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Chilean Trade and Investment Agreements with Southern Countries From Bilateral Treaties to the Pacific Alliance

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This paper analyzes the main features of Chilean trade and investment treaties, examining if there is a Chilean pattern in the regulation of trade and investment flows or if it is influenced by agreements signed by Chile with developed countries. The article also examines if there are differences between the treaties signed by Chile and other “Southern” developing countries and those negotiated with “Northern” developed economies, and if sustainable development concerns are part of the negotiations of trade and investment agreements by Chile.

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Keywords: investment treaties, preferential trade agreements, investor-state arbitration, North-South agreements, South-South agreements, law and development, sustainable development, Chile.

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I. Introduction

According to the 2009 WTO Trade Policy Review, Chile's trade and investment regime is characterized by openness, transparency, and predictability.¹ One of the most prominent features of Chile's trade policy regime is the central role that it gives to Preferential Trade Agreements (PTAs) of which it has 23 in force with 65 trading partners.² At the same time, Chile has negotiated numerous Bilateral Investment Treaties (BITs) – 53 in total – providing additional protection to foreign investment flows. At this time, Chile is also one of the countries negotiating important regional agreements, such as the Transpacific Partnership Agreement (TPP) and the Pacific Alliance (PA).³

As reported by UNCTAD, in 2012 Chile was one of the top 20 economies in both outward and inward foreign direct investment.⁴ Although trade and investment policies have contributed to growth and poverty reduction, as reflected in Chile's improvement on the UNDP Human Development Index,⁵ the OECD has informed that Chile has a high income inequality⁶ and had put considerable pressure on some natural resources, notably air quality and water availability – particularly in sectors such as mining, forestry and aquaculture.⁷

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¹ World Trade Organization (WTO), Trade Policy Review Body, *Trade Policy Review, Report by the Secretariat - Chile, WT/TPR/S/220*. vii (Trade Policy Review), Oct. 7, 2009.

² Under Preferential Trade Agreements (PTAs) we include Economic Complementations Agreements (ECAs), Free Trade Agreements (FTAs), Association Agreements (AA), Economic Partnership Agreements (EPAs), Strategic Economic Partnership Agreements (SEPA) and Partial Scope Agreement (PSA).

³ Chile has also concluded negotiations of a Free Trade Agreement with Thailand and Hong-Kong but both treaties are still pending ratification by the Congress. The information about Preferential Trade Agreements signed and negotiated by Chile is available at the website of the Chilean Directorate General of International Economic Affairs (DIRECON), in the Ministry of Foreign Affairs, <http://www.direcon.gob.cl/>. The information about International Investment Agreements signed by Chile is available at UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/41#iialInnerMenu>

⁴ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2013. GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT. 3, 6 (2013).

⁵ KHALID MALIK, HUMAN DEVELOPMENT REPORT 2013: THE RISE OF THE SOUTH : HUMAN PROGRESS IN A DIVERSE WORLD. (United Nations Development Programme ed., 2013).

⁶ OECD, SOCIETY AT A GLANCE 2014. 110, 111 (Society at a Glance, OECD Publishing 2014).

⁷ OECD & ECLAC, OECD ENVIRONMENTAL PERFORMANCE REVIEWS: CHILE 2005. 15 (Organisation for Economic Co-operation and Development 2005).

Chile has one of the largest numbers of preferential trade agreements in the world,⁸ and it is also a country with a relatively high number of International Investment Agreements (IIAs).⁹ In the following sections we will examine the main features of Chilean trade and investment treaties, with a special focus on development policies.

This paper aims to analyze the main features of Chilean trade and investment treaties, examining if there are differences between the agreements signed by Chile and other “Southern” developing countries and those negotiated with “Northern” developed economies.¹⁰ The objective is to answer the following questions: what is the Chilean policy in the regulation of trade and investment flows? What are the Chilean regulatory priorities in trade and investment and its outcome? Which actors have been relevant in the design and implementation of such policies? Does this regulatory strategy have any relation to developmental policies? Are sustainable development, environmental, labor or social concerns part of Chilean South-South trade and investment regulations? Does Chile follow a regulatory model based on its relations with the United States and the European Union or has it developed its own pattern of regulation?

II. Chilean Trade Agreements

A. Historical Evolution and Main Features

Although Chile was one of the original signatories of the General Agreement on Tariffs and Trade (GATT) in 1947, the strategy of development of the Chilean economy at that time was largely based on industrialization and substitution of imports, with strong and varied State controls and governmental regulations on trade. Externally, it was expressed in a much protected economy with high tariffs and various non-tariff barriers, currency control and different types of exchange rates, discrimination between domestic and foreign investment, and with a financial system with stringent lending standards and differential treatment for foreign banks.¹¹

⁸ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 22.

⁹ However, it is still far from the top countries in this field: Germany, China and Switzerland with hundreds of treaties currently in force. See: United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements by Economy (Dec. 2014), <http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iialInnerMenu>.

¹⁰ There are several competing terminologies on the classification of countries based on their level of development. This paper uses the North/South taxonomy as an analogy of the developed/developing country terminology, which is considered more appropriate. See: LYNGE NIELSEN, CLASSIFICATIONS OF COUNTRIES BASED ON THEIR LEVEL OF DEVELOPMENT: HOW IT IS DONE AND HOW IT COULD BE DONE (International Monetary Fund 2011). For a classification of countries based on The World Bank, *Countries and Economies*, DATA (2015), <http://data.worldbank.org/country>.

¹¹ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), CHILE 20 AÑOS DE NEGOCIACIONES COMERCIALES. 58 (Ministry of Foreign Affairs of Chile 2009).

In 1969, Chile was one of the founding members of the Andean Common Market (ANCOM or Andean Group),¹² an effort to liberalize regional trade, establishing wide common economic policies including the treatment of foreign capital, a common external tariff and joint industrial planning.¹³ Few years after the military intervention of 1973, Chile unilaterally changed its trade and investment policy, moving from substitution of imports to the promotion of exports, liberalizing the domestic financial system, granting national treatment to foreign investors, and unilaterally adopting a standard reduction of tariffs.¹⁴

This radical policy change, led Chile to a withdrawal from the Andean Group in 1976, as there were conflicting positions on common external tariffs¹⁵ and on the treatment of foreign investment.¹⁶ At the time, the commercial exchange with countries of the Andean Group favored by preferential tariffs was below 1.8% of the total trade of Chile.¹⁷ In the late 80's the country implemented an export-led growth strategy focused on agriculture, instead exclusively on extractive industries.¹⁸

With the return of democracy in 1990, Chile prioritized a global re-insertion at the international community and the world economy, starting at a regional level. Under the Latin American Integration Association (LAIA/ALADI),¹⁹ Chile negotiated “Economic

¹² The Andean Group was created by the Cartagena Agreement signed on May 26, 1969 by five Latin American countries: Bolivia, Colombia, Chile, Ecuador, and Peru. Venezuela later joined the Group in 1973.

¹³ William P. Avery, *The Politics of Crisis and Cooperation in the Andean Group*, 17 THE JOURNAL OF DEVELOPING AREAS 155, 155 (1983).

¹⁴ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 58–59.

¹⁵ ANCOM member States had accepted a reduction of Chilean tariffs only up to 60%. Between 1975 and 1979, Chile eliminated all exchange controls and quantitative restrictions, and reduced import tariffs to a uniform 10% (from an average in excess of 100%). Although in 1983-1983 tariffs were temporarily raised up to 35% (the maximum as a “bound” tariff under GATT) after a severe economic crisis, they were then periodically reduced to 11% by 1991. Sebastian Edwards & Daniel Lederman, *The Political Economy of Unilateral Trade Liberalization: The Case of Chile*, NBER Working Paper No. 6510 4–9 (1998).

¹⁶ The new Chilean Statute of Foreign Investment (DL 600 of 1974) granting national treatment to foreign investors clashed with ANCOM Decision 24 (“Andean Foreign Investment Code”), which established a common framework of controlling foreign investment in the region, that included the divest of ownership and control in several multinational companies, the limitation of net profits and provisions regulating the transfer of technology. William P. Avery, *supra* note 13, at 159–60. For an analysis of the Decision 24, see: Frederick M. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. INT’L L. & COM. 319 (1975).

¹⁷ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 43.

¹⁸ MARIA ELENA VARAS, EXPORT GROWTH AND DIVERSIFICATION: A POLICY ANALYSIS FOR THE CASE OF CHILE 3 (2012).

¹⁹ ALADI is the largest Latin American integration effort. Its thirteen member countries include Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela, together representing 20 million square kilometers and more than 510 million inhabitants. Its constitutive and regulatory comprehensive legal framework is given by the Treaty of Montevideo signed on August 12, 1980. ALADI followed a previous failed attempt of economic integration – the Latin American Free Trade Association (LAFTA / ALALC) founded in 1960 by the Treaty of Montevideo signed on February 18, 1960. However, ALADI’s success was only partial and it was affected by the collapse of many Latin American economies during the 1980 debt crisis. Karl Kaltenthaler & Frank O. Mora,

Complementation Agreements” (ECAs), with countries of the region which allowed most of the Chilean trade with ALADI’s countries to continue without tariffs.²⁰ Chile signed the first ECA with Argentina²¹ in 1991, followed by similar agreements with Mexico in 1991; Colombia, Venezuela and Bolivia in 1993; Ecuador in 1994 and 2008²²; Peru in 1998;²³ and Cuba in 1999.²⁴

In 1996, Chile entered into an ECA with MERCOSUR,²⁵ but without becoming a full member of that customs union, considering that MERCOSUR had a different international strategy with higher tariffs and several protectionist measures for State members.²⁶

By mid-1990’s, Chile implemented a policy of “open regionalism”²⁷ and it started trade negotiations with non-ALADI members, aiming to reconcile regional integration with globalization. This strategy has also been labeled as “additive regionalism”, a process defined as sequentially negotiating bilateral free trade agreements (FTAs) with all major trading partners,²⁸ enabling the preferential entry of Chilean goods and services into those countries. These agreements were more “comprehensive” than the ECAs and generally included broad aspects of the bilateral economic relationship, such as trade in goods, investment promotion and protection, cross-border services,

Explaining Latin American Economic Integration: The Case of Mercosur, 9 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 72, 72–73 (2002).

²⁰ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 70.

²¹ *Id.* at 75–78.

²² *Id.* at 78–84, 91–96. The ECA N° 32 with Ecuador entered into force on January 1, 1995 and in 2008 it was replaced by the ECA N°65 which entered into force on January 25, 2010.

²³ *Id.* at 118–21.

²⁴ *Id.* at 123.

²⁵ MERCOSUR is a customs union established in 1991 by the Treaty of Asunción between Argentina, Brazil, Paraguay, Uruguay and Venezuela (since 2012). Bolivia is currently in the process of becoming a member after signing an accession protocol in December 2012. Although the agreement with MERCOSUR is formally an ECA it has the characteristics of a Free Trade Agreement.

²⁶ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 96–118. See also Joaquín Fernandois & María José Henríquez Uzal, *¿Contradicción O Díada? Política Exterior De Chile Ante El Mercosur*, 38 ESTUDIOS INTERNACIONALES (2011). This agreement also implied the absorption of the ACE with Argentina with some exceptions (energy, for example).

²⁷ The concept of “open regionalism” was introduced at APEC (Asia Pacific Economic Cooperation) meetings in the mid-1990’s, without a uniformly agreed definition. It has been defined as the “external liberalization by trade blocs, that is, the reduction in barriers on imports from non-member countries that is undertaken when member countries liberalize the trade among themselves. The degree of liberalization on imports from non-members need not be as high as that for member countries”. Shang-Jin Wei & Jeffrey A. Frankel, *Open Regionalism in a World of Continental Trade Blocs*, STAFF PAPERS VOL 45 NO 3 (SEPTEMBER 1998) 440, 441 (1998).

²⁸ Glenn W. Harrison et al., *Chile’s Regional Arrangements and the Free Trade Agreement of the Americas: The Importance of Market Access*, in 9 GENERAL EQUILIBRIUM MODELS FOR THE CHILEAN ECONOMY 303, 303 (Rómulo A. Chumacero et al. eds., Central Bank Of Chile, 1st ed. 2005).

protection of intellectual property rights, and further facilitating of access to products on the market, among other matters.²⁹

In December 1994, Chile was invited to start negotiations to join the North American Free Trade Agreement (NAFTA),³⁰ a process that did not succeed as the Clinton Administration was unable to obtain a special mandate to negotiate on behalf of the United States Congress ("fast track").³¹ This led Chile to adopt a new strategy: negotiating separate FTAs with each NAFTA member.³² Thus, in December 1996, Chile entered into an FTA with Canada and in 1998 with Mexico. After lengthy negotiations, Chile finally signed an FTA with the United States in June 2003, which entered into force on January 1, 2004.

