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Chile

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1 Collateral

What types of collateral are available?

Chilean law allows the creation of security interests over almost all kinds of assets and rights held by project companies, except for certain assets listed in the Civil Procedure Code that may not be attached under Chilean law (eg, working tools and assets employed in services that may not be stopped with serious harm to public transportation or health, household assets, salaries and child support up to a certain amount).

The main security interests over assets are obtained in Chile through mortgages and pledges.

Mortgages can be granted, among others, over real estate, major vessels (50 or more gross register tons), aircraft, mining concessions and water rights.

With regard to pledges, Chilean law allows the creation of 'regular pledges', where possession of pledged assets is vested in a creditor; and 'pledges without conveyance', where collateral remains with the pledgor.

Regular pledges (eg, civil pledges and commercial pledges) are established, among others, over personal assets, receivables, credits and shares.

Law No. 20190 (known as MKII) became fully effective on 22 January 2011, ie, 90 days after Decree 722, containing the Regulations on Pledges without Conveyance, was published in the Official Gazette on 23 October 2010. As from 22 January 2011, all rules that governed different types of pledges without conveyance were abrogated and replaced by the MKII statute, ie, agricultural pledges; industrial pledges; pledges on personal properties purchased with a deferred payment; the old pledge without conveyance under Law No. 18112; pledges on public works concessions; pledges on port facilities; pledges on public use properties; pledges on state-owned properties; pledges on shared urban financing; and the Sports Act pledge. This new pledge without conveyance subject to Law No. 20190 (the new special pledge) stands out for its broadness of scope, with regard to both the items that can be subject to its provisions, as well as the obligations that can be secured thereby. The new special pledge is intended to perfect a security interest on all kinds of tangible or intangible chattels, either present or future (with the exception of real property, vessels and aircraft, which shall be governed by their special laws), in general; and specifically on all concession rights that may be pledged according to their applicable laws, as per the requirements established thereby (eg, public works concession pledge and pledge over port concession); nominative credits; electronic or dematerialised securities; future properties or rights; real estate by intended use or adherence; things that have not arrived in the country; and groups of assets of one and the same kind or de facto groups of assets, as well as the products manufactured with the components of those inventories (in this case, a 'floating pledge' is established whereby the assets that exit the group will be subrogated by those that remain there. The value of the group must be indicated unless the parties agree otherwise. Article 1496(2) of the Chilean Civil Code will not

apply in this case and the pledge agreement must identify the pledged assets). Likewise, the new special pledge is conceived to secure own or third-party obligations, either present or future and whether they are determined at the time of the pledge agreement or not.

Pledges without conveyance furnished prior to the effective date of Law No. 20190 will continue under the law in force at the time they were created, except if the parties agree to be governed by the new special pledge, by signing a contract that must meet the same formal requirements for furnishing the new special pledge and mention the old pledge and its transformation within one year from the effective date of Law No. 20190. If these requirements are met, then the transformed pledge, its age and the date of the original pledge will be acknowledged.

It should be noted that other regular pledges that exist under Chilean law, where physical handover of the pledged item into the hands of the creditor is of the essence, and therefore any item that is presently pledged cannot be pledged again in favour of new creditors as long as the original pledge has not been redeemed (eg, pledges governed by the Chilean Civil Code and Commercial Code, and the pledge on bearer securities in favour of banks), have not been abrogated by Law No. 20190, and coexist with the new special pledge.

Finally (though not constituting a security interest under Chilean law), lenders may be granted a conditional assignment of rights under material contracts (step-in rights), be named additional insured or loss payee under insurance policies, and request the borrower company to set up collateral accounts (onshore and offshore) with typical waterfall mechanics.

2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

Mortgages are perfected through notarial deeds registered in the Registry of Mortgages of the relevant real estate registrar. Mortgages over major vessels or aircraft must be recorded in specific registrars.

Regular pledges are perfected by delivery of pledged assets to the pledgee. However, for commercial pledges to be effective against third parties, they must be executed in a notarial deed or notarised private deed.

Rules applicable to special pledges were scattered among different laws until Law No. 20190 became fully effective in January 2011. This new statute on pledges without conveyance modernises the collateralisation system; makes uniform the provisions of several old pledge systems under which the debtor maintained the possession and use of the pledged item; and enhances the rights of pledgees. The new special pledge may be created by either an instrument of public record or certified copy of the private instrument, and in the latter

case the signatures must be certified by a notary public and the document must be entered into his or her records.

