



Accession of Chile to the OECD

Review of international investment policies



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FOREWORD

This review is based on the report prepared by the Investment Committee as part of the process of Chile's accession to OECD membership.

The OECD Council decided to open accession discussions with Chile on 16 May 2007 and adopted an Accession Roadmap, setting out the terms, conditions and process for accession, on 30 November 2007.

In the Roadmap, the OECD Council requested a number of OECD Committees to provide it with a formal opinion. In light of the formal opinions received from OECD Committees and other relevant information, the OECD Council decided to invite Chile to become a Member of the Organisation on 15 December 2009.

In the Accession Roadmap, the Investment Committee was requested to examine Chile's position with respect to OECD instruments, standards and benchmarks, to assess the adequacy of its policies taking into account its economic and social situation and to provide the Council with its formal opinion on the willingness and ability of Chile to assume the obligations of membership in the field of investment.

The accession review of Chile was based on the following information:

- The Initial Memorandum of Chile setting out its preliminary position under all OECD legal instruments;
- The responses of Chile to a questionnaire prepared by the Investment Committee;
- Secretariat missions on 1-5 September 2008 and 28-31 October 2008;
- A Secretariat report which was revised following each accession review meeting;
- Accession review meetings of the Investment Committee on 16 December 2008 and 17 June 2009 comprised of a question and answer session with the Chilean Delegation and a closed session during which the Committee discussed its conclusions;
- The response by Chile to a letter from the Chair of the Investment Committee Accession Examinations requesting further improvements, confirmations and clarifications of the country's position under the instruments following the first accession review meeting;
- The technical assessment of the Committee's Working Group on International Investment Statistics (WGIIS) which considered Chile's position under the Benchmark Definition of Foreign Direct Investment, its response to the Survey of Implementation of Methodological Standards for Direct Investment (SIMSDI) and its commitments regarding the reporting of statistics on international investment.
- Information on recent macroeconomic and financial developments provided by the Secretariat of the Economic and Development Review Committee;

- The outcome of the review of Chile by the Committee on Financial Markets concerning the parts of the Codes of Liberalisation dealing with banking and financial services, as reflected in its formal opinion;
- The outcome of the review of Chile by the Insurance and Private Pensions Committee and its Working Party of Governmental Experts on Insurance concerning the parts of the Codes of Liberalisation dealing with insurance and private pensions.

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¹ This review was finalised on the basis of information available as of 6 October 2009, date of its approval by the OECD Investment Committee.

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1. INTRODUCTION AND SUMMARY

1.1. Accession Review Procedure

The Accession Roadmap provided that Chile should commit to the following core principles in the investment area [Annex 1]:

- i) full compliance with the principles of non-discrimination, transparency and 'standstill', in accordance with the OECD Codes of Liberalisation and the National Treatment instrument of the OECD Declaration on International Investment and Multinational Enterprises (reservations under the Codes must be limited to existing restrictions);
- ii) an open and transparent regime for FDI including in key sectors. Restrictions must be limited and concern sectors where restrictions are not uncommon in OECD countries;
- iii) liberalisation of other long-term capital movements, including equity investment and debt instruments of a maturity of one year or more; commercial credit and other capital operations relating to international trade are also to be liberalised; a timetable for the abolition of remaining controls on short-term capital movements is required;
- iv) no restrictions on payments or transfers in connection with international current account transactions; the candidate countries must comply with all IMF Article VIII requirements;
- v) relaxation of restrictions on cross-border trade in services, particularly banking, insurance and other financial services;
- vi) fair and transparent implementing practices and proportionality of the measures relative to the stated objective pursued;
- vii) effective enforcement of intellectual property rights;
- viii) key commitments under investment protection and other international agreements;
- ix) capacity to present a credible plan for the establishment of a visible, accessible, transparent and accountable National Contact Point for the OECD Guidelines for Multinational Enterprises; evidence of the candidate's commitment to the various international instruments cited in the Guidelines.

The Roadmap specifically provided for:

- i) A review and assessment by the Committee of the willingness and ability of Chile to assume the obligations of the Decisions on the Codes of Liberalisation of Capital Movements and Current Invisible Operations (1961 and subsequent amendments) and of the Decisions Related to the Declaration on International Investment and Multinational Enterprises (1976 and subsequent amendments).

- ii) A review and an assessment by the Committee of Chile's position under the Recommendation on the OECD Benchmark Definition on Foreign Direct Investment (1995, recently revised) and under the Declaration on International Investment and Multinational Enterprises (1976 and subsequent amendments). In addition, Chile would be required to comply with statistical reporting requirements associated with the Benchmark Definition.
- iii) An assessment of Chile's position under the Recommendation on OECD Principles for Private Sector Participation in Infrastructure through a technical review by the Secretariat.
- iv) The Investment Committee's Report on Chile's Position under the OECD Investment Instruments presents the full account of the Investment Committee's examination of Chile. The Report was transmitted to Council separately for the adoption of the lists of proposed reservations by Chile to the Code of Liberalisation of Capital Movements and to the Code of Liberalisation of Current Invisible Operations, as well as proposed updated exceptions to the National Treatment instrument.² The Report also includes the updated list of measures reported for transparency in accordance with the Declaration on International Investment and Multinational Enterprises.³

II. Chile's Position under OECD legal instruments relating to investment

a) *Summary of Chile's Position at the time of accession*

Of the 18 OECD instruments in the investment field (see Annex 1 for a complete list), Chile had already formally adhered to two: the Declaration on International Investment and Multinational Enterprises in 1997 and the Declaration on Sovereign Wealth Funds and Recipient Country Policies at the time of its adoption on 5 June 2008.

Chile accepts all of the OECD investment instruments with the following qualifications:

- *Decision of the Council adopting the Code of Liberalisation of Capital Movements [OECD/C(61)96]*

Chile accepts this Decision subject to a list of proposed reservations to the Code of Liberalisation of Capital Movements [Annex 2].

- *Decision of the Council adopting the Code of Liberalisation of Current Invisible Operations [OECD/C(61)95]*

Chile accepts this Decision subject to a list of proposed reservations to the Code of Liberalisation of Current Invisible Operations [Annex 3].

- *Declaration on International Investment and Multinational Enterprises [C(76)99]*

² Information on the OECD Codes of Liberalisation can be found at www.oecd.org/daf/investment/codes

³ Information on the OECD Declaration on International Investment and Multinational Enterprises, including the National Treatment instrument, can be found at www.oecd.org/daf/investment/declaration

Chile accepts the Declaration and related Decisions and Recommendations [C(89)76; C(88)131; C(88)41; C(87)76 and C(86)55] subject to a list of proposed exceptions to the National Treatment instrument. Chile also updates a list of other measures reported for transparency under the instrument [Annexes 4 and 5].

- *Recommendation of the Council on the OECD Benchmark Definition of Foreign Direct Investment [C(2008)76]*

Chile accepts this Recommendation, subject to a timeframe for implementation until the end of April 2011.

- *Recommendation of the Council concerning the Conclusion of Bilateral Agreements for the Co-Production of Films [C(64)124]*

Chile accepts this Recommendation subject to four observations.

b) *The Codes of Liberalisation*

i) *Summary of Chile's Position*

Chile has endorsed the objectives and principles of the Codes of Liberalisation of Capital Movements (CLCM) and Current Invisible Operations (CLCIO), hereinafter “Codes of Liberalisation”. Chile's acceptance of the obligations of the Codes of Liberalisation is subject to reservations, which are listed in Annexes 2 and 3. The Report examines the conformity of measures maintained by Chile with the Codes of Liberalisation, as well as the implications of Chile's proposed adherence to the OECD Codes of Liberalisation. Chile's proposed position under the OECD Codes of Liberalisation can be summarised as follows:

In the field of *inward direct investment*, there are no trans-sectoral restrictions, except for a national security related measure regarding the acquisition of real estate by foreigners in certain geographical areas. Sectoral restrictions are also limited and concern mainly incorporation in Chile, which is required for certain activities, and limits on foreign ownership in air and maritime transport, radio-broadcasting and fishing vessels. In the granting of mining concessions, the Chilean authorities are committed not to discriminate against foreign investors, except for certain mining activities for which there is a national security motivated prior authorisation requirement. Chile is open to foreign investment in the financial sector. Branching is allowed in banks and insurance, but establishment of other types of intermediaries requires incorporation in Chile.