In 1998, the governments of Chile and several Central American countries announced their intent to negotiate an FTA. The agreement signed in 1999, consists of a common set of disciplines with bilateral protocols negotiated successively between Chile and each Central American country: Costa Rica (1999), El Salvador (2000), Honduras (2008), Guatemala (2010) and Nicaragua (2012).³³ In 2006, the ECAs with Peru and Colombia were expanded and replaced by separate FTAs with both countries that entered into force in 2009.

Complementing the negotiations with Latin American countries, an FTA was signed between Chile and Panama in 2008 – the first one of that country with a South American State – and in 2011 started the negotiation of a further economic and commercial integration with Colombia, Mexico and Peru, through the “Pacific Alliance” (PA). The Pacific Alliance was established in April 2011, and formalized by a Framework Agreement signed in Paranal, Chile on June 6, 2012.³⁴ Current members are Chile, Colombia, Peru and Mexico. This is the first regional trade agreement that Chile has concluded after leaving the Andean Community in 1976. Costa Rica is finishing up the process to be incorporated as the Alliance's fifth member,³⁵ and Panama is also a candidate for joining the bloc.³⁶

²⁹ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 70.

³⁰ NAFTA is a free trade agreement between Canada, Mexico and the United States, that was signed in San Antonio, Texas on December 17, 1992, and came into force on January 1, 1994.

³¹ Felipe Larraín, *América Latina a Las Puertas Del Siglo XXI: Hacia Una Asociación Transpacífica*, in AMÉRICA LATINA Y ASIA-PACÍFICO : OPORTUNIDADES ANTE LA CRISIS 379 (Pilar Alamos et al. eds., Colección de Estudios Internacionales, Instituto de Estudios Internacionales, Universidad de Chile, 1st ed. 1998).

³² DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 66.

³³ Organization of American States, *SICE: Trade Policy Developments: Central America - Chile*, SICE - FOREIGN TRADE INFORMATION SYSTEM, http://www.sice.oas.org/TPD/CACM_CHL/CACM_CHL_e.ASP.

³⁴ The Framework Agreement of the Pacific Alliance was signed between Chile, Colombia, Mexico and Peru on June 6, 2012. Organization of American States (OAS), Foreign Trade Information System, *Pacific Alliance*, TRADE POLICY DEVELOPMENTS (Jun. 20, 2014), http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_e.asp.

³⁵ In February 2014, Costa Rica signed a declaration which establishes its roadmap to become a full member of the Alliance including the requirement to have FTAs with each of the member countries.

In 2002, Chile signed an Association Agreement (AA) with the European Union, with substantial differences from other international economic agreements that Chile was signing at that time, as the treaty includes political, economic and cooperation provisions in a wide range of activities.³⁷

The following year, Chile concluded FTAs with Korea and the European Free Trade Association (EFTA), both signed in 2003.³⁸ Both treaties entered into force in 2004. During the same time negotiations with Turkey were started, although an FTA was signed only in 2009 and entered into force on March 2011.

On November 18, 2005, an FTA was signed between Chile and China, the first agreement of this kind with a Latin American country. After the FTA entered into force, China became the main destination for Chilean exports – moving the United States into second place – and doubling the number of exports before the agreement.³⁹ The Chile-China FTA initially did not include investment provisions, but an investment chapter was concluded in September 2012 after a couple of years of negotiation and entered into force in February 2014.

Also in 2005, Chile became part of a regional PTA with other countries of Asia-Pacific: the Trans-Pacific Strategic Economic Partnership Agreement (SEPA) – also known as “P4” – including New Zealand, Singapore and Brunei Darussalam, in force since 2006. The expansion of this agreement has been the basis of the Trans-Pacific Partnership (TPP), currently being negotiated.⁴⁰

The following years, Chile actively concluded a series of trade agreements with countries of the Asia-Pacific region. In 2006, a Partial Scope Agreement (PSA) was signed with India and its expansion is currently being negotiated.⁴¹ In 2007, a Strategic Economic Partnership (SEP) was signed between Chile and Japan and subsequent FTAs were signed by Chile with Australia (2008), Malaysia (2010), and Vietnam (2011), all of

Costa Rica currently has FTAs in force with Chile, Mexico and Peru, and has signed an FTA with Colombia that is pending approval. M. Angeles Villarreal, *The Pacific Alliance: A Trade Integration Initiative in Latin America*, R43748 3 (Congressional Research Service), Oct. 2, 2014.

³⁶ Panama has free trade agreements in force with Chile, Peru, and Costa Rica and has an agreement with Colombia that was signed in September 2013 and is awaiting approval. Panama has also initiated FTA negotiations with Mexico. *Id.*

³⁷ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 154.

³⁸ European Free Trade Association (EFTA) includes Switzerland, Liechtenstein Norway and Iceland.

³⁹ ECLAC, *Aspectos Destacados De La Economía* (“citationID”: “eQxfQfVf”, “properties”: {“formattedCitation”: “{\rtf ECL 21 (2011).”

⁴⁰ For a detailed account of these negotiations, see: TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (Tania Voon ed., Edward Elgar Pub 2014).

⁴¹ This is the first trade agreement of India with an individual Latin American country, although it has a preferential trade agreement with MERCOSUR in force since 2009. DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 179–80.

them currently in force. Two other FTAs were signed in 2012 – with Thailand and Hong-Kong – but approval of the Chilean Congress is still pending.

These agreements have strengthened the will of Chile to reduce trade barriers through negotiations on preferential agreements, privileging the eligible countries for its exports. DIRECON reported that in 2012, Chile reached 62% of the world population and 93% of Chilean exports are to countries which have trade preferences.⁴² Today, Chile's weighted mean applied tariff is below 3%.⁴³ Chile's strategy of an active network of bilateral agreements, with a strong multilateral engagement and the progressive adoption of unilateral measures, has allowed the country to execute a free and coherent trade policy, without being part of any regional integration scheme.⁴⁴

If we analyze the 23 PTAs signed by Chile that are currently in force, we can see an evolution from Economic Complementarity Agreements (ECAs), which mainly covered the liberalization of trade in goods, and in some cases other aspects of integration,⁴⁵ to broader preferential trade agreements, mostly under the form of Free Trade Agreements (FTAs) that provide not only for elimination of tariffs in the trade of goods⁴⁶ and traditional disciplines (market access, rules of origin, customs procedures, technical regulations, sanitary and phytosanitary measures, and trade defense measures), but also broad scope provisions on other issues such as intellectual property, trade in services, competition policy,⁴⁷ government procurement, transparency, dispute settlement⁴⁸ and investment.⁴⁹ Exceptions considered in those

⁴² Francisco Rivera von Hagen et al., *Los Servicios De Tecnologías De Información En Chile*, presented at *Deslocalización De Servicios Y Cadenas Globales De Valor: ¿Nuevos Factores De Cambios Estructurales En América Latina Y El Caribe?* 3 (Economic Commission for Latin America and the Caribbean (ECLAC) Santiago, Chile 2012).

⁴³ "Weighted mean applied tariff" is the average of effectively applied rates weighted by the product import shares corresponding to each country. The World Bank, Tariff rate, applied, weighted mean, primary products (%), <http://data.worldbank.org/indicator/TM.TAX.TCOM.WM.AR.ZS/countries/1W-CL?display=graph>.

⁴⁴ Renata Vargas Amaral & Thalys Ryan de Andrade, *Las relaciones comerciales de América Latina: integraciones económicas regionales y análisis de la proliferación de acuerdos con los EE.UU.* 183–84 (2008).

⁴⁵ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 70. Some PTAs include other aspects like physical integration (FTA with MERCOSUR) or energy integration (ACE with Bolivia).

⁴⁶ In the vast majority of cases, the bulk of tariff lines were liberalized when the FTA entered into force or else during its first years. When timetables are scheduled for complete elimination of tariffs, its duration varies between 6 to 18 years. Products excluded from tariff reduction also vary between FTAs, but generally relate to agricultural products (wheat, wheat flour and sugar), and some chemicals, minerals, wood, footwear, electrical appliances, textiles and clothing. World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 22.

⁴⁷ All Chilean PTAs have special provisions on antidumping, with the sole exception of the SEP with Japan. The big majority have explicit sections on competition policy, with the exception of the ECAs with Cuba and Ecuador, the FTAs with China, Panama, Turkey, Malaysia, Vietnam and the PSA with India.

⁴⁸ Almost all Chilean PTAs have a chapter on dispute settlement, with the sole exception of the ECA with Venezuela.

PTAs usually include national security, taxation, disclosure of information, and balance of payments.⁵⁰ A significant number of Chilean PTAs also include general exceptions based on GATT Art. XX.⁵¹ Newer Chilean PTAs are generally more complex and broader than the ones signed in the 90's.

B. Variations According to the Level of Development of Treaty Partners

In the majority of the Chilean trade agreements there are no major differences between the PTAs signed by Chile with other "Southern" developing countries and those negotiated with "Northern" developed economies.⁵²

Generally, differences do not seem to follow the developed/developing divide. For example, this is the case of provisions on anti-dumping measures, agricultural subsidies, trade facilitation, and transparency.

On the issue of anti-dumping measures, several Chilean PTAs merely refer to the WTO law⁵³ (FTAs with China, Malaysia, Turkey, the United States, Vietnam and the P4 SEPA), whereas others provide for the non-application or elimination of such measures (FTAs with Canada and EFTA), or do not address this issue at all (EPA with Japan).⁵⁴

With regard to subsidies, several PTAs signed by Chile provide for the non-application of agricultural export subsidies (FTAs with Australia, Canada, China, Colombia, Mexico, Panama, the United States and the P4 EPA), whereas others have no reference to this issue (the AA with the European Community and FTAs with Central America and Turkey),⁵⁵ or declare as a common objective the multilateral elimination of export subsidies for agricultural goods, restating the application of the WTO Agreement on Agriculture (FTA with Malaysia)⁵⁶ or the Doha Ministerial Declaration and the Decision Adopted by the WTO General Council of August 1, 2004 (PSA with India).⁵⁷

⁴⁹ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 22. The chapters on investment will be analyzed in the next section.

⁵⁰ Only the Chile-Canada FTA includes an exception on cultural industries (Annex O-06).

⁵¹ General exceptions are included in the FTAs with the United States, Central America, China, Peru, Colombia, Turkey, Malaysia and Vietnam, in the PSA with India, the SEP with Japan, the SEPA P4, and the ECA with Ecuador.

⁵² From the 23 agreements currently in force seven are with Northern developed countries or trading blocs (Canada, European Union, United States, EFTA, P4, Japan and Australia) and 16 with Southern developing countries or trading blocs (Venezuela, Bolivia, MERCOSUR, Mexico, Central America, Cuba, Korea, China, India, Panama, Peru, Colombia, Ecuador, Turkey, Malaysia and Vietnam).

⁵³ Article VI of GATT 1994, the WTO Agreement on Implementation of Article VI of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures.

⁵⁴ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 23.

⁵⁵ *Id.*

⁵⁶ Chile-Malaysia FTA, Art. 3.10.

⁵⁷ Chile-India PSA, Art. IX.

Explicit provisions on trade facilitation are found only in 11 of 23 Chilean PTAs, and three of them are signed with developed countries (the FTA with United States and Australia, and the SEPA P4)⁵⁸ and eight with developing economies (the FTAs with China, Panama, Peru, Colombia, Turkey, Malaysia and Vietnam, and the ECA with Ecuador).⁵⁹

The big majority of the Chilean PTAs include a special chapter on transparency.⁶⁰ Although a special section on transparency is not considered in the ECAs with Bolivia, Cuba and Venezuela, in the FTA with MERCOSUR and in the PSA with India, this seems to be related to the fact that discipline was usually not present in older trade agreements.

However, we do find key differences in Chilean PTAs that seems to be based on the “developed” or “developing” status of the trading partner. Some examples are those related to market access in the trade of goods, government procurement, intellectual property, electronic commerce and in the regulation of trade in specific services.