In general terms, for those securities that require registration, priority will be given by filing and registration regardless of the date when the security interest was created following the 'first registered, first priority' principle. If one item is subject to several pledges or mortgages, they will prevail in the chronological order of the registry entries. According to Law No. 20190, the assignment of the real pledge rights as well as its preference may be made to the extent the secured credit and the right to assign the pledge rights expressly appears in the Register of Pledges without Conveyance.

Law No. 20190 created the Registry of Pledges without Conveyance (the Registry), kept by the Civil Registration and Identification Service (Servicio de Registro Civil e Identificación). The creation of this Registry eliminated the requirement to have the excerpt of the pledge instrument provided in Law No. 18112 published in the Official Gazette and all special pledge registries kept by the real estate registrar ceased to exist. Registration of the new special pledge is crucially important since the security interest is perfected, proven and maintained through the registration of the pledge agreement at the Registry. Also, registration serves as a means of publicity since the new special pledge will only be enforceable against third parties starting on the date when the registration is made at the Registry. To make the relevant registration entries, a Chilean notary public will have to submit a certified copy of the pledge agreement, its amendment or release, to the Registry for registration purposes, within three days from the execution of the respective instrument of public record, or from the date of notarisation in the case of a private instrument.

Credits secured by pledges or mortgages rank below certain credits having a priority ranking (ie, statutory priorities). The Chilean Bankruptcy Act (CBA), together with the Chilean Civil Code and other special laws, set forth a system of categories among creditors (basically depending on the nature of their credits and the guarantees involved), which consists of five different classes of credits, in which the first class credits are paid before the second class credits, and so forth. In general terms, the five classes of credits are as follows:

- first class: employees' remunerations and severance payments, fiscal tax credits and bankruptcy proceedings' expenses;
- second class: credits secured by a pledge (limited in preference only to the relevant secured amount);
- third class: credits secured by a mortgage (limited in preference only to the relevant secured amount);
- fourth class: mainly credits arising from family duties; and
- fifth class: credits that have no preference whatsoever (also known as 'valista credits').

The perfection of mortgages and pledges is not subject to taxes, but to notarial and registration fees. Certain registration fees (eg, mortgages) are linked (with certain caps) to the guaranteed obligation or value of the real estate. Law No. 20190 expressly authorises the Civil Registration and Identification Service to charge fees and other charges for registration of entries, annotations, modifications, cancellations, releases, digitalised entries, certificates, reports and copies of pledge agreements made or executed, which cannot exceed 1 UTM (Unidad Tributaria Mensual) per act, and which will be determined by an executive order issued through the Ministry of Justice on the basis of a prior favourable report by the Ministry of Finance.

Law No. 20190 introduced, for the first time ever, rules governing what is defined as 'loan or collateral agency'. The loan or collateral agency is a collective agency agreement whereby two or more creditors appoint a common agent to represent them in the extension or procurement of their loans, or in the furnishing, amendments or cancellation of their collaterals or both, and for the collective exercise of their rights arising under those loans or collaterals. Law No. 20190 provides that this agency must be expressly accepted by the borrower and, once acceptance is given, it is irrevocable by virtue of the borrower's acquiescence alone. Nevertheless, the agreement can

be revoked ahead of term or modified on the terms contemplated thereby. However, in the borrower's silence, the agreement is deemed amendable or terminable at the discretion of lenders representing at least two-thirds of the principal owed under the respective loan. The collaterals furnished on the loan will be provided in favour of the agent, who will accept them on behalf of the then-current or future lenders as a whole. The agent will also be responsible for accepting any amendments or replacements of the collaterals or consenting to their release in accordance with the terms and conditions of the agreement. Law No. 20190 expressly notes that lenders need not be identified in the documents used to furnish and register eligible collaterals, only the respective loan agreement and the agent. Finally, the agent may only be replaced on the terms and conditions of the agreement and, in its silence, by lenders representing at least the absolute majority of the outstanding balance. The agent's mandate may not be revoked unless a substitute is simultaneously designated.

3 Existing liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

For collateral that requires registration for perfection, a search can be carried out in each relevant registry. Chilean registrars as well as the Civil Registration and Identification Service can certify the existence of liens.

For collateral that does not require entry in a public registry, the assurance available to creditors regarding absence of liens is in the form of contractual warranties and representations by debtors.

Pledges over shares can be verified in the company's shareholders' registry.

