a non-discriminatory manner, and against payment of prompt, adequate and effective compensation, and in accordance with due process of law.⁸⁷ In addition, the agreement has supplemented and expanded the inordinately brief language of NAFTA Article 1105(1),⁸⁸ giving its own interpretation over those that have haunted NAFTA Article 1105(1), and which one author has described as “the most hotly disputed of all Chapter Eleven obligations.”⁸⁹

Among the many issues raised by NAFTA Article 1105 were those related to the contents of the substantive obligations of the “minimum standard of treatment.” Contradictory arbitral awards on the above subject led the NAFTA Parties to request a binding interpretation from the NAFTA Free Trade Commission (FTC), which ruled as follows:⁹⁰

- B. Minimum Standard of Treatment in Accordance with International Law
 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
 2. 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 the customary international law minimum standard of treatment of aliens.
 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international

⁸⁷ *Id.* Art. 10.9(1)(d) in relation with Art. 10.4(1) through (3).

⁸⁸ NAFTA Article 1105(1) states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

⁸⁹ *See generally*, J.C. Thomas, Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators, 17 ICSID Rev.—FILJ 21 (2002).

⁹⁰ Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission, of July 31, 2001, quoted from Thomas, *supra* note 89, at 91.

agreement, does not establish that there has been a breach of Article 1105(1).

On its part, Article 10.4(1) of the Chile-U.S. FTA states:

Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.⁹¹

According to the Contracting Parties, the interpretation of the minimum standard of treatment under Article 10.4(1) of the Chile-U.S. FTA includes the following clarifications:

- that “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”;⁹²
- 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”;⁹³
- that “[t]he 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”;⁹⁴
- that “fair and equitable treatment “includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world”;⁹⁵ and
- that “[f]ull protection and security” requires each Party to provide the level of police protection required under customary international law.”⁹⁶

⁹¹ Without prejudice to the interpretations mentioned below, a fundamental difference between the NAFTA and Chile-U.S. FTA texts is that at relevant parts the latter refers to “covered investments” instead of “investments of investors of another Party” and to “customary international law” instead of “international law.” In addition, as mentioned earlier, the concept of “investments” is also defined differently in the two agreements.

⁹² Chile-U.S. FTA, *supra* note 1, Art. 10.4(3).

⁹³ *Id.* Art. 10.4(2).

⁹⁴ *Id.*

⁹⁵ *Id.* Art. 10.4(2)(a).

⁹⁶ *Id.* Article 10.4(2)(b).

The above provisions have also been supplemented by Annex 10-A, 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.*”⁹⁷ As it can be seen, just like NAFTA Article 1105(1), Article 10.4(1) of the Chile-U.S. FTA will raise some practical questions regarding its application. Future tribunals and scholars will have to determine what specific international law principles “that protect the economic rights and interests of aliens” need to be included in the minimum standard of treatment of aliens established by this Agreement.

e) Most-Favored-Nation Treatment

As of May 2004, Chile had signed 51 bilateral investment treaties, of which 37 are presently in force, most of which contain provisions on most-favored-nation treatment. In addition, Chile has entered into free trade agreements with Canada, Mexico, South Korea, the European Union, Central America and the European Free Trade Association which also include provisions on investment protection and most-favored-nation treatment.⁹⁸ Similar is the situation with the trade agreements which the United States has concluded with Jordan, Singapore and, under NAFTA, with Canada and Mexico. Arguably, as a consequence of the operation of the MFN provisions in these various treaties, investors of any of the treaty parties might be able to invoke the same treatment that Chile and the United States grant to their investors under their free trade agreement.

f) Losses as a Consequence of Armed Conflict or Civil Strife

Compared to NAFTA, the Chile-U.S. FTA expands further the obligation of the Contracting Parties to accord to investors of the other Contracting Party non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.⁹⁹

In such situations, if an investor of one Party suffers losses resulting from the requisitioning or destruction of its covered investment or as part of the use of forces or authorities from the other Contracting Party, which was

⁹⁷ *Id.* Annex 10-A (emphasis added).

⁹⁸ An electronic list of the bilateral investment treaties of Chile is available at <http://www.cinver.cl/bilateral_investment/bits.asp>.