Market access on goods is generally considered in PTAs with developed countries, although binding commitments are only implicit in the PTAs with Japan, the P4 and the EU, even if the future negotiation on the improvement of market access conditions on originating goods is considered.⁶¹ Similarly, there are no plain market access commitments in the ECAs with Venezuela and Bolivia, in the PSA with India, and in the FTAs with MERCOSUR, Peru, Colombia, Malaysia, and Vietnam. Therefore, the North-South PTAs generally provide sufficient access to make them beneficial, but the South-South agreements do not.⁶²

All the PTAs signed by Chile with developed countries, include a chapter on government procurement.⁶³ On the contrary, only the FTAs with Mexico, Central America, Colombia and Korea, include provisions on procurement of goods and services on behalf of a public authority.⁶⁴

⁵⁸ Chile-United States FTA, Art. 7.4, Australia-Chile FTA, Art. 7.6, and SEPA P4, Art. 8.6.

⁵⁹ Chile-China FTA, Art. 64, Chile-Panama FTA, Art. 7.5, Chile-Peru FTA, Art. 10.3, Chile-Colombia FTA, Ch. 5, Chile-Turkey FTA, Art. 28, Chile-Malaysia FTA, Art. 7.7, Chile-Vietnam FTA Art. 7.6, and the ECA with Ecuador, Art. 8.5.

⁶⁰ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 22.

⁶¹ Chile-Japan SEP, Art. 14; P4 SEPA, Art. 3.14; and Chile-EU AA, Art. 26.

⁶² Glenn W. Harrison et al., *supra* note 28, at 340.

⁶³ P4 SEPA, Title IV; Chile-EU AA, Title IV; Canada-Chile FTA, Pt. 3bis; Chile-United States FTA, Ch. 9; Chile-EFTA FTA, Ch. V; Chile-Japan SEP, Ch. 12; and Australia-Chile FTA, Ch. 15.

⁶⁴ Chile-Mexico FTA, Pt. 5bis; Central America-Chile FTA, Ch. XVI; Chile-Korea FTA, Ch. 15; Chile-Colombia FTA, Ch. 13.

Similarly, almost all Chilean PTAs with developed countries include a chapter on intellectual property.⁶⁵ The sole exception is the FTA with Canada. Conversely, only half of the Chilean PTAs with developing countries have provisions on intellectual property: the ECA with Cuba,⁶⁶ and the FTAs with MERCOSUR, Mexico, Korea, and Turkey.⁶⁷ The Chile-China FTA only has a provision on cooperation on intellectual property rights,⁶⁸ and the FTA Chile-Peru a generic commitment to the defense of those rights insofar as they do not constitute unjustified obstacles to bilateral trade.⁶⁹

Although Chilean PTAs do not generally have provisions on electric commerce, we found a chapter on e-commerce in the PTAs with the United States and Australia, and special provisions in the AA with the European Union.⁷⁰ With developing countries, only the FTA with Colombia has a chapter on electronic commerce.⁷¹

Not every PTA signed by Chile has a chapter on trade in services,⁷² but all the agreements signed with developed countries include one. As for developing countries, ECAs often do not consider a chapter on services except for partial commitments in air and maritime transportation (ECAs with Venezuela, Cuba and Ecuador), and the FTAs with Turkey, Malaysia and Vietnam do not have an investment chapter (although they include an “evolutionary clause” providing for future exploratory talks on trade in services).⁷³ The PSA with India also does not have an investment chapter, although negotiations to expand it are currently taking place.⁷⁴

When available, in general Chilean PTAs contain the usual provisions on trade in services, such as market access, non-discrimination (national treatment and most-

⁶⁵ Chile-EU AA, Title VI; P4 SEPA, Ch. 10; Chile-United States FTA, Ch. 17; Chile-EFTA FTA, Ch. IV; Chile-Japan SEP, Ch. 13, Australia-Chile FTA, Ch. 17.

⁶⁶ Chile-Cuba ECA, Ch. VI, basically restating the application of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

⁶⁷ Chile-MERCOSUR FTA, Title XVII; Chile-Mexico FTA, Ch. 15; Chile-Korea FTA, Ch. 16; Chile-Turkey FTA, Ch. IV.

⁶⁸ Chile-China FTA, Art. 111.

⁶⁹ Chile-Peru, FTA, Art. 19.7.

⁷⁰ Australia-Chile FTA, Ch. 16; Chile-United States FTA, Ch. 15; and Chile-EU AA, Art. 104, included in the services chapter.

⁷¹ Chile-Colombia FTA, Ch. 12.

⁷² We must have in mind that the Chilean schedules note for general market access (mode 3) in GATS, establishes that “[a]uthorization to deliver services through a commercial presence may take into account the following criteria: a) The effect of the commercial presence on economic activity, including the effect on employment, on the use of parts, components and services produced in Chile and on exports of services; (...)”; “foreign natural persons may not make up more than 15% of the total staff employed in Chile...(...)” Bertram Boie, *Labour Related Provisions in International Investment Agreements*. Employment Sector Employment Working Paper No. 126 4, 33 (International Labour Organization (ILO) 2012).

⁷³ Chile-Turkey FTA, Art. 61.2; Chile-Malaysia FTA, Art. 14.5; Chile-Vietnam FTA, Art. 14.5.

⁷⁴ Directorate General of International Economic Affairs (DIRECON), Partial Scope Agreement Chile-India, <http://www.direcon.gob.cl/detalle-de-acuerdos/?idacuerdo=6235>.

avored nation treatment), local presence, denial of benefits, non-conforming measures and reservations.⁷⁵ With respect to specific services, most of the Chilean PTAs have chapters or annexes with provisions on telecommunications, professional services and temporary entry for business persons. However, this is not true of financial services⁷⁶ or air transportation.

In the case of telecommunications, all PTAs with developed countries include a chapter on those services, with the sole exception of the SEP with Japan and the P4 SEPA. Conversely, the big majority of PTAs with developing countries do not include a telecommunications chapter, with the sole exception of the FTAs with Korea and Central America.⁷⁷

On the subject of professional services, the situation is different. The big majority of PTAs with both developed and developing countries include provisions with soft commitments to facilitate the recognition of the qualifications and/or registration/licensing of professionals, and to encourage the development of procedures for the temporary licensing of professional service providers.⁷⁸ Treaties without these provisions include mostly developing countries, like the ECAs with Venezuela, Cuba and Ecuador and the FTA with China. The EPA with Japan also does not include them.

The differences arise again with respect to the temporary entry of business persons. With developed countries, only the AA with the European Union and the FTA with EFTA do not have provisions in this regard. As for developing countries, only the Chilean FTAs with Central America, China, Korea, MERCOSUR, Mexico, Peru and the ECA with Ecuador have explicit provisions on this issue.⁷⁹ However, the business persons from Malaysia and Vietnam could benefit from a separate agreement for Asia-Pacific Economic Cooperation (APEC) countries,⁸⁰ and the ones from Colombia from a separate agreement for tourists.⁸¹

⁷⁵ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 23.

⁷⁶ *Id.*

⁷⁷ Chile-Central America FTA, Ch. 11; Chile-Korea FTA, Ch. XIII.

⁷⁸ See Australia-Chile FTA, Art. 9.9 and Annex 9-A; Canada-Chile FTA, Art. 10.5 and Annex 10.5; Central America-Chile FTA, Art. 10.13; Chile-Colombia FTA, Art. 10.9; Chile-EFTA FTA, Art. 29; AA Chile-EU AA, Art. 103; Chile-Korea FTA, Art. 11.10 and Annex 11.10; Chile-MERCOSUR, 53th Protocol (2009); Chile-Mexico FTA, Art. 10.12 and Annex 10.12; Chile-Panama FTA, Art. 10.9; P4 SEPA, Art. 12.11 and Annex 12.B; Chile-Peru FTA, Art. 12.10.5; Chile-United States FTA, Art. 11.9 and Annex 11.9.

⁷⁹ Chile-Central America FTA, Art. 11.13 and Annex 11.13; Supplementary Agreement on Trade in Services Chile-China (2008); Chile-Korea FTA, Ch. 13; Chile-MERCOSUR, 53th Protocol (2009); Chile-Mexico FTA, Ch. 10, Annex 10-12; Chile-Peru FTA, Ch. 12 and Annex 12.10.5; and Chile-Ecuador ECA, Ch. 11.

⁸⁰ Asia-Pacific Economic Cooperation (APEC), APEC Business Travel Card, <http://www.apec.org/about-us/about-apec/business-resources/apec-business-travel-card.aspx>.

⁸¹ Agreement between Chile and Colombia on Tourism, Transit of Passengers its luggage and vehicles, signed in Santiago, 07.12.1980.

Several Chilean PTAs contain chapters on financial services (the ECA with Japan, the AA with the European Community, and the FTAs with Australia and the United States), while others call for future negotiations to include such services (the FTAs with Canada, China, Colombia, EFTA, Korea, Malaysia, Mexico, Peru, Vietnam and the P4 SEPA), and few expressly exclude this discipline (like the FTA with Central America).⁸² In other cases, trade in services is not yet part of the FTA (the Agreements with Malaysia, Turkey and Vietnam).

In the case of air transportation, although generally excluded from Chilean PTAs, there are several side agreements concluded with both developed and developing countries. In the case of Northern countries, only Japan does not have a special Air Transport Agreement, and in the case of Southern countries, such agreements are not available with respect to Colombia, Cuba, India, Turkey, Venezuela and Vietnam.⁸³

III. Chilean Foreign Investment Treaties

A. Historical Evolution and Main Features

By the end of the 1980's and early 1990's, many developing countries in Asia, Africa and Latin America had entered into several bilateral investment treaties (BITs),⁸⁴ with the aim of stimulating economic growth through foreign direct investment (FDI).⁸⁵ At the same time, a number of these countries privatized State-owned enterprises – including their energy and utility companies, in order to become an attractive location to potential foreign investors.⁸⁶ Chile was a leading country on both processes in Latin America.

Although initially BITs were concluded in small numbers between a developing and a developed country, usually at the initiative of the latter,⁸⁷ this pattern changed with the increasing integration of the world economy and trade liberalization. In the 1990s,

⁸² World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 23.

⁸³ Chilean Civic Aeronautic Board, Air Transportation Agreements, <http://www.jac-chile.cl/politica-aerocomercial/14-acuerdos-aeronauticos.html>.

⁸⁴ A bilateral investment treaty is defined as “a reciprocal legal agreement concluded between two sovereign States for the promotion and protection of investments by investors of the one State (‘home State’) in the territory of the other State (‘host State’)”. Marc Jacob, *Investments, Bilateral Treaties*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061>.

⁸⁵ Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 639, 643–44 (1998).

⁸⁶ Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath?*, SSRN Scholarly Paper ID 1708325 2 (Social Science Research Network), Nov. 12, 2010.

⁸⁷ Pakistan and Germany signed the first BIT on November 25, 1959. Other European countries soon followed the German example.

economies in transition and developing countries started signing BITs among themselves and in large numbers.⁸⁸

Basic features of most BITs include the scope of coverage (definition of foreign investment and foreign investor), standards of treatment (including most-favored-nation clauses, national treatment, fair and equitable treatment, full protection and security), standards of protection (guarantees and compensation in respect of expropriation, warranties of free transfer of funds, capital and profits, subrogation on insurance claims), and dispute settlement provisions (Investor-State and State-to-State arbitration).⁸⁹

In that context, Chile signed 53 BITs with the aim of promoting and protecting foreign investment. The majority of them were signed with European and Latin-American countries. With Europe, Chile has signed 22 BITs:⁹⁰ with Spain (1991), Germany (1991), France (1992), Belgium/Luxembourg (1992), Italy (1993), Sweden (1993), Finland (1993), Denmark (1993), Norway (1993), Croatia (1994), Czech Republic (1995), Portugal (1995), Romania (1995), Poland (1995), Ukraine (1995), United Kingdom (1996), Greece (1996), Hungary (1997), Austria (1997), Netherlands (1998), Switzerland (1999), and Iceland (2003).

With Latin-American countries, Chile has signed 18 BITs:⁹¹ with Argentina (1991), Venezuela (1993), Ecuador (1993), Brazil (1994), Bolivia (1994), Paraguay (1995), Uruguay (1995, 2010⁹²), Cuba (1996), Costa Rica (1996), El Salvador (1996), Guatemala (1996), Nicaragua (1996), Panama (1996), Honduras (1996), Colombia (2000), Peru (2000), and Dominican Republic (2000).

Chile has signed 13 more BITs with countries in other regions of the world:⁹³ with Turkey (1998), Tunisia (1998), South Africa (1998), Malaysia (1992), China (1994), Philippines (1995), Korea (1996), Indonesia (1999), Vietnam (1999), Egypt (1999), Lebanon (1999), Australia (1996), and New Zealand (1999).

In 1992, Chapter 11 of NAFTA became the first treaty regulating foreign investment that included two developed countries (Canada and the United States).⁹⁴ Following that example, investment chapters began to be included in certain FTAs. Although

⁸⁸ See: UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS. (United Nations 2005).