As indicated in question 2, a Registry of Pledges without Conveyance was created by Law No. 20190, which is a public, electronic, nationwide and sole registry essentially with the purpose of registering and maintaining the registrations of pledge agreements, their modifications and releases, and reporting any acts and circumstances indicated therein. The great innovation behind Law No. 20190 was the creation of this Registry, not only because it is electronic but also because it overcomes the legal uncertainty problem creditors had under the old law (which did not require registration, just publication of an excerpt of the instrument in the Official Gazette on the 1st or 15th day of each month), whereby the pledgee had to review the entire publication to make sure the asset did not have any prior liens. The strength of this new statute lies in that the information will reside in a single registry, where anyone may access information through certificates that can be obtained easily, quickly and expeditiously in the website of the Civil Registration and Identification Service or at the offices of the latter entity. Only a court may order that a pledge registered in the Registry may be amended or eliminated.

4 Enforcement of collateral

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Under Chilean law, collateral foreclosure requires certain proceedings before a Chilean court. The relevant obligations are paid with the proceeds of the sale of collateral at a public action. If there are no bidders at the public auction, the assets may be awarded to the secured lender. No repossession of collateral is available.

The length of proceedings depends mainly on whether the obligation of the debtor is evidenced in a document that entitles the holder to use summary proceedings (*títulos ejecutivos*). If no summary proceedings are available, the lender can sue the debtor under ordinary proceedings, which may be quite lengthy; or ask the court to summon the debtor to acknowledge the debt. If the debtor so acknowledges, the lender is entitled to summary proceedings.

Security interests created for project financing have different

enforcement proceedings. Moreover, it is possible that at least at the beginning of the proceedings, the same procedure is followed before more than one ordinary court of justice (although it is possible later to join the different proceedings before the same court of justice). As it would not be possible to enforce all the collateral in one single enforcement procedure, it becomes impossible to auction the relevant project assets as an ongoing concern (except 'economic unit' cases under bankruptcy proceedings). However, considering that in project financing the value of the assets is directly related to their contribution to the operation and development of the project as a whole, it would appear to be useless or economically unattractive to auction assets separately. Some of the aforementioned foreclosure issues have been traditionally solved by means of the lender's requiring in the financing agreements that the amount of principal of each disbursement of the loans be documented in a Chilean promissory note, duly signed by the borrower before a Chilean notary public and bearing evidence of the due payment of the applicable stamp tax (thus the note becomes a *título ejecutivo* entitling the lender to summary proceedings).

It is worth noting that Law No. 20190 has eased enforcement of the new special pledge by granting right of execution (*mérito ejecutivo*), without any need for prior recognition, to the instrument of public record or certified copy of the private instrument evidencing the notarised pledge agreement, in relation to the obligations that are assumed or accurately identified thereby. If the pledge agreement does not indicate the secured obligation, then a document proving the claimant's right of execution stating that obligation must be submitted for its enforcement. Once the enforcement action is served on the pledgor and the person furnishing the pledge, if different from the former, then the pledgee may demand the immediate enforcement of the pledge even if objections have been filed. In this case, the other pledgees must also be notified if they have any right to the pledged item, who will be paid from the auction proceeds in the applicable order, regardless of whether their credit has matured or not.

5 Bankruptcy proceeding

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

The CBA applies to both legal entities and individuals. Banks and pooled investment funds are not subject to general bankruptcy proceedings but to liquidation proceedings in accordance with the banking law or the rules applicable to funds (eg, pension funds and mutual funds).

The bankruptcy declaration shall contain, among others, the appointment of a provisional receiver and an alternate, to act in the bankruptcy proceedings until a permanent receiver is appointed by the creditors' meeting, and the seizure of the assets of the debtor.

The bankruptcy declaration has the main following effects: the debtor's assets can no longer be administered by the debtor; the credits are fixed as at the time of the bankruptcy declaration; credits against the debtor become due and payable (regardless of contractual payment terms); with exceptions, all existing or new litigation is consolidated in the bankruptcy court; and transactions entered prior to bankruptcy date and during the 'suspicious period' can be challenged, when not automatically voided.

In addition, the creditors' right to pursue actions for collection is suspended. Procedures against a bankrupt debtor initiated before the declaration are accumulated to bankruptcy proceedings (subject to certain exceptions). The rights of creditors secured with mortgages or pledges are not suspended, except if a creditors' meeting approves the

continuation of the bankrupt debtor's business and secured creditors concur to such approval, or the sale of all or part of the debtor's assets as an 'economic unit', provided mortgaged or pledged assets are part of the 'economic unit' subject to such agreement.

The CBA allows an insolvent party or its creditors to submit agreement proposals to restructure the debtor's obligations and avoid bankruptcy. A restructuring proposal can be filed after the bankruptcy declaration and, if approved, will terminate the insolvency proceedings. Such proposals will become binding upon all creditors if approved by the affirmative vote of the debtor and two-thirds of the creditors holding at least three-quarters of the outstanding claims.