Chile maintains some restrictions on *other capital movements*:

- For capital outflows, both through securities and through credits and loans, there are restrictions on the currency of denomination for foreign securities which limit issuance in pesos; there are limits on the amount of sureties and guarantees granted by resident banks to non-residents in foreign currency; and there are restrictions on certain portfolio investments abroad by securities brokers for their Chilean customers.
- Investments abroad by institutional investors are subject to limits on their share in total assets.

In the field of *exchange controls*, the free convertibility of the domestic currency enables residents and non-residents to freely carry out payments and transfers in connection with current international

transactions, as well as with permitted capital account transactions. In July 1977, Chile accepted the obligations of Article VIII of the Articles of Agreement of the International Monetary Fund.

The Chilean authorities have indicated that they wish to make use of the text of Section 7 of the Investment Committee's Report, "Foreign exchange transactions under the Central Bank's jurisdiction and the Codes", as a basis for a declaration by Chile as part of its Final Statement which would form part of the international agreement between the OECD and Chile on the terms and conditions of Chile's accession to the Organisation. The Chilean authorities recognise that the balance of rights and obligations set forth in the OECD Codes of Liberalisation provide adequate scope for handling potential disturbances to its economy and financial system, including risks to currency stability.

In the field of *cross-border trade in financial services*, Chile's proposed reservations cover restrictions on the provision by non-residents of financial services in Chile. There are also some reservations on residents' freedom to seek and contract financial services abroad at their own initiative. Chile has confirmed that plans for revising the tax regime applicable to insurance services provided by non-residents would not introduce new restrictions under the Codes, as any change would maintain the current tax neutrality between domestic and foreign insurance contracts.

Chile's proposed reservations cover restrictions on *cross-border trade in non-financial services* in the areas of cabotage in Chilean waters; international road transport; the provision of professional services by auditors for financial institutions; lawyers; and operators of multi-modal transport.

Chile has confirmed its commitment to comply with the principle of non-discrimination, in accordance with Articles 8 and 9 of the Codes of Liberalisation and as required by the Roadmap for the Accession of Chile. The Chilean authorities have stated that they fully understand the importance of the principle of non-discrimination under the Codes and appreciate that reciprocity measures are not permitted among OECD Members. Chile has committed to address concerns regarding non-discrimination and reciprocity as follows:

- regarding preferential treatment granted to countries with which Chile has signed international agreements in the area of insurance relating to goods in international trade and related brokerage services, Chile has committed to extend to all OECD Members any preferential treatment granted to an OECD Member;
- regarding the Chilean rule enabling reciprocal liberalisation in the areas of radio broadcasting and registration of foreign-owned fishing vessels, Chile has committed to extend to all OECD Members any liberalisation measures that would benefit an OECD Member;
- regarding Chilean reciprocity provisions in the area of maritime transport, according to which authorities may withdraw liberalisation benefits from a trading partner that has closed its market, Chile is satisfied by the protection offered to OECD Members by the standstill and other provisions of the Codes of Liberalisation and has committed not to apply reciprocity to OECD Members.

Chile maintains national security related measures in the areas of nuclear energy, defence industry, maritime transport, real estate and mining. Chile invokes the safeguard provision of Article 3 of the Codes to cover these measures. Chile has committed to observe the guiding principles of non-discrimination, transparency and predictability, proportionality, and accountability in the implementation of national security related investment measures as expressed in the Recommendation on Guidelines for Recipient Country Investment Policies relating to National Security, adopted by the OECD Council on 25 May 2009

[C(2009)63]. Chile took part in the development of this Recommendation as a participant in the Freedom of Investment process and formally accepts the Recommendation.

c) Declaration on International Investment and Multinational Enterprises

Chile's updated lists of exceptions to national treatment and of other measures reported for transparency are presented in Annexes 4 and 5 of the Report.

With regard to the Guidelines for Multinational Enterprises contained in the Declaration on International Investment and the subsequent Council Decision on the OECD Guidelines for Multinational Enterprises [C(2000)96], the Committee notes Chile's efforts to promote the Guidelines, the establishment and operation of a National Contact Point and steps taken by the National Contact Point to deal effectively with specific instances raised by parties.

2. INWARD DIRECT INVESTMENT

2.1. Foreign direct investment trends in Chile

FDI plays an important role in strengthening the international integration of the Chilean economy. The dynamism of Chilean foreign direct investment inflows is reflected in a tripling of the stock of foreign direct investment in the past decade. Chile has been among the top 10 non-OECD recipient countries in recent years and a new record high for FDI inflows was reached in 2008. Chile, as other emerging economies, has also started to record significant FDI outflows (see Table 1).

The attractiveness for foreign investors of an environment of strong economic growth and stability has been complemented by public policies that have sought to ease the regulatory burden on business and to accommodate Chile's increasing international economic engagement. Chile is a relatively small and fairly open economy on both foreign trade and FDI; the ratio of imports plus exports to GDP was 71% in 2008, while the ratio of FDI inflows to GDP in that same year was 9.7%.

Table 1. Foreign Direct Investment in Chile⁴
(In USD million)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Inflows	4,627.8	8,761.0	4,860.0	4,199.8	2,549.9	4,307.4	7,172.7	6,983.8	7,298.4	12,577.2	16,786.9
Outflows	1,483.5	2,557.9	3,986.6	1,609.7	343.1	1,606.4	1,563.1	2,182.7	2,742.5	3,009.1	6,891.2

Available data show that during the period 1990-2008 the main source countries for FDI have been the United States (23%), Spain (22%), Canada (19%) and the United Kingdom (8%). In the period from 2000 to 2008, the share of total FDI inflows from Spain reached 21% and those from Canada 23%, outstripping those from the United States (17% of the total).⁵

⁴ There are two sources of FDI data: the Central Bank of Chile and the Foreign Investment Committee. The Central Bank provides estimates of total net flows of foreign direct investment in Chile and of net flows of Chilean direct investment abroad as part of the procedures to compile balance of payments data. Sectoral and country breakdowns in the Central Bank data are currently only available for outflows. The Foreign Investment Committee maintains a record of all foreign investments covered by DL600 contracts (see section 1.4 below) and these records provide the only source of information currently available regarding the country of origin and the sector of destination for inflows. However, the share of total FDI coming into Chile under this type of contracts has diminished. In addition to discrepancies generated by partial coverage of the data compiled by the Foreign Investment Committee, differences in methodology for data compilation also contribute to divergence from balance of payments FDI data. Chile's FDI statistical methodologies have been reviewed by the Working Group on International Investment Statistics.

⁵ Estimates based on gross inflows of FDI under the DL600 provisions, as measured by the Foreign Investment Committee.

Mining has been the main recipient sector by far, with one third of the flows over the period 1990-2008, followed by electricity, gas and water supply (22%), financial services (13%, including insurance), manufacturing (12%) and communications (10%).⁶

Chilean companies have become important investors abroad since the early 1990s, mainly in the Latin American region, which received 54% of all outflows during the period 1990-2008. The data on country destination is somewhat obscured by the use of certain tax destinations as the location from which to invest abroad, including a large share of flows (14%) reported for the Cayman Islands, which equals the 14% share of the United States. The most important sectors for Chilean outward FDI are finance (53% of the total during the period 2000-2008), followed by commerce (14%) and mining (12%).

2.2. General legal framework for foreign direct investment

Chile's liberal approach to the participation by foreigners in the economy is reflected in the absence of a specific law concerning foreign investment. There are some specific regulatory measures directed towards mitigating risks that foreign investors may face, by providing assurances regarding changes in tax treatment and repatriation of capital. The latter were important in the period during which Chile maintained exchange controls. The investment agreements signed by Chile reaffirm the commitment expressed in domestic law to a non-discriminatory, predictable and transparent framework for FDI.