⁸⁹ See: AUGUST REINISCH, STANDARDS OF INVESTMENT PROTECTION (OUP Oxford 2008).

⁹⁰ Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 LAW & BUS. REV. AM. 203, 221–22 (2012).

⁹¹ *Id.* at 222.

⁹² Chile and Uruguay signed a new BIT on March 25, 2010, in force since March 18, 2012, that replaced the BIT signed in 1995.

⁹³ Rodrigo Polanco Lazo, *supra* note 90, at 222.

⁹⁴ Charles H. Brower, II, *International Law in Ferment: Recent Developments in Private International Law*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 13, 14 (2000).

Chile has a large number of BITs in force, without considering the renegotiation of the BIT with Uruguay in 2010, Chile has not negotiated this type of agreement in more than ten years (the latest was the BIT signed with Iceland in 2003) opting to include investment disciplines in most of PTAs it has signed.⁹⁵

Today, Chile has 9 PTAs in force with an investment chapter: the ones signed with Canada (1996), Mexico (1998), Korea (2003), United States (2003), Colombia (2006), Peru (2006), Japan (2007), Australia (2008), and China (2012). FTAs with the EU, EFTA, MERCOSUR, Central America and Panama do not include a separate investment chapter, but they refer to previous BITs signed by Chile with those parties. The FTAs with Hong-Kong (2012) and Thailand (2013) also do not include investment chapters, although the FTA with Thailand has a provision that leave open the possibility of negotiating such chapter in the future.⁹⁶

In general, these investment chapters include disciplines on sector liberalization (through negative lists), national treatment, most-favored nation treatment, minimum standards of treatment, performance requirements, free transfers of capital, expropriation and compensation, and dispute settlement (including Investor-State arbitration).⁹⁷

In February 2014, Chile, together with the other three countries that formed the Pacific Alliance in 2011 (Colombia, Mexico and Peru) signed a protocol that includes a chapter on investment with substantive and procedural investment protection standards, similar to the ones included in BITs.⁹⁸ This protocol has yet to be ratified.

From the 53 abovementioned Chilean BITs, only 36 are in force, as eleven have not completed its ratification process (the ones with Brazil, Egypt, Hungary, Indonesia, Lebanon, Netherlands, New Zealand, South Africa, Tunisia, Turkey, and Vietnam), five have been replaced by an investment chapter within an FTA (the BITs with Australia, Colombia,⁹⁹ China, Korea and Peru), and one has been replaced by another BIT (the one with Uruguay). If we add to that the 9 investment chapters in PTAs, 45 is the total number of IIAs¹⁰⁰ signed by Chile, that are currently in force.

⁹⁵ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 19.

⁹⁶ Directorate General of International Economic Affairs (DIRECON), *Acuerdos Concluidos y en Negociación*, <http://www.direcon.gob.cl/acuerdos-concluidos-y-en-negociacion/>.

⁹⁷ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 19.

⁹⁸ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *WORLD INVESTMENT REPORT 2014. INVESTING IN SDGs: AN ACTION PLAN 115* (United Nations 2014).

⁹⁹ The BIT between Chile and Colombia was signed on January 25, 2000 but never entered into force.

¹⁰⁰ International Investment Agreements is a notion used to refer to the investment treaties, whether there are parts of an FTA or a standalone BIT.

B. Variations According to the Level of Development of Treaty Partners

IIAs signed by Chile have two different patterns. When negotiated as standalone treaties, they mostly follow the classical structure of a BIT, as “Agreements on the Reciprocal Promotion and Protection of Investments”. When included in PTAs, they constitute one of the chapters of the agreement, usually next to the section on cross-border trade in services.¹⁰¹

53 Chilean BITs were signed from 1991 to 2003, closely following the “Dutch gold standard model BIT”, as short treaties with broad definitions for investors and investment; unqualified Most-Favored Nation (MFN), National Treatment (NT), and Fair and Equitable Treatment (FET); free transfer of funds in connection with an investment; no exceptions for special sectors; Investor-State Arbitration (ISA); no filter mechanisms for taxation measures; and, full compensation for direct and indirect expropriation, these being the main features of the Dutch BITs, as characterized by Lavranos.¹⁰² However, the “Chilean Model BIT” of 1994,¹⁰³ has neither provisions on “full protection and security” (FPS),¹⁰⁴ nor an umbrella clause, and few Chilean BITs have included those.¹⁰⁵

As mentioned, since 2003 Chile has not signed new BITs, with the sole exception of the treaty with Uruguay in 2010 that replaced a previous agreement of 1995. Today, all the new Chilean IIAs are found as investment chapters in PTAs, the first being the one signed with Canada in 1996, followed by the PTAs signed with Mexico, Korea, United States, Colombia, Peru, Japan, Australia and a recent supplementary agreement on

¹⁰¹ Almost every PTA signed by Chile with a chapter on trade in services has also an investment chapter, or an explicit reference to previous agreements on that issue concluded by the parties. The exceptions are the P4 SEPA, where no investment chapter has been agreed on, although there is a separate BIT between Chile and New Zealand (1999); and the Chile-EFTA FTA, as Chile has previous BITs with Switzerland (1991), Norway (1993) and Iceland (2003) but no with Liechtenstein.

¹⁰² Nikos Lavranos, *The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text?*, SSRN Scholarly Paper ID 2241455 1 (Social Science Research Network), Mar. 29, 2013.

¹⁰³ United Nations Conference on Trade and Development (UNCTAD), *Chile Model BIT*, INVESTMENT POLICY HUB (1994), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2841>.

¹⁰⁴ Every investment chapter of PTAs signed by Chile includes a provision on the standard of “Full Protection and Security” (FPS), defined as the requirement to provide the level of police protection required under customary international law. Few BITs include these obligations: with Germany (Art. 4(1)), Argentina (Art. IV (1)), Belgium/Luxembourg (Art. 3(2)), Denmark (Art. 3(1)), France (Art. 5(1)), Greece (Art. 3 (2)), Indonesia (Art. III (2)), Malaysia (Art. 2.2), Netherlands (Art. 3(1)), Tunisia (Art. 3(2)), United Kingdom (Art. 2(2)), and Uruguay (Art. 5(b)).

¹⁰⁵ “Umbrella clauses” are provisions added to some IIAs that provide additional protection to investors covering investment agreements or contracts that host countries frequently conclude with foreign investors. Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*. Working Papers on International Investment No. 2006/3 3 (Organisation for Economic Co-operation and Development (OECD) 2006). Chilean BITs including an umbrella clause are the ones with Denmark, Greece, Austria and Netherlands. There are no umbrella clauses in the investment chapters of Chilean PTAs.

investment with China (2012). The Chilean Investment Chapters closely follow an updated “NAFTA Model”, being longer and complex texts, with detailed definitions, notably on the scope of fair and equitable treatment,¹⁰⁶ expropriation (particularly indirect expropriation),¹⁰⁷ and the definition of investment the definition of investment (is less broad and subject to certain objective criteria – risk capital commitment, utilities, duration).¹⁰⁸ These chapters also include provisions on performance requirements, full protection and security, filter mechanisms and carve-outs for certain sectors like financial services, transparency rules, and provisions on sustainability, environment and labor.¹⁰⁹ The 2010 Chile-Uruguay BIT also follows this model.

Another major difference is that previous Chilean BITs provide no admission and establishment rights, and protection is only given after the entry to the foreign investment, being admission largely depending on the national law of the host State.¹¹⁰ Conversely, almost all the Investment Chapters of the PTAs signed by Chile include pre-establishment rules, national and most-favored nation treatment regarding admission and establishment, subject to a series of exceptions.¹¹¹ The only exception is the Supplementary Investment Agreement with China, which does not include pre-entry rights.

By contrast, the investment disciplines in other PTAs signed by Chile with countries members of the European Community, EFTA, and MERCOSUR, as well as with Central American nations and Panama, are mostly restricted to granting national treatment to the establishment of investors of the other party in designated sectors, although their scope is increased by the protection given by previous bilateral investment treaties signed by Chile with those countries.¹¹²

However, both Chilean BITs and investment chapters in PTAs share some features. They all include national treatment, MFN treatment, fair and equitable/minimum standard of treatment, subrogation, expropriation and compensation for expropriation, among others.¹¹³

¹⁰⁶ Investment chapters of Chilean PTA usually define “fair and equitable treatment” in a restrictive way, just including 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. See, Australia-Chile FTA, Art. 10.5.

¹⁰⁷ See David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT’L L. REV. 679 (2003).

¹⁰⁸ Daniela Arrese Ortiz, *Modelo Chileno De Tratados Sobre Inversión 46–48* (2009) (unpublished Memoria para optar al grado de Licenciado en Ciencias Jurídicas y Sociales, University of Chile).

¹⁰⁹ Nikos Lavranos, *supra* note 102, at 3–4.

¹¹⁰ ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 134 (Kluwer Law International 2009).

¹¹¹ *Id.* at 137.

¹¹² World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 23.

¹¹³ *Id.*

Also as a general rule, in all Chilean IIAs, investment is protected only if it is carried out in accordance with the treaty and the law of the host country. In this regard the use of Formal Exchange (FEM) for incoming capital and for acquiring the currency to remit capital or profits is mandatory for most foreign investment.¹¹⁴

All IIAs signed by Chile include ISA as a dispute settlement mechanism for claims arising between a Contracting Party and an investor of the other Contracting Party. Before resorting to ISA, these disputes shall, to the extent possible, be settled through amicable consultation or negotiation between the parties. Only if amicable consultations cannot settle the dispute within three to six months,¹¹⁵ the investor can choose between submitting the claim to the domestic jurisdiction of the host State or to international arbitration. In almost all cases, this choice is deemed definitive and exclusive, and recourse to local courts precludes the use of ISA and vice versa.¹¹⁶

When the choice of international arbitration is made, as a general rule, the investor must choose among the institutional arbitration of the International Centre for Settlement of Investment Disputes (“ICSID”), or an *ad hoc* arbitration under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.¹¹⁷

¹¹⁴ Rodrigo Polanco Lazo, *supra* note 90, at 224.

¹¹⁵ A minimum of 3 months consultation prior to arbitration is required in the BITs signed with Malaysia, Ukraine, Romania, Czech Republic, United Kingdom, Poland, Paraguay, Panama, Nicaragua, Honduras, Guatemala, Greece, Philippines, El Salvador, Cuba, Croatia, Austria, Egypt, Indonesia, Netherlands, South Africa and Turkey. A minimum of 4 months consultation prior to arbitration is required in the BITs signed with Dominican Republic, Tunisia and Vietnam. A minimum of 5 months consultation prior to arbitration is required in the BITs signed with Lebanon, Hungary and Costa Rica. A minimum of 6 months consultation prior to arbitration is required in the BITs signed with Argentina, Spain, Germany, Switzerland, France, Belgium/Luxembourg, Venezuela, Sweden, Portugal, Norway, Italy, Finland, Ecuador, Denmark, Brazil, Bolivia, New Zealand, Iceland and Uruguay. All investment chapters in Chilean PTAs consider a minimum of 6 months consultation prior to arbitration.

¹¹⁶ According to this principle (often called “fork-in-the-road”), the election made by the investor of either international arbitration or domestic courts is deemed to be final. However, the efficacy of this provision is relative, as consistent case law in investment arbitration has deemed it applicable only if the same dispute between the same parties has been submitted to domestic courts or administrative tribunals of the host State, before the resort to international arbitration. Plus, not every exercise of domestic procedural rights, would trigger these provisions, as several IIAs include redress through domestic courts or administrative tribunals as guarantees of effective domestic remedies. Christoph Schreuer, *Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JOURNAL OF WORLD INVESTMENT & TRADE 231, 247–49 (2004).