It is worth noting that Law No. 20190 amended the Chilean Civil Code by legally recognising, for the first time ever, the concept of 'subordination'. Debt subordination (also referred to in the Chilean Civil Code as 'credit subordination') is an act or agreement whereby one or more fifth-class creditors agree to postpone, either totally or partially, the payment of their credits in favour of another or other current or future credit(s) in such category. Subordination may also be set forth unilaterally by debtor in its issuances of credit instruments (eg, subordination may be agreed upon at the time bonds are issued, so that such bonds become subordinated to other obligations). In all cases subordination will be irrevocable and will comprise capital and interests, unless otherwise provided for. The establishment of subordination and the early termination of the same, where applicable, must be set forth in a public deed, or in a private document executed and notarised before a notary public. Subordination established by one or more creditors will be binding upon debtor: if such debtor has been a party to the subordination act or agreement, or if such debtor accepts such subordination act or agreement in writing at a later date, or if such debtor is served a notice of such act or agreement by a sworn judicial officer, who exhibits such instrument. Subordination will be binding upon the subordinated creditor's heirs and assigns. The term during which it is effective will not be considered when computing the prescription of the credit collection actions (*acciones de cobro del crédito*). Breach of subordination will entail compensation for damages against debtor, along with action for reimbursement filed against the subordinated creditor. As to debt subordination under bankruptcy of project company and priority among valista creditors:

- the fifth class comprise credits which are not entitled to priority. Valista credits will be prorated over the remaining bankrupt's estate (*masa concursal*), without considering the date thereof;
- notwithstanding the foregoing, if among valista credits there are any credits which are subordinate to other credits, such credits will be paid before the former (priority among valista creditors); and
- debt subordination, now regulated under Chilean law, should be recognised by the trustee in bankruptcy when paying to different creditors (senior first, then subordinated).

6 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

In general terms, foreign exchange transactions can be freely made in Chile. Only a few regulations restrict this general principle:

- operations that must be performed through the formal exchange market (FEM) and reported to the Central Bank (eg, credits, deposits, investments and capital contributions coming from abroad). The FEM is composed by banks established in Chile and exchange houses, stockbrokers and brokerdealers authorised by the Central Bank;
- operations that must be performed through the FEM (eg, operations with foreign capital funds and royalty payments for trademarks, copyrights and patents); and
- operations that need only be reported to the Central Bank (payments related to imports and exports).

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Chile has two laws that are fundamental in regulating foreign investment:

- the Foreign Investment Statute or Decree Law 600 (DL 600); and
- article 47 of the Constitutional Organic Law of the Central Bank, also known as chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank (Chapter XIV).

A DL 600 investor may repatriate its investment one year after the date the investment entered into the country. No tax or other levy applies to such remittances up to the amount of the investment. Foreign currency for these remittances can only be acquired with the proceeds of the total or partial sale or liquidation of the shares or rights corresponding to the foreign investment. Profits may be remitted abroad at any time and with no limit to the amount, provided the applicable Chilean taxes have been paid in advance. Dividends or other distributions of taxable profits are subject to a 35 per cent withholding tax rate. The corporate tax (20 per cent for 2011, 18.5 per cent for 2012, and 17 per cent thereafter) paid by the distributing entity over such same profits may be used as credit against the withholding tax. When corporate and withholding taxes are applied, the withholding tax (on account of the credit system) results in an effective withholding rate of approximately 21.6 per cent.

A Chapter XIV investor may at any time remit abroad the investment and its profits, without limit, provided such remittance is reported to the Central Bank. Except for complying with tax regulations and other reporting requirements, there are no rules in Chile affecting repatriation rights, except that remittances of foreign currency shall be made through a FEM entity. Remittances may also be made with funds maintained abroad, provided the Central Bank is informed on such remittances.

As a general rule, payments made from Chile in consideration for services provided by individuals or legal entities neither domiciled nor resident in Chile are subject to income tax withholding. The general applicable income tax withholding rate on the payments made abroad is 35 per cent. However, some payments abroad are subject to different income tax withholding rates (eg, interest paid abroad in consideration of loans granted abroad by foreign or international banks or financial institutions or bonds issued abroad by a local entity is subject to a 4 per cent income tax withholding rate – thin capitalisation rules also apply).

8 Repatriation

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Project companies are not required to repatriate foreign earnings, although they are generally subject to taxation in Chile.

9 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies are allowed to establish and maintain foreign currency accounts both locally and in other jurisdictions.

10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

As general rule, investors wishing to bring foreign currency into the country as well as to repatriate the investment or its profits shall do it through a member of the FEM.