⁹⁹ NAFTA Art. 1105(2).

not required by the necessity of the situation, the latter Party must provide the investor restitution or compensation, which in either case shall be prompt, adequate and effective, and which, with respect to compensation, will have to comply with the Chile-U.S. FTA standards applicable to an expropriation or nationalization.¹⁰⁰

g) Performance Requirements

The Chile-U.S. FTA establishes additional exceptions and exclusions compared to those of the NAFTA in regard to performance requirements. Among these additional exceptions are:

- (i) authorization by a Contracting Party of the use of an intellectual property right in accordance with Article 31(3) of the TRIPS Agreement, or to “measures requiring the disclosure of proprietary information that fall within the scope of, and or are consistent with Article 39 of the TRIPS Agreement”;¹⁰¹
- (ii) qualification requirements for goods or services with respect to export promotion and foreign aid programs;¹⁰²
- (iii) procurement;¹⁰³ and
- (iv) requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or quotas.¹⁰⁴

h) Dispute Settlement

The dispute settlement provisions of the Chile-U.S. FTA are far simpler compared to those of NAFTA, which provides general and special dispute settlement procedures. NAFTA Chapter 20, Section B establishes the general rules for settlement of disputes between the Contracting Parties. On the other hand, Chapter 11, Section B and Chapter 19 of NAFTA establish rules for investor-State dispute resolution and antidumping and countervailing duty disputes, respectively. In addition, Part 5 of the corresponding parallel agreements establishes the rules for environmental and labour disputes.

¹⁰⁰ Chile-U.S. FTA, *supra* note 1, Art. 10.4(5).

¹⁰¹ *Id.* Art. 10.5(1)(f) and (3)(b)(i).

¹⁰² *Id.* Art. 10.5(3)(d).

¹⁰³ *Id.* Art. 10.5(3)(e).

¹⁰⁴ *Id.* Art. 10.5(3)(f).

The Chile-U.S. FTA, on the other hand, has basically two dispute resolution procedures: One under Chapter 22, which regulates the settlement of disputes between the Contracting Parties, and another, under Chapter 10, Section B, which is applicable to investor-State disputes.¹⁰⁵ Antidumping and countervailing duty disputes are excluded from the coverage of the Chile-U.S. FTA and, thus controversies thereof would have to be submitted to the respective dispute settlement procedures of the WTO. Labour and environmental disputes are subject to the general procedure of Chapter 22, with some exceptions.

Chapter 10, Section B introduces certain major innovations in the areas of investor-state dispute settlement compared to the treatment of these issues in NAFTA Chapter 11, Section B. These include the provisions on the claimant's cause of action, the investor's option to choose among broader list of arbitration institutions, *amicus curiae* submissions, preliminary questions, appellate body, transparency of arbitral proceedings, protection of confidential information, attorney's fees, and governing law.

Under NAFTA, an investor of a Contracting Party can bring a claim, on its own behalf or on behalf of an enterprise of another Party that is a juridical person, which the investor owns or controls directly or indirectly, for breaches by the other Contracting Party of its obligations listed in NAFTA Chapter 11, Section A. The Chile-U.S. FTA has confirmed the NAFTA provisions in this respect, and has added new causes of action. Under the Chile-U.S. FTA, the Contracting Parties are also responsible for any violations under Annex 10-F,¹⁰⁶ or under an investment authorization or an investment agreement.¹⁰⁷

Another difference is the considerable widening of the pool of dispute settlement mechanisms and institutions available to the disputing parties for settlement of their investment dispute. In addition to submitting a claim to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID and the Arbitration Rules of UNCITRAL,¹⁰⁸ such parties may agree on the submission of the disputes to "any other arbitration institution or under any other arbitration rules."¹⁰⁹ The Chile-U.S. FTA then provides the detailed rules as to when a claim shall be deemed submitted to arbitration in each of the above situations.¹¹⁰

¹⁰⁵ Financial Services Disputes are governed also by special rules.

¹⁰⁶ Chile-U.S. FTA, *supra* note 1, Annex 10-F (lists the obligations entered by Chile under its Foreign Investment Statute).

¹⁰⁷ *Id.* Art. 10.15(1)(a).

¹⁰⁸ *Id.* Art. 10.15(5)(a)(b) and (c).

¹⁰⁹ *Id.* Art. 10.15(5)(d).

¹¹⁰ *Id.* Art. 10.15(6).