The principle of national treatment is incorporated in Chile's Constitution, which guarantees to both Chileans and foreigners the right to develop any economic activity, provided applicable legislation is observed and such activities are not contrary to public morals and order, or to national security interests. There are no economic activities reserved for the State, notwithstanding the special provision established under constitutional regulations regarding certain mineral resources.

Foreign investors, once established in the country, benefit from legal protection of property rights. Private property rights are fully protected under the Constitution and property may only be expropriated pursuant to specific constitutional provisions: expropriations may only be executed by a law approved by the legislature, on grounds of public benefit or national interest and the expropriated parties have the right to compensation for the actually caused material damage, which is to be established by mutual agreement or by ruling issued by the courts according to the law.

Chile adhered to the OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies (C/MIN(2008)8/FINAL) on 5 June 2008, at the time when it was adopted by Ministers of OECD countries at the Council at Ministerial level.

Chile does not apply any measures that may conflict with the legal requirements or policies of an OECD Member country and lead to conflicting requirements being imposed on enterprises operating in different jurisdictions. Chile has adhered to the Decision on Conflicting Requirements related to the OECD Declaration on International Investment and Multinational Enterprises.

To ensure transparency and accountability in the making and implementation of laws and regulations affecting foreign investment, the Chilean authorities have noted that mechanisms are in place to provide for public consultation prior to regulatory changes. The Chilean Constitution establishes that all actions of the State are public; thus all procedures must be made public, including the process of preparing new legislation. Furthermore, the Law on the Basis of Administration of the State provides that, prior to the

⁶ Estimates based on gross inflows of FDI under the DL600 provisions, as measured by the Foreign Investment Committee.

issuance of regulations, all regulators have the obligation to publish the proposed regulations in their website and receive comments and petitions.

There are several features of Chilean legislation that further protect interests of investors and the public at large. The use of “silence means consent” in administrative procedures was introduced by a legislative change in 2003. Recent reforms to financial legislation have expanded its use to the approval of licences in banking, insurance and pension fund management. Furthermore, investors have recourse to judicial redress if they think that a decision by an authority has affected the exercise of legal rights.

While Chile still has to make more progress on the development of periodic regulatory impact assessments to ensure that regulations continue to meet their intended purposes and are proportionate to the objectives pursued, authorities do maintain an active exchange of information with interested parties regarding the regulatory framework, which allows them to evaluate the costs and benefits of measures taken.

Real estate

There are two types of measures that specifically limit the acquisition of land by foreigners; they apply to property of the land surface, but not to mining rights.

Firstly, rules for the sale of State-owned land restrict purchases by foreigners in the area comprised 10 kilometres along the borders and 5 kilometres along the coast. Exemptions may be granted for the latter restriction to foreigners with residence in Chile based on a favourable opinion from the Ministry of Defence. Government operations are generally understood to fall outside the scope of the Codes of Liberalisation and the National Treatment instrument and, as no restrictions apply on the eventual re-sale of such property to foreigners, no reservation is required under the Capital Movements Code and no exception needs to be noted under the NTI on this account.

There is a second restriction on the purchase of real estate that does impinge on the obligations under the CLCM. Persons or enterprises from neighbouring countries (Argentina, Bolivia and Peru) may not acquire or lease land in “border zones”, the definition of which is established by the President. Even though this second restriction is directed to nationals of neighbouring countries, it does affect investors from OECD countries that participate in enterprises that a) are headquartered in the territory of one of Chile’s neighbours, b) have a participation of 40% or more from the nationals of these countries, or c) are under the effective control of such persons. In 1967, when legislation was passed, some two thirds of the Chilean continental territory fell within the border zone. Following the review undertaken in 1999, it is now about half the continental territory. The trend has been to reduce the area defined as border zone and to extend authorisations to facilitate leasing and use of property in these areas.

The restriction noted in the previous paragraph was recorded in the list of measures reported for transparency (see Annex 5), as a measure based on public order and essential security considerations, when Chile adhered to the Declaration on International Investment and Multinational Enterprises. In light of Chile’s invocation of essential security safeguards, the measures need not be reflected in a proposed reservation under items I/A and III/A1 of the CLCM.

The Chilean authorities have noted that the above-mentioned restrictions on the purchase of real estate are not directed towards OECD investors, but rather at the nationals of neighbouring countries. The motivations for such restrictions originate in a history of conflicts regarding borders and are only related to national security concerns. The application of these restrictions does not require a review mechanism of any kind, since the authorities rely on the due diligence exercised by public notaries when executing real estate operations.

Chile also maintains restrictions on the sale of land owned by the indigenous peoples of Chile, which applies to both foreigners and Chilean nationals who do not belong to an indigenous group. As the limitation applies equally to Chilean nationals and foreigners, it falls outside the scope of the Code.

Essential security interests

Chile does not have an across-the-board national security review mechanism for foreign investment, but has restrictions in the defence and nuclear energy industries, on acquisition of real estate and on the granting of prior authorisation (in the form of non-judicial concessions and special operation contracts) for mining activities in sea waters and areas classified as important for national security that it wishes to treat as measures under Article 3 of the Code of Liberalisation on essential security interests and public order. Furthermore, for reasons of national security, restrictions can be imposed on the operation of foreign-owned vessels flying the Chilean flag. In light of Chile's invocation of Article 3, these restrictions have not been reflected in proposed reservations under the Capital Movements Code, nor as exceptions to National Treatment, being covered instead by the list of measures reported for transparency under the National Treatment instrument (see Annex 5).

The restrictions on mining (including exploration, exploitation and treatment) of hydrocarbons, liquid or gaseous, of uranium and lithium are not unrelated to essential security considerations and were previously recorded under the list of measures recorded for transparency based on public order and essential security considerations (see section 1.3 below). However, as requested by the Committee, given the broader nature of these restrictions, the Chilean authorities have agreed to place these measures under the disciplines of the Codes, in line with the recommendation of the OECD Council to invoke Article 3 only for those measures that are directly related to genuine essential security considerations.

The Chilean authorities are committed to observe the guiding principles of non-discrimination, transparency, predictability, proportionality and accountability in the implementation of national security related investment measures as expressed in the Recommendation on Guidelines for Recipient Country Investment Policies relating to National Security, adopted by the OECD Council on 25 May 2009 [C(2009)63], which Chile contributed to develop as a participant in the Freedom of Investment process and accepts.

Monopolies and concessions

Concessions play a central role in the Chilean economy, if only because the mining sector accounts for 22% of GDP and concessions are the mechanism enabling the private sector to carry out mining activities. Various laws contemplate the granting of concessions for use of public goods. Concessions are prevalent in telecommunications, aquaculture and gambling casinos. They play a significant role in financing public infrastructure projects. In general, rules for granting of concessions make no distinctions between nationals and foreigners. In some activities incorporation is required as a condition for obtaining concessions. Existing restrictions for the granting of concessions to non-residents or foreigners are noted in the section below on sectoral restrictions.

Chile reports four public monopolies in postal services, the National Pawning Credit Bureau, the Commercial Bulletin of the Santiago Chamber of Commerce and the Judicial Press of Chile.⁷ In addition, transactions with radioactive materials are reserved to the State, the Chilean Nuclear Energy Commission

⁷ The monopoly of the Commercial Bulletin of the Santiago Chamber of Commerce will be replaced by a State-owned unified central registry for information on debtors upon approval of legislation by Congress. The management of the new unified registry would be entrusted to a private administrator.

or parties authorised by the Commission. These measures are now noted in the list of other measures reported for transparency under the NTI.

Corporate organisation

Chile maintains a requirement that 85% of the personnel of an enterprise with 25 or more employees must have Chilean nationality or have been a resident of Chile for more than five years; persons with technical skills unavailable in Chile are excluded from this calculation. The measure applies to domestic and foreign controlled enterprises. It was duly noted by Chile in the list of other measures reported for transparency at the time of its adherence to the Declaration on International Investment and Multinational Enterprises.

