

Investment in Chile: An overview

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In order to explain effectively the main mechanisms available for investing in Chile, it is first necessary to set those mechanisms into context. This can be done with a brief, but not exhaustive, general outline of the principal protections, rights and guarantees that are granted by both the law and the political constitution of the Republic of Chile (PCR) to those who engage in economic investment activities in Chile, be they nationals or foreign investors.

Legal and constitutional rights and guarantees

The scope of that protection covers a wide spectrum of personal rights and needs, such as equality, liberty, property and security, as outlined below.

Equality

The PCR grants equality to all persons before the law:

- In Chile there are no persons, entities or organisations that are privileged in this sense. All inhabitants of the Republic must act in accordance with the law, be they nationals or foreigners.
- Neither the law nor any authority is permitted to impose arbitrary differences.
- All discrimination is prohibited, save that which is based upon individual capability, suitability or aptness, although the law does permit the stipulation of Chilean nationality or of age limits in certain specified cases.
- The State and all government organs are prohibited from discriminating arbitrarily in relation to economic matters.

In terms of foreign investment, Article 8° of the Decree Law 600 of 1974 (DL 600) provides that "The foreign investment and the businesses making the same shall be subjected to the indirect taxation regime and to the regime of common tariffs and duties in the same manner as is applicable in the case of national investment". The DL 600 provides that the foreign investment shall be subject to the common juridical regime that is applicable in the case of national investment, and no discrimination, whether direct or indirect, shall be permitted in this respect.

Liberty

This is used in a wide sense and includes, amongst other applications, freedom to work and the protection of the same:

- Every person has the right to freely enter into a labour contract and to the free choice of employment for a just wage.
- The right to undertake any economic activity that is not contrary to morality, public order or national

security, always in compliance with the laws that govern any such activity. In matters of private law, private individuals, whether nationals or foreigners, are permitted to engage in all acts that are not expressly prohibited by the law.

- The freedom to own all classes of goods, except those that nature has made common to all persons, or those that should be the property of the whole nation, provided that the law so stipulates.

Without prejudice to that which is set out above and by way of confirmation of the principles already identified, it should be noted that the PCR enshrines the principle of the 'Subsidiary Role of the State' in economic matters, through Article 19 No.21, which provides that "The State and its organs may develop or participate in business activities only where authorised by a Law of Qualified Quorum. In such a case, the conduct of those activities will be subject to the common legislation governing the activities of private individuals, without prejudice to any exceptions that the law may provide in cases of just cause, which must also be subject to Qualified Quorum."

Article 1545 of the Chilean Civil Code enshrines the principle that every contract legally entered into is a law as between the contracting parties and cannot be invalidated save by mutual consent or legal cause. This reflects the principle of autonomy of will, which is one of the fundamental pillars underlying the whole of Chilean civil and commercial legislation. As a broad, general principle, in many diverse areas, including that of the economy, that legislation allows the parties freedom to decide upon their own contract terms.

Thus, both natural and juridical persons, nationals and foreigners, are allowed a wide degree of liberty, both from an economic and a juridical perspective, to effect investments in Chile in the manner in which they freely choose, unless a law expressly limits that freedom.

Property

With regard to rights of property, such rights are recognised in relation to every class of goods, both tangible and intangible. Under no circumstances may

anybody be deprived of his property, nor of any of the essential attributes or powers of ownership, save by virtue of general or special laws authorising the expropriation of property by reason of public utility or national interest, as prescribed by the legislator.

Security

Finally, in relation to security, by virtue of a rule having the status of a simple law (that is to say, a law that does not form part of the PCR), it is established that the law can only govern future conduct and shall never have retroactive effect.

As a safeguard for the protection of individual rights and guarantees, anybody who, as a result of illegal or arbitrary acts or omissions, suffers deprivation, disturbance or threat in the legitimate exercise of rights and guarantees granted by the PCR may apply to the appropriate judicial authority. That authority shall make the necessary ruling in order to re-establish the right and to ensure the due protection of the affected person, pursuant to a very flexible judicial procedure known as a 'Recurso de Protección', (a petition for the protection of the court).