Chapter XIV provides an easy way for bringing foreign currency into the country, which is relatively exempt from public authority intervention. Investments conducted through Chapter XIV must exceed US\$10,000.

DL 600 may only be used for investments currently exceeding US\$5 million, or its equivalent in freely convertible foreign currency. In the case of investments comprising tangible assets, technology and capitalisation of profits or credits, the minimum amount is of US\$2.5 million. Investment projects filed with the Foreign Investment Committee (FIC), including related loans, must meet a 25:75 equity-debt ratio. All investments under DL 600 require prior approval from the FIC. If the investment is approved, a foreign investment contract will be executed with the Republic of Chile.

Additional authorisations and approvals are required for certain types of projects (eg, the Environmental Assessment Service's approval for projects that are subject to the System for the Evaluation of Environmental Impact; the Undersecretariat of Fishing's approval regarding investments in this sector; the Chilean Copper Commission's authorisation in the case of copper mining projects; authorisation from the Superintendency of Banks and Financial Institutions (SBIF) to operate in the banking sector, and authorisation from the Superintendency of Securities and Insurances (SVS) for projects related to insurance and investment funds).

There are no percentage restrictions on foreign holdings nor are there any restrictions on foreign ownership of real estate, with the exception of real property located in limiting territories, which may not be owned by nationals of border countries.

Only a few strategic activities are restricted to the state (eg, production of nuclear energy, and exploration and exploitation of oil and gas deposits, lithium, and deposits of any kind located on the sea floor under Chilean jurisdiction or in areas deemed, by law, to be important to national security). However, under certain circumstances, foreign companies can invest even in these sectors.

Concessions to operate public telecommunications services and intermediate services are reserved to companies established in Chile. However, in the case of radio broadcasting telecoms services, concessions requested or acquired by entities controlled above 10 per cent by foreign investors may be granted only if their country of origin grants Chilean citizens the same rights that they enjoy in Chile (reciprocity).

Foreigners may not invest in Chilean fishing companies unless their country has a relevant reciprocity arrangement with Chile. Chile practises an 'open skies' air transport policy, but makes market access for foreign companies subject to reciprocity. Chile also requires reciprocity with respect to international maritime traffic cargoes. Cabotage is reserved for ships registered in Chile (with some exceptions).

Electricity concessions are reserved for nationals or legal entities established in Chile.

11 Documentation formalities

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

As to the formalities for the perfection and enforceability of certain security interests, please see question 2.

Financing or project documents (not executed in Spanish) to be admissible in evidence in judicial proceedings in a Chilean court would have to be translated into Spanish by an official or court-appointed translator.

12 Government approvals

What government approvals are required for typical project finance transactions? What fees and other charges apply?

For general rules on requirements applied to foreign investors to act in Chile, see question 10.

As a general principle, there are no government approvals associated with project finance transactions per se. Each infrastructure or natural resource sector has specific legal and regulatory frameworks, and projects in these industries may be subject to prior authorisations, approvals, licences or even concessions.

13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

The Insurance Law reserves insurance and reinsurance services in Chile for stock corporations incorporated in Chile for this sole purpose. However, Law No. 20190 of 2007 includes a chapter on insurance-market liberalisation: enabling foreign insurance companies to set up branches in Chile (rather than having to establish a local company with separate capital), and allowing foreign companies from countries with which Chile has a corresponding international treaty to sell international maritime and air transport insurance, together with insurance for goods in transit.

Except for compulsory insurance (SOAP) and insurance relating to the pension and social security systems which must be taken out in Chile, Chilean natural or legal persons may freely take out insurance abroad, subject to foreign exchange regulations.

14 Foreign employee restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

General rules apply: no less than 85 per cent of the workers of one given employer with more than 25 employees must be Chilean. This restriction may be relaxed, among others, in cases where foreign technicians or experts have skills otherwise unavailable in Chile.

General immigration rules also apply: foreign workers are required to obtain work visas to work in Chile and individual employment contracts of foreigners must include certain mandatory clauses.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

There are no specific limitations. All merchandise can be imported into Chile, with certain exceptions. Nevertheless, certain tax incentives may be applicable (eg, deferral in payment of import duties).

16 Nationalisation and expropriation

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Expropriation in Chilean territory is mainly regulated in article 19(24) of the Political Constitution (PC) and in the Chilean Expropriations Procedure Act. The PC grants the government authority to expropriate property, including property of foreign investors, only for public benefit or national interest, on a non-discriminatory basis and in accordance with due process of law, and with prior and fair payment of compensation.

Since 1991, Chile has negotiated and concluded several bilateral investment treaties (BITs). These treaties, among other things, protect private property rights through the establishment of basic principles and minimum standards in cases of expropriation.