Chilean legislation requires incorporation to carry out certain activities. These incorporation requirements have been reflected in draft proposed reservations under item I/A of the CLCM only for those activities for which branching is a feasible form of organisation.

There are various nationality requirements for directors, managers and board members in Chile. These are intended to provide certainty regarding the presence in Chile of representatives of firms who can be held accountable. The Chilean authorities have explained that these measures are not intended to constitute barriers to foreign investment in Chile.

The measures regarding corporate organisation apply equally to Chilean controlled and foreign controlled enterprises and should therefore be listed only in the list of other measures reported for transparency under the NTI. This list has also been expanded to include corporate organisation measures in the financial sector that had been inadvertently omitted.

2.3. Sectoral regulations in non-financial sectors

Transport

Air transportation

Foreign participation in air transport is limited to minority holdings in Chilean enterprises, as only Chilean nationals and those enterprises in which they hold majority ownership may register an aircraft in Chile. Firms in the sector also face requirements regarding nationality of presidents, managers and a majority of directors and/or administrators. The restriction on ownership gives rise to a proposed reservation under item I/A of the CLCM (see Annex 2) and is reflected in Chile's list of exceptions to NTI (see Annex 4).

Maritime transportation

Registration requirements for vessels limit foreign participation in the water transportation and shipping sector, including cabotage and tugging activities performed in Chilean ports, to minority stake holding in Chilean controlled firms. Restrictions are also present in the activities of stowage and dockage, which must also be carried out by Chilean majority owned firms. These restrictions give rise to proposed reservations under item I/A of the CLCM and are reflected in Chile's list of exceptions to NTI.

Land transportation

International land transport between Chile and its neighbours is reserved for enterprises that are established in Chile, or one of its neighbouring countries, and majority owned by nationals of these countries. International land operators cannot carry out local transportation services. The restriction on

international land transport gives rise to a proposed reservation under item I/A of the CLCM and is already reflected in Chile's current list of exceptions under the NTI.

Mining

Mining by the private sector in Chile is carried out mostly through a system of judicial concessions, as the Constitution establishes the total, exclusive, inalienable and everlasting ownership of the State over mines. Chile's mining laws envisage two types of judicial concessions: one for exploration and another one for exploitation. The former is to investigate the existence of mineral substances. The latter is to obtain, extract and exploit the substances and to freely dispose of them. The Constitution establishes that mining concessions are to be granted through a resolution by a court of law in a non-contentious procedure, without decision-making intervention of any other authority or person and without prejudice to the right of a third party to oppose the registration of a claim that is harmful.⁸ Procedures for the granting of concessions include deadlines for all stages, including the decisions that have to be made by the judge. During these procedures, the National Geology and Mining Service is the technical entity in charge of the measurement of concessions. The concession has duration and carries rights as stipulated by law, can be physically divided and is protected by the constitutional guarantee of the right to property. The concession carries the obligation to undertake those activities required to satisfy the public interest that gives rise to the granting of the concession. Extinction of a concession ahead of its stated duration can only be declared by a court of law.⁹ Since national treatment is granted at all stages of the process of granting of concessions no reservations or exceptions to national treatment need to be recorded on this account.

The Chilean authorities have confirmed that the conditions for granting of judicial concessions in mining do not discriminate between Chilean nationals and foreign investors. Indeed, the entire process is in the hands of judicial authorities and concessions are granted if all legal requirements are met.

The Constitution also establishes that mining activities in certain parts of the country and for certain products, no matter where they may be found, may not be the subject of judicial concessions; in these cases, operations can only be executed by the State, a State-owned enterprise, or by means of administrative concessions or special operation contracts. This is the case for the exploration, exploitation and treatment of liquid or gaseous hydrocarbons, as well as of lithium and uranium deposits. The restriction also applies to products located in seawaters subject to national jurisdiction and in areas classified as important for national security. The requirements and conditions for such administrative concessions or special operating contracts are subject to the requirements and the conditions to be determined in each case by a Supreme Decree of the President of the Republic. Authorisation is therefore required for mining of uranium and for hydrocarbon and lithium deposits.

The procedures for the granting of administrative concessions or special operation contracts in mining do not, *per se*, establish discriminatory treatment towards non-residents. After a decision has been reached to exploit any of the above-mentioned mining resources, the authorities may allocate to investors the

⁸ The Mining Code establishes the conditions under which a third party may oppose the granting of a concession. A third party may raise objections to the application of a survey if the survey is to cover lands embraced in an existing petition or concession to explore or if there is a preferential right to survey pursuant to a prior claim. A party may also oppose to the record of the survey once the survey has been completed, on the same grounds of overlap with other claims or of pre-existing preferential rights to survey.

⁹ In accordance with the Mining Code, the voidance or nullity of a mining concession can be granted by judicial sentence only in the following cases: error by the expert while surveying the claim; fraud or deceit while surveying the claim; violation of rules on shape, bearing, area or sides or upper section of a concession to explore or of a claim; and irregularities in the establishment of a concession to explore or of a mining concession regarding inclusion of tracts outside those specified in the petition or the claim.

concession or special operating contract by means of either a competitive or a non-competitive process. The authorities have further explained that, under the rules for the competitive process, the decision as to who will obtain the concession or the contract is based solely on the terms of the tender in a transparent process that does not discriminate between nationals and foreigners. Furthermore, the Chilean authorities have confirmed that the practice has been to allow private exploration of these minerals through a process of competitive non-discriminatory bidding. The non-competitive allocation process has never been used. The majority of special operating contracts currently being executed were granted to foreign investors.

In sum, the issue of discrimination in the granting of non-judicial concessions or special operating contracts arises only to the extent that these may be granted through a non-competitive process, which involves a degree of discretion. Indeed, if such a process were to be used to exploit mining resources, which are State-owned property according to the Chilean Constitution, there would be no firm legal assurances regarding the treatment granted to potential foreign investors.

Chile recorded these measures in the list of measures reported for transparency based on public order and essential security considerations at the time of the country's adherence to the Declaration on International Investment and Multinational Enterprises. However, from the point of view of the application of Article 3 of the Codes of Liberalisation, the Committee considered that the provisions regarding non-judicial concessions are problematic due to their broad coverage, both regarding geographical scope, as well as the range of activities covered. In particular, some of these activities do not appear to be closely related to the protection of essential security interests, but rather to considerations regarding strategic industries. The Committee has suggested that a more consistent approach would be to narrow the scope of the national security notification under the transparency list of the National Treatment instrument and lodge a reservation under the Code and an exception under the National Treatment instrument to cover the provisions establishing a non-competitive process for the granting of non-judicial mining concessions.

In light of the above considerations, Chile has agreed that a proposed reservation be entered under item I/A of the Code of Liberalisation of Capital Movements and an exception be recorded under the National Treatment instrument to cover discretion in the granting of concessions and special operating contracts for mining of hydrocarbons, uranium and lithium. The restrictions regarding mining in sea waters and in areas classified as important for national security continue to be recorded in the list of other measures reported for transparency.

There are various additional restrictions concerning transactions with radioactive materials, which are reserved for the State and derive from national security considerations. Chile has the right of first offer at market prices and terms for the purchase of mineral products when thorium and uranium are contained in significant quantities. Furthermore, only the Chilean Nuclear Energy Commission, or parties authorised by the said Commission, may execute or enter into juridical acts regarding extracted natural atomic materials and lithium, as well as their concentrates, derivatives and compounds. As these measures apply equally to both nationals and foreigners, they do not constitute exceptions to national treatment. They have been recorded in the list of other measures reported for transparency under the NTI.

Energy

Production of nuclear energy is reserved to the Chilean Nuclear Energy Commission, which may set the conditions for private parties to participate in joint projects. Nuclear energy is already on the list of activities covered by the existing list of measures reported for transparency based on public order and essential security considerations. In light of the invocation of Article 3 by Chile for these activities, no proposed reservation need be lodged under item I/A of the CLCM.