¹¹⁷ In the great majority of BITs signed by Chile, only ICSID Arbitration Rules are applicable. This happens in the agreements with Germany, Belgium/Luxembourg, Malaysia, Venezuela, Ukraine, Sweden, Romania, United Kingdom, Portugal, Paraguay, Panama, Norway, Nicaragua, Honduras, Guatemala, Finland, Philippines, El Salvador, Ecuador, Denmark, Croatia, Costa Rica, Bolivia, Indonesia, Egypt, Tunisia and Holland. In a significant group of treaties, there is a choice of either ICSID or UNCITRAL Arbitration Rules: Argentine, Spain, France, Uruguay, Czech Republic, Poland, Italy, Hungary, Greece, Brazil, Austria, Vietnam, Lebanon, New Zealand, Turkey, Dominican Republic, South Africa and Iceland. In only one treaty, ICSID is not considered as a choice of international arbitration: in the BIT with Cuba where investor can opt for *ad hoc* arbitration under the rules of the same agreement or under UNCITRAL Arbitration. All investment chapters in PTAs signed by Chile consider a choice of international arbitration between ICSID Arbitration Rules (including its Additional Facility) and UNCITRAL Arbitration Rules. The

In the majority of the BITs signed by Chile, once a dispute has been submitted to a domestic court or international arbitration, the recourse to diplomatic protection to settle the dispute is excluded, unless the other Contracting Party has failed to abide or comply with any judgment, award, order or other determination made by the competent international or local tribunal in question.¹¹⁸ This prohibition is considered in all the Chilean BITs, with the notable exceptions of the agreements with Malaysia, Belgium/Luxembourg and Iceland. However, here we find again a difference with the investment chapters in PTAs signed by Chile, as almost all of them, with the sole exception of the FTA with Australia do not exclude diplomatic protection.

As we can see, besides the historical evolution from BITs to PTAs, with newer investment chapters in trade agreements generally more long and complex, in the majority of the analyzed IIAs, there are no key differences between the agreements signed by Chile with “Northern” developed economies in relation to those negotiated with other “Southern” developing countries.¹¹⁹ Few differences seem to follow the developed/developing divide.

For example, the only explicit exceptions to the “fork-in-the-road” provisions are contained in the BITs with Germany, Belgium/Luxembourg, Netherlands, Austria, and Switzerland where, even if a claim has been presented before the tribunals of the Host State, the foreign investor has the possibility to submit the dispute to international arbitration if domestic courts have not produced a final substantial decision within 18 to 36 months, or if the parties agree beforehand.¹²⁰ Similarly, “umbrella clauses” are only found in BITs signed by Chile with developed countries: Denmark, Greece, Austria and Netherlands.¹²¹

In another example, the FTAs with Canada and the United States define investor as: “investor of a Party means a Party or state enterprise thereof, or a national or an

PTAs with United States, Peru, Colombia, Japan, Australia and the Supplementary Investment Agreement with China also add the possibility of any other arbitral institution agreed by the parties.

¹¹⁸ United Nations Conference on Trade and Development (UNCTAD), *supra* note 103, sec. 8. Informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute, are usually not considered diplomatic protection.

¹¹⁹ From the 23 agreements currently in force, seven are with Northern developed countries or trading blocs (Canada, European Union, United States, EFTA, P4, Japan and Australia) and 16 with Southern developing countries or trading blocs (Venezuela, Bolivia, MERCOSUR, Mexico, Central America, Cuba, Korea, China, India, Panama, Peru, Colombia, Ecuador, Turkey, Malaysia and Vietnam). In fact, the P4 SEPA defies this classification, as currently includes three “developed countries (New Zealand, Singapore and Brunei Darussalam) but it is being expanded in the negotiations of the Trans-Pacific Partnership to include new countries, both developed (Australia, Canada, Japan, and the United States) and developing (Malaysia, Mexico, Peru, and Vietnam).

¹²⁰ The waiting period is 18 months in the BITs with Germany, Switzerland, Belgium/Luxembourg and Netherlands, and 36 months in the BIT with Austria. Rodrigo Polanco Lazo, *supra* note 90, at 225.

¹²¹ BITs signed by Chile, including an umbrella clause, are the Chile-Denmark BIT (1993), Art. 3(1); Chile-Greece BIT (1996), Art. 3(3); Austria-Chile BIT (1997), Art. 2(4); and Chile-Netherlands BIT (1998), Art. 3(4). Denmark, Greece, Austria and Netherlands already had previous BITs with umbrella clauses. See Katia Yannaca-Small, *supra* note 105.

enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.”¹²² This concept has been further clarified only in the FTAs with Peru and Colombia, and in the 2010 Chile-Uruguay BIT as meaning “that an investor intends to make an investment, when you have made the essential actions needed to make such an impression, such as the channeling of resources for the establishment of the capital of a company, obtaining permits and licenses, among other”.¹²³ However, other investment Chapters in Chilean PTAs do not address this particular definition (FTAs with China and Korea) and the FTA with Mexico, having the same definition of investor as the FTAs with Canada and the United States, does not clarify its meaning, probably because it was negotiated before the FTAs with Colombia and Peru.

The broad definitions of “investment” and “investor” in the Investment Chapters of FTAs, considering the possibility of protecting foreign investment even if the transfer of funds has not taken place, are a departure of the Chilean Model BIT, which referred only to the capital that actually has been transferred from abroad.¹²⁴

IV. Chilean Trade and Investment Agreements and Development Policies

Ebert and Posthuma have highlighted a trend among South-South PTAs to gradually include some labor provisions.¹²⁵ In the same line, Gordon and Pohl have reported¹²⁶ that language referring to environmental issues is rare in BITs but is becoming increasingly common in other IIAs, both in North-South and South-South agreements.

However, almost none of the 53 Chilean BITs has explicit labor or environmental provisions¹²⁷ and only some of the investment chapters in Chilean PTAs tackle these

¹²² Canada-Chile FTA, Art. G-40, Chile-United States FTA, Art. 10.27, Chile-Japan SEP, Art. 105, and Australia-Chile FTA, Art. 10.1.

¹²³ Chile-Peru FTA, Art. 11.28, footnote 15; Chile-Colombia FTA, Art. 9.28, footnote 19; Chile-Uruguay BIT, Art. 1(ñ), footnote 3.

¹²⁴ Rodrigo Polanco Lazo, *supra* note 90, at 223.

¹²⁵ Franz Christian Ebert & Anne Posthuma, *Labour Provisions in Trade Arrangements: Current Trends and Perspectives 19–20* (International Labour Organization (International Institute for Labour Studies) 2011).

¹²⁶ For an overview of environmental provisions in investment agreements, see: Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (2011).

¹²⁷ The sole exception is the 2010 Chile-Uruguay BIT, which has a provision (art. 14) declaring that a Party is not prevented from adopting, maintaining, or enforcing any measure compatible with that agreement that it considers appropriate to ensure that investment activity in its territory is undertaken considering host State’s environmental powers. The lack of labor or environmental provisions is not an exclusive characteristic of Chilean BITs. As Cordonnier and Newcombe point out, with regard to sustainable development, “stand alone IIAs have not yet begun to provide institutional mechanisms or capacity-building”. Marie-Claire Cordonnier Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, in *SUSTAINABLE DEVELOPMENT IN WORLD*

issues.¹²⁸ Overall, 14 of the 23 PTAs address sustainable development issues including provisions on labor and environment.¹²⁹

With respect to PTAs, there is a significant degree of variation in the way sustainable development provisions are considered, as some agreements contain detailed commitments in this regard, including the creation of joint commissions, cooperation procedures and even citizen claims, while others merely refer to labor and environmental concerns in the preamble of the treaty. This inconsistency is common to treaties signed by Chile both with developed and developing countries, although two of the most detailed PTAs with respect to development policies are the FTAs with Canada and the United States.

The very first Chilean FTA was signed with Canada in 1996 that included sustainable development and environmental protection as general objectives in the preamble of the treaty, and side agreements on labor and environmental cooperation. In labor matters, the agreement aims for a high level of national laws in the area of Core Labor Standards (CLS), as well as minimum working conditions (hours of work, minimum wages and occupational safety and health) and migrant rights, and enforcement of national laws in these areas.¹³⁰ The environmental agreement has as one of its objectives, the promotion of sustainable development based on cooperation and mutually supportive environmental and economic policies.¹³¹ Both agreements include the creation of joint commissions for environmental and labor cooperation, and mechanisms allowing citizen complaints similar to NAFTA's Labor and Environmental Agreements.¹³²

INVESTMENT LAW 101, 120 (Marie-Claire Cordonier Segger et al. eds., Global trade law series, v. 30, Kluwer Law International 2011).

¹²⁸ These are the investment chapters of the PTAs with Canada, United States, Colombia, Peru, Japan, and Australia and in the Supplementary Agreement on Investment with China.

¹²⁹ These are the agreements with Canada, United States, P4 SEPA, Australia, European Union, EFTA, Japan, Colombia, China, Mexico, Korea, Turkey, Malaysia and Peru. DIRECON has indicated that the Chile-Hong Kong FTA will include environmental provisions and a MOU on Labor Cooperation. Directorate General of International Economic Affairs (DIRECON), *supra* note 96.

¹³⁰ As an enforcement mechanism, the agreement considers fines up to US\$ 10 million in case of non-application of national labour law in the area of child labour, occupational safety and health and minimum. Franz Christian Ebert & Anne Posthuma, *supra* note 125, at 12.

¹³¹ Canada-Chile Agreement on Environmental Cooperation (CCAEC), Art. 1 (b).

¹³² The CCAEC allows submissions from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. If either National Secretariat finds the submission meets these criteria, it is forwarded to a Joint Submission Committee who establishes whether the submission merits requesting a response from the Party, and which can even recommend the preparation of a factual record on a submission where it considers it warranted. See CCAEC, Arts. 14-15. The Canada-Chile Agreement on Labor Cooperation (CCALC) allows complaints ("public communications") to be submitted to signatory countries by natural persons, an enterprise, or an organization of employers or workers, on labor law matters arising in the territory of the other Party. Each National Secretariat shall review such matters, as appropriate, in accordance with domestic procedures. The communications accepted or declined for review and their status is made publicly available. See CCALC, Art. 15.

The FTA signed with the United States in 2003, also contains a labor and an environmental cooperation mechanism in Chapter 18 and 19, respectively.¹³³ The labor chapter outlines a cooperative agenda to promote worker's rights and an agreement that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment, requiring effective enforcement of domestic labor laws.¹³⁴ The environmental chapter's main objective is to contribute to the Parties' efforts to ensure that trade and environmental policies are mutually supportive in accordance with the objective of sustainable development, highlighting the importance of multilateral environmental agreements in this regard.¹³⁵ However it does not consider citizen complaints like in the side environmental agreement with Canada. Complementing this framework, the investment chapter includes a commitment to not lower standards in order to attract investment.¹³⁶ A parallel Environmental Cooperation Agreement was signed in 2003, establishing a Joint Commission for Environmental Cooperation.¹³⁷

Similar commitments to lower neither labor nor environmental standards are included in the P4 SEPA Environmental Cooperation Agreement and in the P4 Memorandum of Understanding (MOU) on Labor Cooperation. This MOU is particularly important with respect to Brunei Darussalam as the parties affirm their commitment to the principles of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), and at the time of the signature of the P4 (2005), Brunei was not yet a member State of the ILO.¹³⁸ Both the FTA with the United States and the P4 do not permit citizen submissions but they consider the designation of points of contact to facilitate communication in these matters and do allow a State-to-State consultation process.¹³⁹

¹³³ It must be noted that in the Chile-United States FTA, entire categories of social and environmental regulations have been reserved by the parties (e.g. fisheries), with the objective to preserve regulatory flexibility and secure transparency for firms. Marie-Claire Cordonier Segger & Andrew Newcombe, *supra* note 127, at 128.

¹³⁴ *Id.* at 134.

¹³⁵ Chile-United States FTA, Art. 19 and 19.9.

¹³⁶ Chile-United States FTA, Art. 10.12.

¹³⁷ The objectives of this agreement are "to promote the conservation and protection of the environment, the prevention of pollution and degradation of natural resources and ecosystems, and the rational use of natural resources in support of sustainable development". Chile-United States Agreement on Environmental Cooperation, signed in 17 June 2003, Art. I.

¹³⁸ Brunei Darussalam became a member State of the ILO in January 2007, and it has only ratified two of the ILO's eight fundamental Conventions, the Worst Forms of Child Labour Convention, 1999 (No.182) and the Convention on the Minimum Age, 1973 (No.138). International Labour Organization (ILO), Brunei Darussalam, <http://ilo.org/asia/countries/brunei-darussalam/lang--en/index.htm>.

¹³⁹ In theory, dispute settlement of the FTA could be triggered if a Party considers that a measure of the other Party is inconsistent with the obligations of this Agreement or that the other Party has otherwise failed to carry out its obligations under this Agreement, or wherever a Party considers that a measure of the other Party causes nullification or impairment. See Chile-United States FTA, Art. 22.1, 22.16. These disputes may ultimately lead to economic consequences for the party in breach of the labor provisions, as the dispute settlement consider fines up to US\$ 15 million, something that some see as an enforcement mechanism for environmental or labor obligations. See: Franz Christian Ebert & Anne Posthuma, *supra* note 125, at 9.