17 Fiscal treatment of foreign investment

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

A DL 600 investor may elect to be subject to either the application of the normal tax burden as for local investors, or a fixed overall income tax rate (tax invariability) of 42 per cent, calculated on net taxable income (the current rate being 35 per cent), for a term of 10 years from the beginning of commercial production. This rate can be extended up to 20 years for mining projects over US\$50 million. Additionally, DL 600 investors are entitled to be treated in the same manner as a local investor and, in some cases, to the freezing of custom duties and value added tax (VAT).

Other incentives include accelerated depreciation of fixed assets to one-third of their normal life, in certain cases; deferred payment (from one to seven years) of customs duties on the import of certain capital goods; and the possibility for VAT taxpayers and exporters, in certain cases and under certain circumstances, to recover in cash accumulated VAT credits.

On December 2002, the Chilean Congress passed a law that created the 'Investment Platforms' regime, to promote the creation of investment vehicles for foreign investors that wish to establish their business centre in Chile from where to invest in other countries of the region. Such corporations are not subject to taxation in Chile on their foreign source income.

The Chilean Tax Code includes an exemption with respect to all taxes affecting foreign institutional investors (mutual funds and pension funds).

In addition, there are some regional incentives linked to isolated geographical zones, and specific incentives to the forestry industry; to the oil industry; to explore, exploit or process radioactive substances; to the installation of solar thermal systems; and to R&D activities.

Finally, Chile has entered into several double taxation treaties.

18 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Energy

- National Energy Commission (CNE)
- Superintendency of Electricity and Fuels (SEC)
- Ministry of Economy
- Ministry of Energy

Telecoms and media

- Ministry of Transportation and Telecommunication
- Telecommunications Undersecretariat
- National Television Council

Mining

- Ministry of Mining
- Regional Ministerial Secretariats (SEREMIS)
- Chilean Copper Commission (COCHILCO)
- National Geology and Mining Service (SERNAGEOMIN)

Maritime transport

- Transport Undersecretariat
- Directorate General of the Maritime Territory and Merchant Marine (DIRECTEMAR)
- Merchant Marine Development Commission

Ports

- Marine Undersecretariat of the Ministry of Defence
- DIRECTEMAR
- Also relevant for port infrastructure projects: the Ministry of Public Works (MOP) and the Directorate of Ports' Works (DOP)
- Enterprise System (SEP) regarding state port enterprises

Air transport

- Civil Aviation Administration (DGAC)
- Civil Aeronautics Board (JAC)
- National Directorate of Airports (DAP)

Fishing and aquaculture

- Fisheries Undersecretariat of the Ministry of Economy
- National Fisheries Service (SERNAPESCA)
- Fisheries Development Institute (IFOP)

Water treatment

- Superintendency of Sanitary Services (SISS)

19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Law No. 19971 on International Trade Arbitration (modelled on the UNCITRAL Model Law) governs the arbitration of international disputes. Chile has been a party to the New York Convention and to the Inter-American Convention on International Trade Arbitration (the Panama Convention) since 1975. In general, foreign arbitral awards are recognised and enforced in Chile, subject to an exequatur from the Supreme Court, which will be granted provided legal requirements are met and there are no public order considerations.

Chile is also a party to the Convention on Settlement of Investment Disputes between States and Nationals of other States (1965 Washington Convention), which was ratified in 1991. In turn, almost every international investment or trade treaty signed by Chile includes the possibility of recourse to an ICSID court.

In general, all matters may be referred to arbitration unless there is an express prohibition on doing so (eg, antitrust matters (save for conflicts arising as a result of antitrust litigation); criminal cases; police court cases).

20 Applicable law

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Financing documents are typically governed by foreign law (usually New York or English). All agreements providing for the creation of security interests over property located in Chile are subject to the mandatory application of Chilean law.

21 Jurisdiction and waiver of immunity

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Under Chilean law, there is no restriction on submitting civil or commercial agreements or relations to foreign law or jurisdiction, or to arbitration proceedings outside Chile, provided that there are some contacts with the jurisdictions whose laws are selected and provided, further, that Chilean law shall apply on issues of public policy.

Any security interest granted over assets located in Chile shall be governed by Chilean law and subject to the jurisdiction of Chilean courts, but the principal loan agreement may be governed by a foreign law and subject to the jurisdiction of courts sitting abroad.

The enforcement of foreign judgments is subject to an exequatur from the Supreme Court. Once the exequatur is granted, a foreign judgment is as enforceable as a domestic judgment, and it may be enforced pursuant to the general rules.