Fisheries and aquaculture

Fishing is reserved to Chileans, by virtue of two restrictions: the first establishes that only Chilean flag vessels are allowed to fish in internal waters, the territorial sea and the exclusive economic zone; the second establishes that only Chilean nationals or firms in which they hold more than 50% of the equity capital and that are incorporated and have their real effective seat in Chile may register a fishing vessel. In addition, resident enterprises constituted by foreign non-residents are not permitted to engage in small-scale fishing.

The law also establishes that the requirement of Chilean majority ownership for registration of fishing vessels may be waived in the case of investors from countries that do allow registration of Chilean owned vessels. No OECD Member currently benefits from application of the reciprocity clause. Chilean authorities have been reminded of the importance for OECD Members of adhering and standing by the principle of non-discrimination of the Codes under Articles 8 and 9. Furthermore, full compliance with the principle of non-discrimination is part of the requirements of the Roadmap. In response to the request by the Committee, the Chilean authorities have confirmed that they fully understand the importance of the principle of non-discrimination under the Codes and stand ready to commit to extend to all OECD Members those liberalisation measures that would benefit any OECD Member.

The restrictions on investment in small-scale fishing give rise to a proposed reservation under item I/A, concerning activities reserved for Chilean nationals or permanent residents of Chile, and are already reflected in the list of exceptions to national treatment. The restriction on the registration of fishing vessels is covered by a proposed reservation under item I/A of the Code and an entry under the list of exceptions under the NTI.

The exception to National Treatment that Chile currently records regarding regulation of fishing by foreign vessels in domestic waters can be removed, as it has been clarified that this is a matter that falls outside the scope of the investment instruments.

Foreigners may obtain concessions to use beaches, land adjacent to beaches, water-columns and seabed lots to engage in aquaculture activities, as well as to obtain a permit in order to harvest and catch water species in internal waters, the territorial sea and in the exclusive economic zone. The Ministry of National Defence grants the right to the use and benefit, for an indefinite period, of certain national properties, in order to conduct aquaculture activities. If the holder of the concession fails to meet certain mandatory conditions, the concession may be revoked. The requirements for granting of a concession include environmental impact assessments among other studies. The requirement of incorporation in Chile to obtain a concession has not been reflected in the proposed list of reservations, as creation of an enterprise is the usual form of establishment in this area; it is not a departure from national treatment and need not be recorded in the list of exceptions

Printed media and news agencies

Ownership of printed media and national news agencies is open to foreigners, who must, nevertheless, fulfil domicile requirements and be incorporated in Chile. There are also nationality and residency requirements for presidents, administrators, legal representatives and managers that apply to Chilean and foreign-owned enterprises alike.

The updated list of exceptions under the NTI records the deletion of the entry regarding communications media, since ownership restrictions on printed media and news agencies have been relaxed since Chile adhered to the Declaration on International Investment and Multinational Enterprises. The remaining incorporation requirement is not an exception to national treatment. Furthermore, as

incorporation is regarded as the usual mode of establishment, it has not been included in the list of proposed reservations under item I/A of the CLCM. The nationality requirement for president, administrators and legal representatives are non-discriminatory towards foreign investors and are, therefore, merely noted under the updated list of other measures reported for transparency under the NTI.

Post, telecommunications and broadcasting

Concessions are also prevalent in the telecommunications sector and incorporation is required to obtain or use a concession. The Chilean authorities have explained that the procedures for granting telecommunications concessions do not establish entry barriers for new operators to the local telecommunications market. They have also noted that the procedures and technical criteria are intended to be objective and non-discriminatory; they are mandatory for both nationals and foreigners. In fact, the majority of telecommunication operators in Chile are controlled by foreign investors and have been operating since the first privatisations. Presently, all companies are private and there is no State participation in the sector. The law distinguishes five types of telecommunication services:

- *Broadcasting services*: transmissions destined to free and direct reception by the public in general, including sound, television and other kind of emissions.
- *Public telecommunications services*: the purpose of which is to satisfy the telecommunications needs of the community in general.
- *Limited telecommunications services*: the purpose of which is to satisfy specific telecommunications needs of certain companies, entities or persons under prior agreement therewith. These services may include the same type of emissions of radio broadcasting services, and their supply may not give access to traffic to or from the users of public telecommunications networks.
- *Amateur radio-communication services*: the purpose of which is radial interconnection and technical and scientific experimentation, carried out personally for non-profit purposes.
- *Intermediate telecommunications services*: comprise services provided by third parties through facilities and networks the purpose of which is to satisfy the transmission or switching needs of general telecommunications concessionaires or licensees or to provide long-distance telephone service to the community in general.

Concessions from the Minister of Transportation and Telecommunications (see Table 2) are needed for the purpose of installation, operation and exploitation of public telecommunication services, intermediate telecommunication services and radio broadcasting services.¹⁰ The operator must be a juridical person duly constituted in Chile and with domicile in the country.

The use and enjoyment of frequencies of the radio-electric spectrum is granted on a free and equal access basis by means of essentially temporary telecommunications concessions, permits or licenses granted by the State through the Ministry of Transportation and Telecommunications. Concessions and permits may be granted without limitations as to the quantity or type of service, or the geographic location. Therefore, more than one concession or permit for the same type of service may exist in the same geographic area.

¹⁰ In the case of TV broadcasting services, the concession is granted by the National Council of Television according to Law 18838 through a public contest process. The Undersecretariat of Telecommunications reviews all the applicants' projects and elaborates a technical report for the Council.

Table 2. Table 2. Telecommunications: summary of licenses and procedures

	Type of Services	Type & length of license	Issued by
Public Telecommunications Service	- Fixed telephony - Rural telephony - Mobile telephony - Data transmission	Concession 30 years	Ministry of Transportation and Telecommunications (MTT)
Intermediate Service	- Long distance telephony - Transmission and switching	Concession 30 years	MTT
Limited Telecommunications Services	- Radio-communications - Background music - Cable television - Satellite television - Experimental use - Others	Permit from 10 years or indefinite	Undersecretariat of Telecommunications
TV Broadcasting Services	- Broadcasting television services	Concession 25 years	National Council of Television
Radio Broadcasting Services	- Frequency modulated sound broadcasting service - Amplitude modulated (AM) sound broadcasting service - Short wave - Low power FM sound broadcasting service	Concession 3 - 25 years	MTT

The procedure to grant a concession may be:

- *Direct*: in case there is no limitation for the entrance of new operators, through a simple and administrative procedure, which is initiated by a formal request (including annexes covering legal, technical and financial aspects), followed by a period of eventual objections by third interested parties, and finalised with the issuance of a Supreme Decree by the Ministry of Transportation and Telecommunications.
- *By a public "beauty contest"*: exceptionally, in case of spectrum scarcity, when it is not feasible to allow an unlimited number of concessions or permits, the Ministry of Transportation and Telecommunications will publish in the official gazette a technical norm to establish the need to limit the number of new operators based on scarcity of spectrum. This is the general case for radio broadcasting services. In this case, the Undersecretariat of Telecommunications prepares for every contest a set of terms of reference. This document defines the type of service, number of operators able to get the concession, criteria to evaluate the best proponent and all the relevant information to participate in it. Selecting criteria are based only on coverage and timeline for the rollout of the proposed project. In case two or more proponents achieve equal score, a one round bid decides who will be awarded the concession. In the case of a technical tie, if an application had been presented prior to publication of the technical standard, this applicant will have a preference to be awarded the concession.

In general, incorporation in Chile is a condition to be the holder of a title to such concessions and there are various nationality requirements for the presidents, managers and administrators of the firm. The Chilean authorities have explained that these requirements are not intended to create barriers to the participation of investors from OECD Members in the telecommunications sector in Chile. To the extent that creation of an enterprise is the common form of establishment for foreign investment in the sector, these incorporation requirements have not been reflected in the list of proposed reservations under item I/A of the CLCM.