Nevertheless, and notwithstanding the legal and constitutional recognition of the principle of equality before the law, both for nationals and foreigners, as well as the enshrining of the right of property in the law, certain exceptions do exist. These are put in place for the purpose of adequately protecting and defending the public interest and the interests of national security, in particular areas judged to be sensitive and in which the rights of foreigners to own and/or to manage certain businesses are restricted. Relevant sectors include, for example, the communication sector, ports, the ownership of ships and other similar fields of activity. This type of restriction is not unusual and indeed is understood to be relatively commonplace in the legal systems of other countries. With respect to the right of property, there are exceptional cases of restriction regarding state owned lands and lands situated near the frontiers. This is a common situation in Latin-American countries.

Lastly, it should also be noted that in 1991, Chile became a party to the 1965 Washington Convention that created the International Centre for the Settlement of Investment Disputes (ICSID).

The Central Bank of Chile

The Central Bank of Chile is an autonomous body with constitutional status, with a technical character, a juridical personality, its own patrimony and indefinite duration. In the exercise of the powers granted by the Organic Constitutional Law, the Bank, by resolution adopted on April 10, 1990, made a new Compendium of Rules for International Exchange, comprising four titles,

themselves broken down into various chapters.

The chapter XIV concerns the rules governing credits, deposits, investments and capital contributions emanating from the exterior:

Chapter XIV sets out the rules governing obligations to make payments of currency to the exterior, or to persons who are not resident or domiciled in Chile where such payments are made with the intention of entering into (whether inside or outside Chile) any act, agreement or contract pursuant to which a party domiciled or resident in Chile, not being a banking business established in Chile, undertakes a credit obligation or receives a deposit.

This chapter also contains the rules regulating the conversion into Chilean legal pesos of foreign currency entering Chile, by persons resident in Chile, in connection with acts or operations conducted inside or outside Chile, the purpose of which is to make investments or capital contributions in Chile.

Principal mechanisms for foreign investment in Chile

There is no particular rule that provides for different investment mechanisms depending on whether the investor is a Chilean national or a foreigner, since in general, both are governed by the same laws. Instead, the distinction is made based upon the character of residence or domicile of the investor, either inside or outside Chile, as opposed to his nationality.

It is appropriate to observe that if natural or juridical foreign persons, with neither domicile nor residence in Chile, incorporate in Chile a company governed by Chilean law, it will be considered a Chilean company for all legal and economic purposes, save with regard to some limited exceptions.

There are currently two main banking mechanisms available in Chile for the making of general foreign investments. These are:

- i) Chapter XIV of the Chilean Central Bank Foreign Exchange Regulations (Chapter XIV); and
- ii) the 1974 Decree Law 600.

Chapter XIV of the Chilean Central Bank Foreign Exchange Regulations

The minimum investment under Chapter XIV is US\$10,000 and only investments of the equivalent of this amount or more are eligible. This regulation is an administrative regulation that changes from time to time.

The rights provided to the investor under Chapter XIV are the following:

- The right of access to the Formal Exchange Market, subject to prior approval of the investment by the Central Bank of Chile for remittance of the capital invested and the profits.

- Chapter XIV is a less formal way for making the foreign investment than DL 600. It provides a virtually automatic system for registering the investment, through a simple advice to the Central Bank of Chile by way of a prescribed form.
- Foreign credits can enter freely and for any amount. They do not have to be made in association with any specific investment of capital.
- There is no requirement that the foreign investment should remain in Chile for one year.

Decree Law 600

In the case of an investment of foreign currency and associated credits, only investments of at least US\$1m (or its equivalent in another foreign currency) are eligible to enter using this mechanism. This financial minimum limit is fixed pursuant to an administrative regulation that changes from time to time.