Sustainable development and environmental protection are also considered as general objectives in the preamble of the P4 treaty.

In the same vein, the SEP Chile-Japan mentions, in the preamble, that the parties are convinced that “economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development, and that the strategic economic partnership can play an important role in promoting sustainable development”. Only one provision of its main text recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures.¹⁴⁰ However, in Annex 3 of a joint statement signed together with the SEP, both governments also declare that it is inappropriate to set or use environment laws, regulations, policies and practices for the purposes of disguised restriction on international trade. In the same Annex, both countries reaffirm their intention to continue to pursue high level of environmental protection and to fulfill their respective countries’ commitments under applicable international environment agreements, harmonizing environmental laws, regulations, policies and practices in harmony with those commitments, and promoting its public awareness.¹⁴¹

With respect to labor commitments, in the same Annex 3, both governments reaffirm their respective countries’ obligations as members of ILO and their commitment to the abovementioned ILO Principles, sharing the view that on the importance of having their respective countries’ labor laws, regulations, policies and practices in harmony with their countries’ commitments under international labor agreements and of promoting its public awareness. Both governments consider inappropriate to set or use labor laws, regulations, policies and practices for the purposes of disguised restriction on international trade and that is inappropriate to weaken, reduce or fail to enforce or administer the protections afforded in domestic labor laws solely to encourage trade or investment.

The Australia-Chile FTA only includes labor and environmental issues as areas of cooperation. In labor and employment matters, cooperative activities will be based on the concept of decent work, including the principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.¹⁴² Cooperation on environment is aimed to strengthen environmental protection and the promotion of sustainable development in the context of reinforcement trade and investment

¹⁴⁰ Chile-Japan SEP, Art. 87 “Each Party recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area”.

¹⁴¹ In the same Annex 3, both governments agree to encourage and facilitate, as appropriate, cooperative activities in the field of environment such as promotion of projects under Clean Development Mechanism (CDM), and exchange of information on environmental impact assessment of economic partnership agreements.

¹⁴² Australia-Chile FTA, Art. 18.2.4.

relations.¹⁴³ Similarly, the AA with the European Union just considers an article identifying topics of cooperation on environment¹⁴⁴ and includes a dedicated provision on social cooperation with reference to Conventions of the ILO.¹⁴⁵ Both treaties consider sustainable development and environmental protection as general objectives in their respective preamble.

The FTA with EFTA only mentions the promotion of “the environmental protection and conservation, and sustainable development”, and the improvement of “working conditions and living standards”, as part of the preamble of the treaty.

There is no fundamental change in the treatment of sustainable development issues if we review the Chilean PTAs with developing countries, as it also varies from detailed commitments to mere policy references, although fewer agreements with Southern States include comprehensive obligations in this regard. The FTA signed with Colombia has a special chapter on environment (Chapter 18), where the parties reaffirm their sovereign rights over their natural resources, and the right to establish their own levels of environmental protection, promoting sustainable development and domestic policies and laws in harmony with international environmental agreements. In addition, the parties recognize that it is inappropriate to use policies, laws, regulations and environmental management as a disguised barrier to trade. A special provision is included in the investment chapter, declaring that a Party is not prevented from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.¹⁴⁶

In the same way, the FTA with Colombia has a Labor Chapter (Chapter 17) where the parties reaffirm their obligations as members of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work (1998), and recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. In addition, the chapter details methods of cooperation between the parties to achieve these objectives.

A similar approach is taken in the FTA with China (2007) – which preamble consider sustainable development and environmental protection as general objectives – and its

¹⁴³ Australia-Chile FTA, Art. 18.2.5.

¹⁴⁴ Chile-EU AA, Art. 28, encourages “conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the latter in the interests of sustainable development”.

¹⁴⁵ Chile-EU AA, Art. 44. “The Parties recognise the importance of social development, which must go hand in hand with economic development. They will give priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the International Labour Organisation covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour, and equal treatment between men and women”.

¹⁴⁶ Chile-Colombia FTA, Art. 9.13.

supplementary Memorandum of Understanding (MOU) on Environmental Cooperation, and in the MOU on Labor and Social Security Cooperation. However, in the Labor MOU there is no explicit reference to ILO instruments although cooperation areas include decent work, labor laws and labor inspection, improvement of working conditions and workers' training, globalization and its impact on employment, the working environment, industrial relations and governance.¹⁴⁷ Cooperation issues in the environmental MOU include quality of water and air pollution.¹⁴⁸ In Chile-China Supplementary Agreement on Investment (2012), it is explicitly recognized that "except in exceptional circumstances, do not constitute indirect expropriations nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment".¹⁴⁹

The FTAs signed with Mexico (1998) and Korea (2003) did not include a supplementary agreement or a chapter on environment or labor. However, in their preamble sustainable development and environmental protection, are considered as general objectives, and both treaties include a provision,¹⁵⁰ establishing that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns. In addition, it is recognized that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Consequently, a Party should not waive or derogate from such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other has offered such an encouragement, it may request State-to-State consultations with a view to avoid any such encouragement.

In the FTAs with Turkey and Malaysia, the Parties recognize in the preamble the importance of strengthening their capacity to protect the environment and promote sustainable development in concert with strengthening trade and investment relations between them. They also declare that it is inappropriate to set or use their environmental laws, regulations, policies and practices for trade protectionist purposes. It is also inappropriate to relax, or fail to enforce or administer, their environment laws and regulations to encourage trade and investment. In addition to that, both PTAs detail some ways of cooperation between the parties to achieve these objectives.¹⁵¹ Furthermore, the FTA with Turkey declares that both parties will promote decent work, sound labor policies and practices, reaffirming their obligations

¹⁴⁷ MOU Labor Cooperation Chile-China, Art. 1.

¹⁴⁸ MOU Environmental Cooperation Chile-China, Art. 2.

¹⁴⁹ Chile-China FTA, Supplementary Agreement on Investment, Appendix A.

¹⁵⁰ Chile-Mexico FTA, Art. 9-15, Chile-Korea FTA, Art. 10.18. The same provision is found in the FTAs with Canada (Art. G-14).

¹⁵¹ Chile-Turkey FTA, Art. 37.8, and Chile-Malaysia FTA, Art. 9.5.

as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), recognizing that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws.¹⁵²

The FTA Chile-Peru has a lower environmental commitment, only establishing that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns.¹⁵³ There are no obligations to not lower environmental standards and there are no State-to-State consultations in environmental matters. However, the same FTA has a Labor Memorandum of Understanding (MOU) where the parties reaffirm their obligations as members of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work (1998), and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).¹⁵⁴

Neither the framework agreement with Central American countries in 1999, nor the bilateral protocols with Costa Rica (1999), El Salvador (2000), Honduras (2008), Guatemala (2010) and Nicaragua (2012) include labor or environmental provisions. The same happens with almost all the ECAs signed by Chile, with the exception of the ECA with Bolivia that include a provision to promote cooperation in environmental preservation,¹⁵⁵ and the ECA Chile-Ecuador that consider in the preamble the creation of new employment opportunities, improving working conditions and living standards in their respective territories.

With respect to dispute settlement involving Chilean PTAs or IIAs, there have been no inter-state disputes regarding the interpretation or application of the treaty. One of the few reported cases of interstate arbitration involving these treaties was initiated by Peru pursuant to the Chile-Peru BIT (2000), while a previous investor-State arbitration was taking place under the same BIT, between a Chilean investor and the Republic of Peru (*Peru v. Chile* case).¹⁵⁶ Based on the existence of the State to State arbitration, Peru requested suspension of the investor-State arbitration proceedings where it was the respondent, arguing that interpretative priority should be given to interstate proceedings.¹⁵⁷ Without providing any reasoning behind, the request was

¹⁵² Chile-Turkey FTA, Art. 37.7.

¹⁵³ Chile-Peru FTA, Art. 11.13. The same provision is found in the Chile-United States FTA, Art. 10.12.

¹⁵⁴ Chile-Peru FTA, Labor MOU, Art. 2.

¹⁵⁵ Bolivia-Chile ECA, Art. 19.g.

¹⁵⁶ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: *Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru*)

¹⁵⁷ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 214 (Oxford University Press 2012).

denied by the investor-state arbitral tribunal merely considering that “the conditions for a suspension of the proceedings were not met”.¹⁵⁸ The interstate arbitration was pursued no further.

With the exception of the *Vieira v. Chile* case,¹⁵⁹ investor-State arbitration cases where Chile has been the respondent State have not dealt directly with sustainable development issues.¹⁶⁰ In *Vieira*, arbitration was brought by a Spanish investor after the Chilean government rescinded certain fishing permits on ecological grounds (limits on the fishing of hake and conger).¹⁶¹ The claim was rejected by the arbitral tribunal in a split decision the tribunal, concluding that the dispute between Vieira and Chile regarding the fishing rights in question had already arisen by the time the Chile-Spain BIT entered into force.¹⁶²

V. Trade and Investment Regulatory Framework and Institutions

A. Regulatory Priorities and Its Outcome

Since the 90’s Chile’s integration into the world economy has been possible largely thanks to a vigorous policy of bilateral trade negotiations, that followed a policy of unilateral openness during the second half of the 1980’s. Today the country has 24 agreements in force with 62 different trading partners, and exports to countries with PTAs accounted for 2014, 93% of total shipments, reaching US \$ 76,648 million. The prospects for future are to continue in the same path, strengthening ties with the countries of the Latin American region, like Brazil, Central America and the Caribbean (especially with Dominican Republic and Cuba). Other regions identified as important are the Eurasian Economic Union, India, China and Africa. Equal importance is given to the possible closure of the TPP negotiations, the participation in the Pacific Alliance,

¹⁵⁸ *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. The Republic of Peru*. ICSID Case No. ARB/03/4. Award on Jurisdiction, [2004] 19 ICSID Review - Foreign Investment Law Journal 359 (International Centre for Settlement of Investment Disputes (ICSID)) [9].

¹⁵⁹ *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, (Case No. 18/ARB/04/7)

¹⁶⁰ The other investor-State arbitration cases are *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (Case No. ARB/98/2) – regarding the expropriation of a publishing enterprise –the longest case in ICSID history, still pending; and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (Case No. ARB/01/7) – regarding the denial of construction permits of a residential and commercial complex, where the amount awarded was approximately US\$ 5.9 million plus compound interest (LIBOR rate from the date of the breach until the date of payment).

¹⁶¹ Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, 30 INTERNATIONAL LITIGATION & ARBITRATION 1099, 75 (2009).

¹⁶² *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7. Award, 21 August 2007, (2007) Investment Treaty Arbitration (ITA) [266–303].

and an update of the agreements with the European Union and the European Free Trade Association (EFTA).¹⁶³

The regulatory priorities behind Chilean investment policy have evolved from the DL 600 – when foreign investment effectively needed special, both institutional framework and stability, to enter the country. Today, the Chilean government considers that a regime of exceptionality is not necessary, as the country has a globally recognized status, not only as a member of the OECD since 2010, but also because of its economic, social and institutional stability. For that reason, DL 600 has been repealed and a new regulation is in the making, aimed to create the “right” incentives to attract foreign direct investment.¹⁶⁴ Following OECD’s recommendations, the idea is to offer foreign investors a stable macroeconomic conditions and a non-discriminatory legal framework with respect to domestic investors, preventing tax competition between countries with the aim of attracting foreign investment projects. The focus would be in the promotion of investments into strategic sectors and to those who lack investment due to market failures identified properly, guaranteeing access of foreign investors market the formal exchange market and the ability to remit the capital value of their investment and profits.¹⁶⁵

Although the policy orientation behind the trade and investment regulatory changes in Chile, promoting free trade and strong protection to foreign investors, may be considered more “right-oriented” than “left-oriented”,¹⁶⁶ it is worth mentioning that both free trade agreements and bilateral investment treaties concluded by Chile were negotiated since early 90’s, in a democratic regime with a coalition in power of center-left political parties. In fact, since 1990 to 2010, Chile had two Presidents from the Christian-Democratic Party and two Presidents from the Socialist Party that kept a coherent continuity in the trade and investment policies.

The strategy of Chile adopted during the military regime of unilateral reduction of tariffs and strong domestic protection to foreign investors, during democracy morphed into open/additive regionalism and to the promotion and protection of foreign investors using international agreements. Chile did not embarked in those changes as

¹⁶³ Pablo Urria, *Los desafíos para las negociaciones comerciales de Chile en 2015*, DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON) (Feb. 27, 2015), <http://www.direcon.gob.cl/2015/02/los-desafios-para-las-negociaciones-comerciales-de-chile-en-2015/>.