The state of Chile and its bodies are authorised, regarding certain types of agreement, to submit them to foreign law and jurisdiction, to set special domicile, to appoint service agents abroad for purposes of any such agreement, and to waive sovereign immunity (Decree Law 2349 and Supreme Decree 1009, both of 1978, as amended).

22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The PC provides that the state is the owner of all mineral, hydrocarbon and fossil fuel deposits within Chilean territory. Under Chilean law, as a general rule, all metallic and non-metallic substances may be subject to concessions, which may be granted to individuals and companies for exploration and development of these natural resources.

There are no restrictions on foreigners owning mining rights. Nevertheless, there is some doctrinal discussion as to whether Decree Law 1939 of 1979, which prohibits the nationals of bordering countries acquiring border real estate, is also applicable to concessions. No domestic partner is required.

The Chilean Mining Code expressly states that the following substances are not subject to concession: liquid and gaseous hydrocarbons; lithium (with some exceptions); and deposits of any kind located on the sea floor under Chilean jurisdiction or in areas deemed, by law, to be important to national security. These non-claimable mineral substances may be mined by the state or under administrative concessions or special operational contracts, all of them governed by their own legal statute.

The Geothermal Law provides that geothermal energy belongs to the state, although natural or legal persons organised under Chilean law may apply for geothermal concessions.

According to Chilean law, water is a national asset for public use and private entities are entitled to use water through water rights.

Restrictions or limitations set out in regulations applicable to properties belonging to native populations and on national monuments and archaeological sites shall also be considered.

23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The 'specific mining tax', is regulated on articles 64-bis and 64-ter of the Chilean Income Tax Law (ITL). It was first introduced through Law No. 20026, becoming effective on 1 January 2006. On October 2010, by means of Law No. 20469, it was subject to significant amendments aimed at increasing the tax burden applicable over large mining companies.

The 'specific mining tax' is structured as an income tax on mining operational taxable income obtained by mining operators. For these purposes mining operators means any individual or entity that extracts minerals that could be subject to a mining concession and sells them in any state of production. On the other hand, mining operational taxable income means the net income determined for corporate tax purposes, with the adjustments indicated on article 64-ter of the ITL, including: the deduction of all income not directly connected to the sale of mining products; the addition of costs and expenses not directly connected to income from the sale of mining products; and the addition of the specific following expenses: interests paid or accrued over owed amounts on the relevant tax period; carry forward losses; amount deducted for application of accelerated depreciation (only ordinary depreciation can be deducted); and expenses related to the acquisition of a right to exploit a mine owned by a third party (ie, lease, usufruct, etc); among other adjustments.

The applicable tax rate is progressive, based on the taxpayer's annual gross sales of mining products expressed in metric tonnes of fine copper (MTFC), in accordance to the Copper Grade A's average price registered during the relevant period in the London Stock Exchange. Related parties sales of mining products must be added to determine the annual gross sales of mining product of a mining operator.

Mining operators whose annual gross sales of mining products are equal to or are less than the equivalent of 12,000 MTFC are exempt from the specific mining tax.

Mining operators, whose annual gross sales of mining products are equal to or are less than the equivalent of 50,000 MTFC, and greater than the equivalent of 12,000 MTFC, are subject to a progressive tax rate by brackets from 0.5 per cent to 4.5 per cent.

Mining operators, whose annual gross sales of mining products are greater than the equivalent of 50,000 MTFC, are subject to a progressive tax rate by brackets from 5 per cent to 14 per cent, which is determined in function of the mining operational margin. This last concept was incorporated by Law No. 20469 and corresponds to the result, multiplied by 100, from dividing the mining operational taxable income by the mining operational income (all income earned or accrued from the sale of mining products).

According to article 11-ter of DL 600, in the case of mining investments of US\$50 million or more, foreign investors may claim invariability, for 15 years from the commencement of commercial production, for: the specific mining tax, including its rate and taxable basis, and the future taxation of any other tax income tax on mining activities, including royalties and similar duties; and the mining licence rate and its calculation method. The mining tax invariability is incompatible with the income tax invariability rights generally available to foreign investors under other DL 600 provisions.

24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

There are no restrictions other than the one established by Law No. 16624, which requires copper producers (over 75,000 tons per year) to reserve or stock a percentage of their production for consumption by national industry. The amounts of copper to be reserved are determined by COCHILCO.

25 Environmental, health and safety laws

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The PC guarantees to all persons the right to live in a clean environment free of contamination and provides that the law may determine specific restrictions in exercising particular rights and privileges in order to protect the environment.