Decree Law 600 provides that capital should be entered and valued in the following manner:

- Freely convertible foreign currency sold on the formal exchange market at the most favourable exchange rate to the investor.
 - Physical assets in all forms or condition.
- Technology in its different forms, when it can be capitalised.
 - Loans associated with a foreign investment.
 - Capitalisation of foreign loans and debts.
 - Capitalisation of profits that are transferable abroad. As a general rule, the capital must enter Chile within three years of the contract. In special cases this term can be extended. The main rights and benefits granted in favour of the foreign investor by Decree Law 600 are as follows:
 - The foreign investor may repatriate its capital after the expiration of one year following its entry into Chile, and may remit profits at any time.
 - The remittance of the net proceeds of disposal of shares or rights representing the foreign investment, or of all or part of the company acquired or incorporated with that investment, shall be exempt from all contributions, taxes or encumbrances, up to the amount of the investment made. Any excess over the investment made will be subject to general taxation rules.
 - Regulations affecting remittances of capital and net profits may not be less favourable than those applied to imports in general.

V I A L Y P A L M A

A B O G A D O S

Vial y Palma was formally founded in 1938, as a modern partnership company. With members of both families having been dedicated to the practice of law on an uninterrupted basis since the start of the nineteenth century. Agustín Vial S. became a lawyer in 1797, and José Gabriel Palma V. became a lawyer in 1819, opportunity in which they worked together. Vial y Palma has evolved into a full service corporate. The principal areas of specialisation are antitrust, arbitration, banking, bankruptcy and insolvency, business law, corporations (open and closed), debt recovery, distributorship, e-commerce, employment, environment, estates, foreign investment, franchise law, intellectual property, internet, investment, joint ventures, landlord & tenant, litigation, mergers & acquisitions and related commercial transactions, project finance, real estate development & construction, securities, shipping, taxation, technology, telecommunications, media trade finance and visas.

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- The investor is assured access to the formal exchange market for the remittance abroad of capital or net profits.
- The investor shall have the right to have included in the contract a provision for its total tax charge to be fixed at 42% for a period of 10 years from the date of start-up of operations. However, the foreign investor may, on a once only basis, renounce the option to fix the tax rate in this way, and become subject to the common or general tax regulations.
- The foreign investor, and the companies in which it participates, are subject to the common legislation applicable to national investments, without any direct or indirect discrimination.
- Should laws or regulations be made which the foreign investor considers to be discriminatory the foreign investor may request the elimination of such discrimination, provided that not more than one year has passed since the enactment of the relevant law or regulation.
- Special rights are available for investments of US\$50m or more, whose purpose is the development of industrial or mining projects. For example:
 - i) the 10-year fixed tax rate period may be increased for a period compatible with the estimated life of the project, with a maximum of 20 years;
 - ii) special conditions for the entry and liquidation of part or all export proceeds, insurance and other claims;
 - iii) the ability to keep its accounts in foreign currency; and
 - iv) the right to hold foreign currencies abroad.
- The investor signs a contract with the Chilean State (foreign investment agreement) that cannot be amended unilaterally.

In conclusion, the foreign investor using the mechanism contained in the DL 600 acquires permanent rights by signing a legal contract with the Chilean State, the provisions of which cannot be unilaterally modified by the latter.

In relation to the credits associated to a foreign investment, it is necessary to emphasise the following:

- Article 2 (d) of the DL 600 provides (in relation to credits associated to a foreign investment) that the

general conditions governing the credits must be authorised by the Central Bank of Chile. This includes term, interest and other contractual terms, as well as the charges that must be paid by the debtor as part of the total cost of utilising external credit, including commission, tax and expenses.

- Credits associated to a foreign investment under DL 600 must be made jointly with a proportion of capital contribution or investment. At this moment, the proportion of associated credit permitted is a maximum of 75% loan credit and 25% capital contribution or investment. This is an administrative regulation that may change from time to time.

Operations utilising American Depository Receipts (ADRs)

A third possible mechanism for investment is by the use of American Depository Receipts (ADRs). This option is less frequently used, owing to the particular specific requirements that need to be met in any issue of ADRs.

An investment in ADRs issued on behalf of a Chilean company should comply with (inter alia) the following criteria:

- An open corporation domiciled in Chile, registered in the stock exchange register (Registro de Valores), and transacting its shares on the Chilean stock exchanges should issue the shares.
- The shares should be in respect of increases in the capital of the issuing company that have been previously offered to existing shareholders who have not subscribed for the same.
- The operation must have a minimum value of not less than US\$50m.

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