¹⁶⁴ Cámara de Diputados de Chile, Proyecto de Ley que establece una ley marco para la inversión extranjera directa en Chile y crea la institucionalidad respectiva, http://www.camara.cl/pley/pley_detalle.aspx?prmID=10319&prmBL=9899-05.

¹⁶⁵ Foreign Investment Committee, Government announces presentation of bill on new institutional framework for foreign investment (Jan. 13, 2015), <http://www.ciechile.gob.cl/en/espanol-gobierno-anuncia-envio-de-proyecto-de-ley-para-nueva-institucionalidad-en-inversion-extranjera/>.

¹⁶⁶ Although “left” and “right” have different meanings for different people, for the purpose of this research we concentrate on the attitude of people with respect to jobs, order, governmental decisions, and crime. See: Wiebke Weber, *Behind Left and Right. The Meaning of Left-Right Orientation in Europe* (2012) (unpublished Ph.D., Universitat Pompeu Fabra).

responses to international commitments assumed by the country before international organizations or aligned to it. This can be considered as an autonomous policy shift, responding to the internal reality of the country as Chile, as the option of bilateral or plurilateral agreements was deemed the most convenient for Chile, considering its low bargaining power in multilateral negotiations and that a continuation of the unilateral opening would yield few additional efficiency gains.¹⁶⁷ However, this policy did not exclude unilateral openness or multilateral negotiations (mainly through GATT-WTO).¹⁶⁸ Chile was an early adopter of these policies in Latin America and its policy change was generally not influenced or aligned with movements in other countries of the region. One of the most notable exceptions in this regard, is the influence of the experience of Mexico in NAFTA that was one of the triggers of the Chilean interest in that type of agreements.

Chile has maintained its position with respect to trade and investment in the international economic fora. Evidence of this can be found in its early exit from the Andean Community due to differences with respect to the investment policy of that bloc, and its overall support of the WTO Agreements, PTAs, BITs and IIAs in general. As mentioned, Chile is one of the countries with more PTAs in the world,¹⁶⁹ and a relatively high number of IIAs.¹⁷⁰

Chilean trade and investment policies have contributed to growth and poverty reduction in the country. In 2013, Chile was ranked 41 out of 187 countries and territories in the UNDP Human Development Index (HDI), together with Portugal. According to the UNDP, between 1980 and 2013 Chile's HDI value increased from 0.640 to 0.822 (28.4 % or an average annual increase of about 0.76%). In the same period, Chile's life expectancy at birth increased by 10.9 years, mean years of schooling increased by 3.4 years and expected years of schooling increased by 3.8 years, and Chile's GNI per capita increased by about 168.2%.¹⁷¹

However, the OECD has reported that from 1990 to 2004 Chile experienced "high, diversified, export-led growth supported by sound macroeconomic and social policies", but also put considerable pressure on some natural resources, notably air quality and water availability – particularly in sectors such as mining, forestry and aquaculture.¹⁷²

¹⁶⁷ Manuel Agosin, *Beneficios Y Costos Potenciales De La Iniciativa Para Las Américas: El Caso De Chile*, ESTUDIOS PÚBLICOS 101, 52 (1993).

¹⁶⁸ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 16, 124. This policy considered the smaller size of Chilean domestic market and its particularities, such as its geographic location and type of natural resources.

¹⁶⁹ World Trade Organization (WTO), Trade Policy Review Body, *supra* note 1, at 22.

¹⁷⁰ See: United Nations Conference on Trade and Development (UNCTAD), *supra* note 9.

¹⁷¹ United Nations Development Programme (UNDP), *Chile. HDI Values and Rank Changes in the 2014 Human Development Report*, in HUMAN DEVELOPMENT REPORT 2014. SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE (United Nations 2015).

¹⁷² OECD & ECLAC, *supra* note 7, at 15, 22.

Although these policies have resulted in significant reductions in poverty, Chile has a high income inequality with a Gini coefficient of 0.50, the highest of OECD members.¹⁷³

B. Institutions and Actors

The main Chilean institutions mobilized in the process of promoting the abovementioned changes in trade and investment regulation, have been the Ministry of Foreign Affairs with respect to trade, and the Ministry of Economy with respect to foreign investment.

Regarding trade, two agencies of the Ministries of Foreign Affairs are particularly relevant: the Directorate General of International Economic Affairs (DIRECON), and the Institute of Export Promotion (Pro-Chile). DIRECON was created by Decree with the force of law N° 53 of January 10, 1979 and its mission includes the implementation of the Presidential policy on foreign economic relations, promotion and negotiation of international treaties and agreements of an economic nature (with the concurrence of the Minister of Finance), collaboration into the development of the country's exports, and developing public and private sector proposals for the optimum utilization of international markets.¹⁷⁴ Since its inception, DIRECON has been leading the negotiation of ECAs and PTAs and continues to do so.¹⁷⁵ An Inter-Ministerial Committee on International Economic Negotiations presided by the Ministry of Foreign Affairs, was created in 1995,¹⁷⁶ in order to harmonize the interests of the different ministries in these negotiations and coordinate different negotiations.¹⁷⁷

Pro-Chile is the Chilean agency in charge of promoting exports of goods and services from the country that also contributes to the promotion of tourism. It was created by Decree Law N° 740 of November 4, 1974,¹⁷⁸ and its mission includes identify business opportunities, co-finance participation in trade shows, and provide technical assistance to exporters.¹⁷⁹ Together with other organizations such as Fundación Chile, Pro-Chile has contributed in the success of Chilean exports.¹⁸⁰ Today the country stands out

¹⁷³ OECD, *supra* note 6, at 110, 111.

¹⁷⁴ Decreto con Fuerza de Ley N° 53 de 1979, crea La Dirección General de Relaciones Económicas Internacionales del Ministerio de Relaciones Exteriores y Establece su Estatuto Orgánico (Oficial Gazzete, April 27, 1979), http://www.direcon.gob.cl/wp-content/uploads/2013/07/DFL-53_27-ABR-1979.pdf.

¹⁷⁵ See: DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11.

¹⁷⁶ Decree N° 419 of April 7, 1995, Crea Comité Interministerial de Negociaciones Económicas Internacionales (Oficial Gazzete, May 10, 1995), <http://www.leychile.cl/Navegar?idNorma=13192>.

¹⁷⁷ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 202.

¹⁷⁸ Decreto Ley N° 740, crea el Instituto de Promoción de Exportadores de Chile (Pro-Chile) (Oficial Gazzete, November 13, 1974), http://www.prochile.gob.cl/wp-content/uploads/2013/03/creacion_prochile.pdf.

¹⁷⁹ MARIA ELENA VARAS, *supra* note 18, at 10.

¹⁸⁰ Fundación Chile was created by agreement between Chile and the American company Telephone and Telegraph Corp (ITT) as part of a settlement after nationalization without compensation in the early 1970s. *Id.* at 6–7.

worldwide as the largest exporter of blueberries, grapes, plums, prunes, dried apples, trout and Pacific salmon.¹⁸¹

Regarding investment, the Foreign Investment Committee (FIC) is the institution that represents Chile in administering legal procedures related to the Foreign Investment Statute (including the analysis of investment applications, signing of investment contracts and authorization of remittances), provide information concerning foreign investment for investors and potential investors, and coordinates the defense and representation of the country in cases filed by foreign investors before arbitral tribunals.¹⁸² The FIC was the leading agency in the negotiation of bilateral investment treaties during the 90's.¹⁸³

The Foreign Investment Committee (FIC) was created by Decree Law 600 of July 11, 1974¹⁸⁴ and is formed by the Ministers of Economy (who acts as its president), Finance, Foreign Affairs and Planning as well as the president of the Central Bank. Other ministers responsible for specific economic sectors are invited to participate in meetings whenever is deemed necessary. The FIC is headed and managed by an Executive Vice-President who is appointed by the President of the Republic.¹⁸⁵

However, since January 1, 2016 the FIC will be replaced by a new "Foreign Investment Promotion Agency" (FIPA), since the DL 600 was repealed by Article 9 of the Law No. 20780 of September 26, 2014. A "Transversal Foreign Investment Advisory Commission" presented in January 2015 a report on a new institutional framework for foreign investment,¹⁸⁶ and a project of law establishing FIPA was submitted to the Congress the same month, which has been approved by the Chamber of Deputies and now is pending Senate approval.¹⁸⁷

Legal professionals played a large role on this process, as represented the large number of public servants of the abovementioned Ministries and Agencies involved in the design and creation of regulations, as well as trade and investment negotiations, together with economists. In that context, domestic and international regulations in both trade and investment are closer to the legal tradition of "public" law more than

¹⁸¹ Pro-Chile, Foods from Chile. Source of Life 4 (2014), <http://www.prochile.gob.cl/importers/wp-content/uploads/sites/4/2014/10/dirffch.pdf>.

¹⁸² Foreign Investment Committee, About Us (2015), <http://www.ciechile.gob.cl/en/sobre-el-cie/quienes-somos/>.

¹⁸³ See ROBERTO MAYORGA LORCA ET AL., INVERSIÓN EXTRANJERA RÉGIMEN JURÍDICO Y SOLUCIÓN DE CONTROVERSIAS: ASPECTOS NACIONALES E INTERNACIONALES, ch. V (LexisNexis 2005).

¹⁸⁴ The Decree Law 600 of 1974 was restated, coordinated and standardized by Decree with the force of law N° 523 of 1993 (Oficial Gazzete, December 16, 1993).

¹⁸⁵ Rodrigo Polanco Lazo, *supra* note 90, at 210.

¹⁸⁶ Ministry of Economy, Economic Development and Tourism of Chile (n 6).

¹⁸⁷ Cámara de Diputados de Chile, Proyecto de Ley que establece una ley marco para la inversión extranjera directa en Chile y crea la institucionalidad respectiva, http://www.camara.cl/pley/pley_detalle.aspx?prmID=10319&prmBL=9899-05.

“private” law, as they contain elements of constitutional law, administrative law and public international law.

The participation of private actors in this process was formalized in 1995, with the creation of a Committee for the Participation of the Private Sector, within the Inter-Ministerial Committee on International Economic Negotiations.¹⁸⁸ A larger participation of the civil society has been considered since 2011, with the enactment of the Law N° 20.500 on Associations and Public Participation in Public Administration, that considers a more active role of citizens in the creation of public policies and regulations, through mechanisms of public information, public consultation and civil society councils.¹⁸⁹

In that context, since April 2014 DIRECON decided to initiate a process of transparency and openness of the negotiation of the Trans Free Trade Agreement (TPP), inviting various organizations of civil society to join the so-called "Adjoining Room". This is an open space for information, dialogue and debate aimed to help to define the positions of Chile in the TPP negotiation. It is open to all organizations that have directly expressed interest and is open to participation by any domestic interested party, whether non-governmental organizations, associations, unions, national academic institutions, among others.¹⁹⁰

Due to the recent implementation of these policies on public participation, it is difficult to assess the fragilities or weaknesses of these institutional changes, but in recent years Chilean society is clearly demanding more information and transparency from its government, ensuring that government decision making is not compromised by conflicts of interest.¹⁹¹

VI. Conclusion: Is There a Chilean Pattern of Trade and Investment Agreements?

As we have seen, Chile has adopted multiple approaches to regulate inward and outward, trade and investment flows, including unilateral, multilateral and bilateral/regional strategies. The main purpose of this paper was to examine if, in doing so, Chile has implemented a different approach when negotiating with other Southern developing countries when compared with the approach taken in negotiations with Northern developed countries.

¹⁸⁸ DIRECTORATE GENERAL OF INTERNATIONAL ECONOMIC AFFAIRS (DIRECON), *supra* note 11, at 202.

¹⁸⁹ Law N° 20.500, Sobre Asociaciones y Participación Ciudadana en la Gestión Pública (Official Gazette, February 16, 2011).

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¹⁹¹ OECD, OECD Better Life Index - Civic Engagement (2015), <http://www.oecdbetterlifeindex.org/topics/civic-engagement/>.

With respect to trade agreements Chile has evolved from a policy of unilateral openness to a Latin American regionalism represented by the ECAs signed with ALADI members in the early 1990's. In the middle of the same decade, Chile progressed in the implementation of a policy of open or additive regionalism, negotiating Free Trade Agreements (FTAs) with all its major trading partners, a policy that continues until today, without abandoning the multilateralism and its commitments under WTO Agreements.

