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CHILEAN FDI STATUTE CREATES NEW AGENCIES TO BOLSTER INVESTMENT

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Chilean lawyers agree a new statute for foreign direct investment (FDI) will improve the administration and promotion of FDI through the creation of new government bodies, but have also expressed concern over the removal of a provision guaranteeing non-domiciled companies a fixed rate of tax.

President Michelle Bachelet signed the statute on 16 June, but the changes will not take effect until 1 January 2016. The new foreign investment scheme replaces Decree Law 600 (DL600), which dates back to the first year of the Pinochet dictatorship. The repeal of DL600, which gave investors the opportunity to agree a fixed amount of tax over a 10-year period, was announced last year when Chile overhauled its tax system in a bid to up government tax revenues.

The new statute come less than a month after the UN's Economic Commission for the Development of Latin America and Caribbean published figures showing the Andean country brought in US$20 billion in FDI last year. The figure marks an increase of 14 per cent over 2013 and goes against the wider trend in Latin America where FDI decreased by an average of 16.4 per cent in 2014.

The Bachelet administration will be hoping the changes to the FDI law will help maintain investor interest in Chile. The new law promises foreign investors the right to remit capital and profits generated in Chile abroad; access to foreign exchange markets; and guarantees them the same treatment as local investors before the law, such as in tax disputes or expropriation compensation. Investors can also benefit from a complete exemption of value added tax for the import of capital assets so long as these assets are used to exploit developments in the mining, industrial, forestry, energy, infrastructure, telecoms and technology sectors; exceed US$5 million in value; and generate income within 12 months.

The statute creates a new ministry called the Ministers Committee for

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the Promotion of Foreign Investment, which will be chaired by the Economics Minister. It will counsel the presidency on the areas of the economy best suited for foreign investment. The newly created Foreign Investment Promotion Agency, which is the legal successor of the Foreign Investment Committee created by

DL600, will administer and support this new ministry's work. It will be led by a director appointed by the president.

Guerrero Olivos partner Sebastián Guerrero believes the newly created government bodies will help Chile promote FDI opportunities to foreign companies through better advertising, coordination and administration than the more decentralised Foreign Investment Committee they replace. The Bachelet administration has described the previous FDI regime as passive and hopes the new agencies will actively encourage FDI by advertising the areas of the economy it wishes to develop and searching for the investors best placed to do the work.

In addition to the new government bodies, the statute is aimed at making foreign investment in the country less onerous by ending the requirement under DL600 whereby a foreign investor needed to enter into an agreement with the government every single time it made an investment in the country. The removal of this requirement eliminates a layer of bureaucracy for investors. "This will marginally simplify making investments in Chile and eliminate the aftercare required for such agreements," notes JorgeCarey, a partner at Carey.

The new statute also eliminates an option that allowed foreign investors to enter into a special agreement with the government that guarantees a fixed rate of tax for 10 years. Its removal is contentious, although it will continue to exist for four more years during which investors can still obtain a fixed rate of income tax pegged at 44.5 per cent. Nonetheless, some lawyers, particularly those familiar with the mining sector, have expressed concerns over the impact the removal of the fixed tax system may have on long-term, high-risk investments. Bofill Mir & Alvarez Jana Abogados' Guillermo Fonseca says DL600 has played an important role in the extractive industry's development. He argues the nature of mining, which often involves decades of work before a project becomes operational, means developers need to predict future income flows for years in advance.

More broadly, the new statute defines who is considered a foreign investor and what constitutes FDI. The latter is defined as "the

transfer into the country of foreign capital or assets owned or controlled by a foreign investor" where those investments exceed US$5 million. Furthermore, the transfer must involve the acquisition or ownership of at least 10 per cent of the Chilean domiciled target company. However, as Carey notes, these definitions largely reiterate the contents of DL600, or reaffirm the protections present in Chile's numerous bilateral trade agreements. "[Investors'] real concern when deciding whether or not to invest in our country, is its political stability, the reasonableness of its macroeconomic policies and the way environmental, labour and tax matters, among others, are handled by the local agencies," he affirms, arguing the new statute will neither improve nor discourage FDI.