In the area of radio-broadcasting, the granting and use of concessions is limited to enterprises with no more than 10% foreign ownership. Exceeding the 10% limit is subject to reciprocity for Chilean nationals in the applicant's country of origin. No OECD Member currently benefits from the application of this reciprocity clause to exceed the 10% limit. Nevertheless, there is one case in which a foreign investor has acquired a larger share in a radio-broadcasting enterprise through indirect holdings in other Chilean enterprises. The administrative decision to authorise such investment has been challenged in an appeals process and is still under judicial review. The outcome of this judicial review process will not directly impinge on the application of the reciprocity clause. In response to its request, the Chilean authorities wish to reassure the Investment Committee of their commitment to the principle of no-discrimination of the OECD Codes of Liberalisation and confirm that, in the event that a more liberal treatment could be granted to any OECD Member, it would be granted to all OECD Members.

Gambling

Gambling concessions are assigned by a public entity that, according to the Chilean authorities, acts in a transparent manner with clearly established rules. Concessions are valid for a 15-year period. Greater competition has been introduced in the sector following the authorisation of 18 new gaming casinos between May 2005 and August 2008. This process attracted new foreign players, which are predominant among the new concessions granted.

No reservations or exceptions are called for and gambling is duly noted among the activities subject to concession in the list of measures noted for transparency.

Infrastructure

Since 1993 concessions have also played an important role in programs to promote private sector participation in the development of public infrastructure projects by means of build-operate-transfer (BOT) schemes. Infrastructure concessions granted by the Ministry of Public Works may be granted for any public works project. Generally, a concessionaire undertakes to construct or improve a specific facility and then operate, profit from and maintain it for a specified term. The government provides the design and monitors construction and operation. Concessions typically last from 10 to 30 years, although the law allows for periods up to 50 years. Concessionaires are allowed to charge fees for the use of the chartered public work, within the limits imposed by law and the relevant concession agreement. The involvement of foreign investors in BOT schemes has been actively sought.

No reservations or exceptions are called for and infrastructure is duly noted among the activities subject to concession in the list of measures noted for transparency.

2.4. Special incentives to attract foreign investment

Chile adhered in 1997 to the Decision on International Investment Incentives and Disincentives by which adhering countries recognise the need to give due weight to the interest of other adhering countries affected by laws and practices in this field, endeavour to make measures as transparent as possible and are prepared to consult one another on the above matters.

Tax incentives in Chile do not, in general, distinguish between foreign and domestic owned enterprises. This principle of non-discrimination is set out in law; however there are some special incentives that benefit only foreign investors, namely the special regime of Decree Law 600 (DL600), Foreign Investment Capital Funds (FICEs), the Investment Platform Law, the Program for Hi-Tech Investment and tax incentives for foreign portfolio investors.

Chile has made efforts to simplify, unify and eliminate special incentives. The authorities consider that Chile maintains relatively few special incentives and no changes to the existing system are envisaged at present. However, in accordance with the OECD FDI Incentive Policies Checklist, the Chilean authorities' policy is to ensure that special tax and other incentives to attract investment are subject to periodic net cost-benefit assessments and that they are not maintained for longer periods than necessary.

Decree Law 600

The special and voluntary regime of DL600, administered by the Foreign Investment Committee, offers foreign investors the option to enter into a legally binding contract with the Chilean State that provides two types of guarantees covering tax obligations and repatriation of capital and profits.¹¹ The scheme does not include a special dispute settlement mechanism; any disputes regarding DL600 contracts are to be handled by Chilean courts. While the contract cannot be modified unilaterally by the State or by subsequent changes in the law, investors may, for their part, request at any time the amendment of the contract to increase the amount of the investment, change its purpose or transfer their contractual rights to another foreign investor. An investor may also have concurrent or sequential contracts regarding a single investment project.

DL600 contracts guarantee investors the right to remit profits at any time; they also establish a lock-in of one year to repatriate capital. Should the Central Bank exercise its authority to impose restrictions to foreign exchange transactions in future, those investments covered by outstanding DL600 contracts would be exempt from these restrictions and the Central Bank's actions would not have any effect on investors' rights to access the foreign exchange market in order to repatriate profits and capital. The guarantee regarding freedom of transfers under DL600 has lost its appeal in the context of the current regime of complete freedom of international payments and transfers. Before the removal of exchange controls in 2001, the value of DL600 contracts was of the same order of magnitude as the flows recorded in the balance of payments data. In recent years, the absolute amount of investments recorded under DL600 contracts has declined markedly from their peak value of USD 9.2 billion in 1999 to only USD 1.4 billion in 2007; an amount that represents slightly less than 10% of the total flows recorded by the balance of payments statistics.

The second important feature of DL600 contracts is that they provide certainty regarding the tax regime. Although Chile's Constitution is based on the principle of non-discrimination, DL600 offers some tax advantages for foreign investors. These are not "tax breaks" or "tax holidays", but are intended to provide a stable tax horizon, acting as a form of "tax insurance". DL600 offers several different tax options, but basically allows the investor to lock into the specific tax provisions prevailing at the time an investment is made. The tax advantages offered by DL600 are:

- *Invariability of income tax regime:* foreign investors can choose to lock into an effective fixed overall tax rate of 42% on taxable income for up to ten years (twenty years in the case of industrial and extractive investments of USD 50 million or more), thereby hedging the risk of future changes in the general income tax regime. The lock-in can be waived at any time, but an investor cannot subsequently revert to the guaranteed 42% rate.

¹¹ The types of contributions to an enterprise's capital that may be protected by a contract, according the Article 2 of DL600, are foreign currency, physical goods, technology which is amendable to be capitalised, related credits, capitalisation of foreign credits and debts, capitalised earnings. The protection regarding free transfers abroad is granted to these contributions and to any liquid earnings, as recorded in the enterprise's balance sheet and on which taxes have been paid. Thus, DL600 contracts cannot cover payments linked to royalties or patents.

- *Invariability of indirect taxes:* foreign investors can freeze the Value Added Tax (VAT) at the current 19% rate. They can also freeze import tariffs on capital goods, provided they are imported in accordance with a DL600 contract. Additionally, imports of certain capital goods are exempt from VAT.
- *Special regime for large projects:* investments of over USD 50 million in new industrial or extractive activities, including mining, may be entitled to additional tax benefits. The Foreign Investment Committee is revising its policy and new contracts under this regime are not being considered at this time.
- *Tax on mining projects:* foreign investors may opt for invariability of the specific tax on mining activities for projects over USD 50 million.
- *Minimum investment and other requirements:* the minimum investment for a new project is USD 5 million, for investments consisting of foreign currency and associated credits. The minimum amount is reduced to USD 2.5 million for investments in the form of tangible assets, technology and capitalisation of profits or credits. For projects to be submitted to the Committee's consideration, they must have a ratio of equity to associated credits of no more than 25/75.

Changes to Chile's list of exceptions to National Treatment, which includes an entry regarding transfers of investments carried-out under DL600, are needed in the light of the fact that the time limits on capital transfers for investments carried-out under DL600 are established as a result of a contract that has been voluntarily established by both parties. Furthermore, those investors that wish to repatriate their capital may do so, under the present regime of free capital movements, on condition they request the nullity of their outstanding DL600 contract.

The Chilean authorities have noted that, although the provisions of DL600 have largely outlived their main attractiveness, the special regime may still play a role in the current Chilean environment of greater certainty regarding the applicable fiscal regime and freedom from exchange controls. In particular it may help to provide creditors some degree of comfort and, to that extent, reduce the cost of funds raised abroad to finance an investment in Chile.

Foreign Investment Capital Funds (FCIFs)

This regime was created to provide access by foreign investors to the Chilean securities markets when capital controls were still in place. The regime establishes a preferential tax treatment for foreign investment funds. FCIFs are required to obtain a favourable report issued by the Chilean Superintendent of Securities and Insurance (*Superintendencia de Valores y Seguros*, SVS) in order to conduct business in Chile. FCIFs may not remit capital for five years following the investment of such capital, although earnings may be remitted at any time. A FCIF may hold a maximum of 5% of a given company's shares, although this can be increased to a maximum of 10% if the shares are first-issue shares. Furthermore, a FCIF may not invest more than 10% of its assets in a given company's stock, unless the security is issued or guaranteed by the Republic of Chile or the Central Bank. All together, no more than 25% of the outstanding shares of any listed company may be owned by a FCIF.