In what is a major contribution to international arbitration, the Chile-U.S. FTA authorizes tribunals to accept and consider *amicus curiae* submissions from persons or entities which are not disputing parties.¹¹¹

The Chile-U.S. FTA goes further to provide for the arbitral tribunal's authority to address and decide, as a preliminary question, any objection by the respondent party that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under the terms of the Agreement. Under those terms, a tribunal may only make an award, separately or in combination, for monetary damages and applicable interest. The tribunal can also order the restitution of property and may award costs and attorney's fees.¹¹² Such an objection can also be raised by the responding party within 45 days after the tribunal has been constituted and may lead to a suspension of the proceedings on the merits.¹¹³

Probably the most significant of the innovations introduced by the Chile-U.S. FTA in the area of investor-state dispute settlement is the provision of the option for the appeal of the award.¹¹⁴ Currently, a procedure has been established for a review by the disputing parties of the proposed award. Under the treaty, at the request of a disputing party, an arbitral tribunal shall, before issuing an award on liability, transmit, for comments, its proposed award to the disputing parties and to the non-disputing Contracting Party.¹¹⁵ This procedure however would not apply, if an appeal has been made available under a separate multilateral agreement between the Contracting Parties, which establishes an appellate body that can hear investment disputes.¹¹⁶

Unlike NAFTA, the Chile-U.S. FTA makes the transparency of the investor-state arbitral proceedings a procedural requirement, with a few exceptions concerning the disclosure of confidential or privileged information.¹¹⁷ The tribunal must, in addition, make its hearings open to the public.¹¹⁸

Under NAFTA, a tribunal decides disputes in accordance with the provisions of the Agreement and the applicable rules of international law.¹¹⁹ The same rule applies in the Chile-U.S. FTA disputes arising out of alleged breaches of an investment obligation under Chapter 10, Section A or Annex 10-F of the Agreement and under the Chilean Foreign Investment Statute.

¹¹¹ *Id.* Art. 10.19(3).

¹¹² *Id.* Art. 10.19(4) in relation with Art. 10.25.

¹¹³ *Id.* Art. 10.19(5).

¹¹⁴ *Id.* Art. 10.19(10).

¹¹⁵ *Id.* Art. 10.19(9)(a) and (b).

¹¹⁶ *Id.* Art. 10.19(10).

¹¹⁷ *Id.* Art. 10.20(2), (3), (4) and (5).

¹¹⁸ *Id.* Art. 10.20(1) and (2).

¹¹⁹ NAFTA Art. 1131(1).

However, if the claim is for the breach by the Contracting Party of an investment authorization or an investment agreement, the tribunal must decide the issues in accordance with the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree. If the rules of law have not been specified or otherwise agreed upon by the disputing parties, the tribunal shall apply the law of the respondent State (including its conflict of law rules), the terms of the investment agreement or investment authorization, such rules of international law as may be applicable and the FTA agreement.¹²⁰

IV. FINAL COMMENTS AND OBSERVATIONS

There is no doubt that the innovations introduced by the Chile-U.S. FTA will require intensive and careful analysis in the years ahead. In this respect, several observations regarding the novel treatment by the Chile-U.S. FTA of issues of foreign investment and investment dispute settlement should be underlined:

- The Chile-U.S. FTA clarifies and broadens the respective provisions of NAFTA in several critical areas, such as the concepts of investment, indirect expropriation; covered investment and minimum standard of treatment;
- Several of the innovations introduced by the Chile-U.S. FTA reflect, or go far beyond, the law emerging from the jurisprudence of the U.S. courts or NAFTA arbitration awards;
- The treatment of expropriation as a result of regulatory State actions in the Chile-U.S. FTA contrast with relevant U.S. jurisprudence, which requires the exhaustion of local remedies as in the *Williamson County* case.¹²¹ Under the Chile-U.S. FTA, the choice by an investor of local remedies would not be a practical option.
- It would appear that the balance between the rights of foreign investors and those of domestic investors of the host State have been shifted in favour of the foreign investors;

¹²⁰ Chile-U.S. FTA, *supra* note 1, Art. 10.21 in relation with Art. 10.15(1).

¹²¹ See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

- It could be also argued that the broadening of the scope of concepts such as “investment” and “indirect expropriation” could lead to increased litigation, which could ultimately add up to creating frictions between the Contracting States in the future;
- Pursuant to the most-favored-nation clause of the FTA, Chile and the United States would have to recognize to foreign investors from third countries the same rights which the FTA grants to Chilean and U.S. investors.

Although the provisions of the Chile-U.S. FTA should not be regarded as a model, there is little doubt that they will be invoked in future arbitral proceedings and will be considered in bilateral and multilateral trade and investment treaty negotiations.