The main regulatory differences in both Chilean strategies are that ECAs were mainly focused on the reduction of tariffs whereas PTAs were more broad and comprehensive, including disciplines beyond the trade in goods, such as trade in services, intellectual property, and investment, among others. Although ECAs were signed only with other "Southern" developing countries, FTAs were not exclusively negotiated with developed countries. In fact, after the first Chilean Free Trade Agreement – with Canada in 1996 – Chile signed an FTA with Mexico in 1998, and from that date, almost every trade agreement has followed the FTA framework or other similar structure, regardless of whether it has been negotiated with a developed or a developing country.¹⁹² However, we find certain differences in PTAs signed by Chile that seems to be based on the "developed" or "developing" status of the trading partner, especially in fields like market access in the trade of goods, trade in services, government procurement, intellectual property, investment and electronic commerce.

These differences are not exclusive of Chilean PTAs. While PTAs have surged in Southern countries as regionalism intensifies and global value chains flourish, differences have also been detected in Asian FTAs between Southern countries and with Northern States in areas such as tariffs, rules of origin, trade in services, WTO notification, and deep integration.¹⁹³

Regarding investment agreements, Chile adopted an active policy of negotiating and signing BITs in the 1990's, that included open definitions for investors and investment, MFN, national and fair and equitable treatment, and unrestricted access to ISA, full compensation for direct and indirect expropriation. A change of policy started in 1996 with the Canada-Chile FTA that included an investment chapter, and since 2003 Chile has not signed more BITs as standalone agreements. From that year, with the sole exception of the second Chile-Uruguay BIT (2010), all Chilean IIAs are to be found as investment chapters in PTAs. These chapters are longer and complex than BITs, with detailed definitions of certain standards, notably Fair and Equitable Treatment (FET), Full Protection and Security (FPS) and expropriation (especially indirect expropriation). They also include provisions on performance requirements, filter mechanisms,

¹⁹² Since that date, only the agreements with Cuba (1999) and Ecuador (2008) have followed the ECA framework.

¹⁹³ Gansehan Wignaraja & Dorothea Lazaro, *North-South vs South-South Asian FTAs: Trends, Compatibilities, and Ways Forward*. UNU-CRIS Working Papers, W-2010/3. (United Nations University, Comparative Regional Integration Studies 2010).

exceptions and carve-outs for certain (notably financial services), and transparency rules. Today Chile belongs to a group of Southern countries moving from negotiating traditional bilateral investment treaties (BITs) to include investment chapters into PTAs like Peru, or Colombia.

In this field, there are also no major differences if the IIAs were signed with “Northern” or “Southern” countries. In fact the majority of BITs and of IIAs signed by Chile (including the investment chapters in PTAs), are with developing countries – and the first Chilean BIT was signed with Argentina in 1991. Some of the few variances we can find are related with the investor-State dispute settlement, where some BITs with developed countries include exceptions to the “fork-in-the-road” provisions that are contained in the majority of the Chilean BITs,¹⁹⁴ and certain investment chapters in Chilean PTAs with developing countries have a more restricted definition of “investor”¹⁹⁵ in relation to similar agreements signed with developed countries.

In the case of Chile, the impacts of these regulatory strategies in relation to developmental policies are clearly different, as neither ECAs nor BITs include environmental or labor provisions, or in general related to sustainable development.¹⁹⁶ In the framework of a tendency to include some labor and environmental provisions among South-South PTAs, several Chilean agreements include them, although only some of them address these concerns specifically in their investment chapter. There is a significant degree of variation in the way these provisions are considered, as some PTAs include detailed commitments in this regard while others merely mention labor and environmental concerns as policy references. If we review the Chilean PTAs with developed or developing countries, there is no important change in the treatment of sustainable development issues, although two of the most comprehensive PTAs with respect to labor and environment are the FTAs with Canada and the United States, and fewer agreements with developing countries include detailed commitments in this regard, notably the agreements with Colombia and China.

In general, Chile follows a model of trade and investment agreement that is influenced by treaties previously signed by Northern developed countries. With respect to investment treaties, both the Chilean Model BIT and the 53 BITs signed by Chile generally follow what has been characterized as the “Dutch Model”, that reflects, in general, the European approach to investment treaties.¹⁹⁷ With some minor variations – like the inclusion of “fork-in-the road” provisions, a reduced use of umbrella clauses

¹⁹⁴ See Chilean BITs with Germany, Belgium/Luxembourg, Netherlands, Austria, and Switzerland.

¹⁹⁵ See Investment Chapters in the FTAs signed by Chile with Colombia and Peru.

¹⁹⁶ One of few exceptions is the abovementioned Bolivia-Chile ECA that include a provision to promote cooperation in environmental preservation (Art. 19.g).

¹⁹⁷ However, the first BIT signed by Chile was with Argentina on August 2, 1991, quickly followed by the Chile-Spain BIT, signed on October 2, 1991, and the Chile-Germany BIT, signed on October 21, 1991. Interestingly, the Chile-Netherlands BIT signed on November 30, 1998 is not yet in force.

and the full protection and security standard – Chile used this framework in the negotiations of BITs with other developing countries.¹⁹⁸

In the case of trade agreements, the NAFTA Model has clearly served as a blueprint for the negotiation of the disciplines contained in later Chilean agreements – especially if we consider that the first two FTAs signed by Chile are with NAFTA members (Canada and Mexico)¹⁹⁹ and there was the explicit intention of becoming part of that trade bloc.²⁰⁰ However, Chile has been an actor in the development of the model, as evidenced by the investment chapter of the Chile-United States FTA, whose innovations on transparency, fair and equitable treatment, full protection and security, indirect expropriation, and in general on ISA²⁰¹ served as an outline for future investment chapters in PTAs signed both by Chile and the United States.²⁰² Innovations are also found in Chilean agreements with Southern countries. For example, the FTA with Colombia was the first negotiated by Chile and a South American country that included chapters on government procurement, e-commerce, environment and labor. Although the Chilean FTA with Korea (2003) does not include labor provisions, after the signature of the Chile-Peru FTA in 2006 (that includes an MOU on Labor and Migration cooperation), Peru included a labor chapter in the FTA with Korea (2010) – something that had already been included in the FTA signed with the United States in 2006.²⁰³

Two agreements will be decisive for future developments of patterns in trade and investment treaties between Southern countries: the Trans-Pacific Partnership (TPP) and the Pacific Alliance. The TPP currently includes three “developed” countries (New Zealand, Singapore and Brunei Darussalam – all members of the P4 together with

¹⁹⁸ This is not surprising, as already a 2004 UNCTAD survey on South-South investment treaties, concluded that South-South BITs seemed to be closer to the European approach, with some distinctive features, such as the emphasis for “fork-in-the-road” clauses, and on exceptions on public policy grounds or balance of payments. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT AGREEMENTS 31–32 (United Nations 2005).

¹⁹⁹ The Chile-MERCOSUR FTA, although signed before the Canada-Chile FTA it was formally an ECA (ECA No. 35).

²⁰⁰ Article P-04 of the Canada-Chile FTA explicitly declares that the parties shall work toward the early accession of Chile to the NAFTA. See also Felipe Larraín, *supra* note 31, at 379.

²⁰¹ See: Scott R. Jablonski, *iSí, Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 627 (2004); David A. Gantz, *supra* note 107.

²⁰² United States even included some of these provisions in the Model BITs that developed in the years 2004 and 2012. However, it must be clarified that concerns with respect to transparency in Investor-State Arbitration and the interpretation of the FET and FPS standards, had been the object of interpretations of the NAFTA Free Trade Commission in 2001 and 2004. See North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions. NAFTA Free Trade Commission July 31, 2001; and North American Free Trade Agreement, Statement of the Free Trade Commission on non-disputing party participation October 7, 2004.

²⁰³ See Organization of American States (OAS), Foreign Trade Information System, Peru: Trade Agreements in Force, http://www.sice.oas.org/ctyindex/PER/PERAgreements_s.asp.

Chile) but in the negotiations it is being expanded to include new countries, both developed (Australia, Canada, Japan, and the United States) and developing (Malaysia, Mexico, Peru, and Vietnam).²⁰⁴

The Pacific Alliance has already an Additional Protocol to the Framework Agreement, signed on February 10, 2014, where Colombia, Chile, Mexico and Peru commit to liberalize 92% of their trade, with the remaining 8% over the coming years.²⁰⁵ Although not yet ratified, this protocol is huge step in regulation of trade and investment between these Southern States, as includes the broadest common disciplines ever negotiated by these countries: in trade in goods, services, market access, non-tariff barriers, rules of origin, trade facilitation, sanitary and phytosanitary measures, technical barriers, government procurement, investment, financial services, maritime services, electronic commerce, telecommunication, transparency, exceptions, and dispute settlement. The chapter on investment includes ISA and provisions on corporate social responsibility and on not lowering health, environmental standards and other regulatory objectives.

However, the Pacific Alliance currently does not include an especial chapter on environmental or labor issues, although the ones previously signed with Colombia and Peru (only in labor issues) are still in force. In recent negotiations, public officials have stressed the need to deepen integration, for which they outlined a roadmap that seeks soon reach agreements on issues of new generation in areas such as infrastructure, Small and medium-sized enterprises (SMEs), health, intellectual property and financial cooperation, among others.²⁰⁶

The outcome of both TPP and the Pacific Alliance will allow us to assess if the regulatory changes implemented by Chile are also replicable in other countries and if they can have a spillover effect on the mainstream regulatory patterns. Up to now, Peru and Colombia have been the countries of the region that have embraced similar regulatory policies to the ones previously advanced by Chile in trade and investment. Mexico has been also an early adopter of this type of policies, since becoming a NAFTA member in 1992.

Chile has been successful in increasing both outward and inward trade and investment, and it has progressively incorporated provisions addressing concerns on sustainable development in its preferential trade agreements. However, a further analysis of the effects of these treaty obligations in trade, investment and sustainable development is needed to understand why this is happening, as international legal commitments are

²⁰⁴ For updated information on the status of TPP negotiations, see: Organization of American States (OAS), Foreign Trade Information System, *Trans-Pacific Partnership Agreement*, TRADE POLICY DEVELOPMENTS, http://www.sice.oas.org/TPD/TPP/TPP_e.ASP.

²⁰⁵ Organization of American States (OAS), Foreign Trade Information System, *supra* note 34.

²⁰⁶ Directorate General of International Economic Affairs (DIRECON), Ministros de Alianza del Pacifico acuerdan profundizar integración (Apr. 30, 2015), <http://www.direcon.gob.cl/2015/04/ministros-de-alianza-del-pacifico-acuerdan-profundizar-integracion/?lang=es>.

not necessarily the key factor behind the increase of commerce, foreign investment and the improvement of labor and environmental standards.²⁰⁷

Such a study would be particularly important for Southern economies, as they have increased their share in international investment and trade. Since 2012 developing countries have become the main FDI recipients²⁰⁸ and FDI outflows from developing countries also reached a record level of 39% of the global FDI.²⁰⁹ If in 1980 developing countries only accounted for 34% of the world exports, by 2011 their share had risen to 47%, nearly half of the global total. South-South trade has been an important factor in this, and its share in world trade has increased from 8% in 1990 to 24% in 2011.²¹⁰

²⁰⁷ With respect to foreign investment, there is an ongoing debate about the effect of IIAs on foreign investment flows. Some studies show that IIAs have a great positive impact as they minimize political risk, others have a modest or limited impact, and some that have no impact or even a negative one. See: Andrew Kerner and Jane Lawrence, *What's the Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation*. BRITISH JOURNAL OF POLITICAL SCIENCE, available in: <http://dx.doi.org/10.1017/S0007123412000725>; Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 33 WORLD DEVELOPMENT 1567 (2005); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005); UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s*; Axel Bergera, Matthias Busseb, Peter Nunnenkampc, and Martin Royd, *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, WORLD TRADE ORGANIZATION ECONOMIC RESEARCH AND STATISTICS DIVISION, September 2010; Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?* 42 LAW & SOC'Y REV. 815 (2008); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only A Bit...And They Could Bite*, World Bank Policy Research Working Paper No. WPS 3121 (2003); and Lauge Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence* (2010), online: http://works.bepress.com/lauge_poulsen/4, among others.

²⁰⁸ According to UNCTAD, in 2013 FDI flows to developing economies reached a new high of \$778 billion (54 % of the total) and developing and transition economies now constitute half of the top 20 ranked by FDI inflows. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *supra* note 98, at 2–5.

²⁰⁹ *Id.* at 5–7.

²¹⁰ WORLD TRADE ORGANIZATION (WTO), WORLD TRADE REPORT 2013. FACTORS SHAPING THE FUTURE OF WORLD TRADE 5–6 (2013).