Today, foreign investors who wish to invest in Chilean securities issued in Chile are not required to do it through this regime. The engagements of both parties to these contracts have been entered into voluntarily and are not deemed to be relevant regarding obligations under the CLCM.

Following the removal of remaining exchange controls the FCIF mechanism has lost its appeal and it will slowly disappear as no new investments in FCIFs are being made.

Investment Platform Law

The Investment Platform Law (Law No. 19840 of 2002) aims to promote Chile as a regional base for multinational companies. Tax-free status is granted on earnings from international (non-Chilean) operations. At the same time, there are provisions designed to prevent the use of Chile as a tax haven or the misuse of the regime by domestic entrepreneurs to evade the payment of domestic taxes. The Chilean operations of these companies are taxed under the regime that normally applies to foreign investment.

When using Chile as a platform for investment, foreign investors can take advantage of Chile's economic and institutional stability, develop their activities more efficiently abroad and decrease costs and risks. The enterprise should have as sole objective to realise investments in Chile or abroad and provide remunerated services to enterprises and societies that are constituted abroad. Non-resident shareholders should hold at least 25% of the capital or profits, while Chilean residents should hold no more than 75% of the capital or profits.

Program for high-technology investments

This program seeks to attract foreign investment in high-technology projects in Chile. To qualify, investments must be over USD 500 000 and intensively promote the development and use of new technologies in the fields of information and communication technology, biotechnology, new materials, electronics and processes-engineering. Also eligible are firms that use new techniques when producing or adding value to abundant natural resources. The subsidies come from the budget of the Corporation for Fostering Production (CORFO). The subsidies may cover:

- *Pre-investment studies*: up to 60% of the total cost of the study and no more than USD 30 000 per enterprise.
- *Project start up*: up to USD 30 000 per enterprise for development of working plans to facilitate the start up of an investment.
- *Investment in fixed immovable assets*: includes the acquisition of land, urbanisation, construction of industrial infrastructure and technological equipment. It is directed towards the development of technological parks. Up to 40% of the total investment in fixed immovable assets with a maximum of USD 2 million per enterprise.
- *Long-run rental of property owned by a third person*: if an investment project needs a long-run rental of property, it can request a subsidy for a period of at least 5 years for up to 40% of the total rent during the first 5 years with a maximum of USD 1 million per firm. If a firm applies to subsidies to invest in immobilized fixed assets and to pay for long-run rentals, the total amount received cannot be higher than USD 2 million per enterprise.
- *Use or rent property of CORFO*: There is a discount in the rental fee when using or renting assets owned by CORFO up to a maximum amount of USD 500 000 per enterprise.
- *Human capital development*:
 - (i) Up to 25% of the worker's annual gross salary with a maximum of USD 5 000 per worker in client service centres, shared services, repair centres, assembly, distribution and logistics.
 - (ii) Up to 50% of the worker's annual gross salary with a maximum of USD 25 000 per worker in technology of information and development of software centres, knowledge

centres, integration and technological development centres and technological research centres. When hiring foreign professionals, the subsidy is up to 30% of the annual gross salary of the worker.

- High specialisation training programs: up to a 50% of the cost of the training program, payable only once to any firm and for a maximum of USD 100 000 to cover activities that allow the identification, training and recruitment of highly specialised Chilean professionals, including the development of capacities and competences with technologies and sophistication that are not easily found in the Chilean market.

Incentives and facilities for foreign portfolio investors

This facility extends beyond direct investment to also cover inward portfolio flows. The Chilean tax system provides a total income tax exemption on capital gains on listed shares, as long as the transactions take place through public offer in regulated markets, according to specific regulations. In addition, foreign institutional investors, such as mutual and pension funds can benefit from similar exceptions for bonds or other publicly offered securities that represent debt issued by the Central Bank of Chile or the Chilean government or enterprises constituted in the country.

To simplify fulfilment of tax obligations by foreigners, the Internal Revenue Service has established a simple system to obtain a taxpayer identification number (RUT) for foreign taxpayers without residence or domicile in Chile who want to invest in Chilean financial market instruments. The RUT can be obtained through a financial institution of the foreign investor's choice, simplifying the administrative procedures that the investor has to face in the country. Certain restrictions apply for the use of the facility. It cannot be used neither by residents of countries on the list of tax havens, nor by investors who seek to control, administer or manage the firms in which they have invested. Furthermore, one of the following instruments must be used for payment: fund transfers from a client's account to the agent's account; foreign currency paid by the client to the custodian bank that acts as intermediary and transfers the funds to the agent in Chile; or a credit card.

2.5. International investment agreements

Chile's approach to investment agreements

Chile has pursued international investment agreements as a means to strengthen the investment environment by providing certainty regarding rights and obligations of investors. Bilateral investment treaties (BITs) and specific investment chapters in preferential trade agreements (PTAs) signed by Chile contain clauses regarding fair and equitable treatment, national treatment and most favoured nation status. In addition, Chile has included investor-State dispute settlement mechanisms in these international agreements.

Chile initiated negotiations of BITs in the 1990's after adhering in 1991 to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Through BITs, Chile offers protection to investors and guarantees the free transfer of capital, of profits or interest generated by foreign investments, and, in general, any transfer of funds related to investments, without affecting the regulatory powers of the Central Bank regarding foreign exchange transactions. These agreements establish investor-State dispute settlement mechanisms to enable disputes to be settled through friendly consultations. If no agreement is reached, investors are entitled to opt for submitting the case before the Chilean tribunals or to international arbitration. In most BITs, this jurisdictional option is final; once the investor has chosen one of the options, it cannot turn to the other.

Chile's current policy is to include specific investment chapters in PTAs and to have these replace existing BITs. Even though some PTAs have maintained in force previously signed BITs, it has been Chile's preference to have a self-contained investment chapter which regulates both investment in goods and services by means of a negative list approach. Additionally, most of the PTAs cover investment from the pre-establishment phase. These investment chapters provide the protection offered by the BITs and include additional provisions that increase the level of protection of investors, such as more developed rules on minimum standard of treatment and expropriation, as well as prohibition of certain performance requirements and of the imposition of nationality requirements on senior management and board members. As for investor-State dispute settlement, many of the PTAs have, compared to BITs, more developed international arbitration procedures as they include additional provisions covering consolidation, *amicus curiae*, transparency and preliminary objections.

Finally, a number of Chile's investment agreements contain, usually in an annex, provisions that reserve the right of the Central Bank to impose restrictions on transfers and payments, in accordance with the provisions of the Constitutional Organic Law of the Central Bank, if and when such measures were needed in order to maintain the stability of the currency and the normal functioning of internal and external payments. Such provisions are found, for instance, in the agreements with Australia, Canada and the EU, but not in the 2004 agreement with the United States.¹²

Agreements in force

Chile has thirty-eight BIT's currently in force.¹³ In addition, it has signed twenty PTAs.¹⁴ In total, Chile has PTAs in force with 56 countries. Eight of these treaties include investment provisions in self-contained chapters.¹⁵ Among these eight PTAs, there are three (Australia, Colombia and Peru) which include self-contained investment chapters, which are still in the process of Congressional approval. Once these PTAs come into force, the respective BITs will cease to apply.

Chile's Association Agreement with the EC, which entered into force on 1 March 2005, is one of the EC's most far-reaching trade agreements with a non-EC country. There is a chapter covering establishment which provides national treatment for a list of sectors. The BITs between Chile and individual EC countries were maintained in force.

¹² The agreement with the United States provides that in case restrictions pursuant to the Central Bank law were imposed, there will be a one-year waiting period before investors can bring claims to international arbitration.