Law No. 19300 of 1994 (on General Environmental Norms, as amended by Law No. 20417 of 2010) constitutes the most important environmental legal framework, and together with Supreme Decree No. 95 of 2001 of the Ministry Secretary General of the Republic, regulate the material aspects and procedures of the so called System for the Evaluation of Environmental Impact (SEIA).

Formerly, the authority on policy, regulation and management of environmental matters was concentrated in the National Environmental Agency (CONAMA), which was regionally decentralised through regional agencies (COREMAS). In addition, supervisory authority was scattered among other governmental agencies.

With the enactment of Law No. 20417, a thorough reform was made to the Chilean environmental institutional framework. The CONAMA was eliminated and new environmental agencies were created, each with specialised functions, ie, the Ministry of the Environment (Ministerio del Medio Ambiente), which concentrates the policy and regulatory authority; the Environmental Assessment Service (Servicio de Evaluación Ambiental), which evaluates the environmental impact of investment projects; the Council of Ministers for Sustainability (Consejo de Ministros para la Sustentabilidad), to act as the organisation for political deliberation; and the Superintendence of the Environment (Superintendencia del Medio Ambiente), an agency with supervisory authority that can decide fines and other sanctions on environmental matters. This latter agency will become fully operative once the new environmental courts (*tribunales ambientales*) are operating, which is expected to occur during 2012.

Chile is also a signatory of various international treaties on environmental matters, such as the Washington Convention, the RAMSAR Convention, the United Nations Climate Change Convention and the Kyoto Protocol.

26 Project companies

What are the principal business structures of project companies?
What are the principal sources of financing available to project companies?

The principal business structures for project companies are stock companies or corporations, limited liability partnerships or branch offices in Chile. In addition, special companies ruled by the Chilean Mining Code are also used (eg, contractual mining companies).

The principal sources of financing for project companies are commercial loans or syndicated loans from local or international banks. Multilateral financial institutions are also a common source. Though less frequently, local and international capital markets are also used. Ultimately, regarding mining projects, the purchase of a royalty associated with future production of a mine and the *avío*, a similar contract to the above, have appeared as alternatives to finance.

27 Public-private partnership legislation

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

PPP legal and regulatory framework is embedded in a multi-sector concession law, the Public Works Concession Law, contained in Decree No. 900, of 1996 of the Ministry of Public Works, as amended lately by Law No. 20410 of 2010 (the Concessions Law); and its Regulations, contained in Statutory Decree No. 164, of 1991, as amended (Regulations). The Concessions Law and Regulations is

complemented for some sectors by sectoral laws (eg, Law No. 19542 of 1997 - Port Modernisation Law). Specifics are contained in the respective PPP contracts.

28 PPP – limitations

What, if any, are the practical and legal limitations on PPP transactions?

Pursuant to the PC, the state and its agencies may conduct entrepreneurial activities or participate in the same only if a qualified quorum law authorises it. In such cases, such activities will be subject to the common legislation applicable to private individuals or entities, without prejudice to the exceptions that for justified reasons the law contemplates, which law must also be a qualified quorum law.

There are several areas or sectors of the economy in which the state or its agencies have been legally authorised to participate or grant concessions to private entities, such as mining, geothermal energy, electricity, gas, sanitation services, navigation, and so on.

29 PPP – transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

The most significant PPP transactions completed to date are public transportation and prisons. In addition, ports, airports and toll roads have been extremely successful on the specific BOOT side (amounting several million US dollars during the past 10 years).

In terms of toll roads, some of the most significant transactions completed to date have been the following:

- Autopista del Maipo (266km road from Santiago to Talca) – original investment US\$705 million;
- Autopista Central (60.13km urban toll road with electronic toll system) – original investment US\$455 million; and
- Costanera Norte (42.4km urban toll road with electronic toll system) – original investment US\$385 million.

Update and trends

Law No. 20190 (also known as MKII), which makes tax and institutional changes to promote the development of a risk capital industry and further the process of modernisation of capital markets, became fully effective on 22 January 2011. MKII represents a significant step in Chilean continuous legislative efforts to introduce legal changes in line with standard international practice in contract documentation for project finance transactions. The new regulation concerning pledges without conveyance (see questions 1 to 4) creates a unique legal statute that simplifies, facilitates and provides greater assurance in the creation, preservation and enforcement of this security. It is now possible, for example, to create successive pledges over one same asset, being preferred by the chronological order of their respective registration in the Register of Pledges without Conveyance. Also, the legal acknowledgement by MKII of the validity of debt subordination agreements (see question 5), which allows such agreements to be enforced by trustees in bankruptcy as well as the legal recognition of a 'security agent' to act as common agent of multiple lenders in the case of syndicated loan transactions (see question 2), are good evidence of this modernising legislative effort.

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