¹³ BITs are in force between Chile and Argentina, Australia, Austria, Belgium and Luxembourg, Bolivia, China, Costa Rica, Croatia, Cuba, the Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Italy, Malaysia, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippines, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Ukraine, the United Kingdom, Uruguay, and Venezuela.

¹⁴ PTAs have been signed between Chile and Australia, Bolivia, Canada, Colombia, Cuba, China, Ecuador, India, Japan, Korea, Mexico, Panama, Peru, United States, Venezuela, the European Community, the countries of Central America, the members of EFTA, members of MERCOSUR, and members of the Trans Pacific Strategic Economic Partnership (P4) agreement (New Zealand, Singapore and Brunei Darussalam). In consequence, Chile has PTAs in force with the following OECD countries: Australia, Canada, Iceland, Japan, Korea, Mexico, New Zealand (as P4 member), Norway, Switzerland, United States and all the European Union members of OECD.

¹⁵ In addition, negotiations are underway with P4 members to add a specific chapter on investment to the existing agreement.

OECD 1967 Draft Convention on the Protection of Foreign Property

Chile adheres to the principles contained in the Draft Convention and makes three observations to its text.

- Firstly, with respect to foreign property, Chile grants treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
- Secondly, with respect to depriving, directly or indirectly, property of a national of another Party, the Chilean Constitution establishes that the expropriation of foreign property can only be done by virtue of a general or a special law authorising expropriation for the public good or the national interest, duly determined by Congress. The expropriated Party shall always be entitled to compensation for actually caused material damage, which shall be fixed by mutual agreement or by ruling issued by the courts according to the law.
- Thirdly, with respect to transfers, the Central Bank, under its Constitutional Organic Law, has the right to maintain or adopt measures in order to ensure stability of the currency and the normal operation of domestic and foreign payments. For this purpose, the Central Bank of Chile is empowered to regulate the supply of money and credit in circulation and international credit and foreign exchange operations. The Central Bank of Chile is also empowered to issue regulations governing monetary, credit, financial, and foreign exchange matters. Such measures include the establishment of restrictions or limitations on current payments and transfers, including capital movements, to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement.

2.6. Intellectual property rights and other selected aspects of the broader framework for investment

Intellectual property rights protection and enforcement

Chile has strived to improve its framework for intellectual property rights (IPRs) as a key element of the overall investment policy framework. During the past decade, legal, administrative and institutional reforms have been introduced and international engagements have been entered into to provide protection for IPRs. Chilean authorities note that legislation now fulfils the standards of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), as well as the standards of the major World Intellectual Property Organisation (WIPO) treaties.

Legal Framework

In Chile, constitutional provisions protect the rights of authors over intellectual and artistic creation, as well as copyright and industrial property over patents, trademarks, designs and technological processes. Constitutional protection against expropriation applies to IPRs. The relevant legal framework is further developed in provisions of the Industrial Property Law, the Copyright and Related Rights Law and the Plant Breeders' Rights Law.

The Industrial Property Law provides protection for:

- *Trademarks* for renewable 10-year terms, granting exclusive right to use the protected sign in the course of trade, without requirements of use for registration or renewal of trademarks.

- *Patents* for non-renewable 20-year terms, for products or processes, provided that they are new, involve an inventive step and are capable of industrial application. Excluded from patentability are economic models; business plans; discoveries; scientific theories; mathematical, surgical, therapeutic or diagnostic methods; and plants and animals. New plant varieties may be protected through a *sui generis* system (registry) administered by the Agricultural and Livestock Service of the Ministry of Agriculture.
- *Industrial Designs* for non-renewable 10-year terms, including textiles designs and stampings. Industrial designs may also be protected under the Copyright and Related Rights Law.
- *Geographical indications and appellations of origin* are protected through a special registry administered by the Chilean Industrial Property Registry. Foreign geographical indications may be protected if requirements provided by the law are fulfilled, including previous protection of the term in the country of origin. Once granted there is no need for renewal.
- *Topographies of integrated circuits* for non-renewable 10-year terms.
- *Undisclosed information* of pharmaceutical products for 5-year terms and of agricultural chemical products for 10-year terms. Since 2005, the law provides protection for trade secrets and undisclosed data of new chemical entities submitted to government agencies for approval of pharmaceutical and agricultural chemical products.

The provisions on non-disclosed information of pharmaceutical and agrochemical products were introduced in 2005, together with the establishment of the registry for geographical indications and appellations of origin, following the first major review of the law after it was approved in 1991. The review also implemented pending commitments under the WTO TRIPS Agreement, established rules for appraisal of damages for infringement of industrial property and introduced new civil action procedures and precautionary measures that provide a wider range of tools for judicial enforcement of IPRs. In 2007, additional amendments to the Industrial Property Law were introduced to recognise and protect sound, collective and certification trademarks. Additionally, it provided for a patent term extension to compensate unjustified delays in the administrative process to obtain registration.

The Copyright and Related Rights Law protects copyright and related rights of authors, performers, producers of phonograms and broadcast entities. Protection is granted since the creation of the works and registration in the Copyright Office is merely a public notification measure that provides grounds for an ownership presumption in favour of the legal entity or natural person that registered the works. Protected under this statute are works such as books, music, publications, photography, cinematographic works, sculptures and software. For authors, copyright protection extends to 70 years after their death. For performers and phonogram producers the 70-year term applies from the date of the first authorised publication. For broadcast entities, a 50-year term is provided from the date of the first broadcasting. A bill was sent to the Chilean Congress in 2007 to amend the Copyright and Related Rights Law in order to introduce new civil action and criminal procedures to fight IPR infringements, as well as to strengthen penalties. It also includes specific provisions related to Internet service providers' liability, and establishes new exceptions and limitations to copyright and related rights in order to ensure a proper balance between stakeholders. The referred bill constitutes a thorough revision of the Copyright and Related Rights Law and is still under parliamentary discussion.

The Plant Breeders' Right Law, according to Chilean authorities, is in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV 1978) and is being revised in the light of Chile's upcoming adherence to UPOV 1991.

International engagements

Chile adhered to the TRIPS Agreement in April 1994. The TRIPS Agreement requires all WTO members to provide certain minimum standards of protection and enforcement for IPRs. The Chilean authorities have explained that the legal and institutional framework for IPRs confers protection to all categories of intellectual property included in the TRIPS Agreement, namely: copyright and related rights, trademarks, geographical indications, patents, industrial designs, layout designs (topographies) of integrated circuits and protection of undisclosed information.

Chile is a member of the World Intellectual Property Organisation (WIPO) since June 1975. Chile signed the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in 2002.

Chile has acceded to the following multilateral intellectual property agreements:

- Berne Convention for the Protection of Literary and Artistic Works (Paris Act), since June 1970;
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, since September 1974;
- Paris Convention for the Protection of Industrial Property (Stockholm Act), since June 1991;
- International Convention for the Protection of New Varieties of Plants (UPOV 1978), since January 1996.

A bill to accede to the Patent Cooperation Treaty is also under discussion before the Chilean Congress.

In addition, provisions regarding IPRs are included in the PTAs that Chile has concluded with Canada, China, Korea, Japan, Mexico, United States, the EU, the countries of Central America, EFTA and P4. Furthermore, protection of IPRs is reinforced by provisions in Chile's PTAs with investment chapters, where the definition of investment typically includes IPRs.

Enforcement

In Chile, infringement of IPRs is subject to fines and compensation of damages. Infringement of copyright and related rights is subject to public prosecution and imprisonment. In such proceedings, criminal courts have the authority to order the destruction of the tools and implements used to produce unauthorised copies.

Civil action to redress IPR infringements is also available; it may include, *inter alia*, compensation of damages. Civil actions are subject to summary rules of proceeding, an abbreviated special proceeding. Additionally, the Industrial Property Act entitles right holders to request precautionary measures to prevent IPR infringements. The Chilean authorities have the intention of amending the Copyright and Related Rights Law to provide for similar precautionary measures for copyright and related rights holders.

The Chilean authorities have stressed the significant improvement in the enforcement of IPRs in recent years. The 2000 reform of criminal procedures has increased efficiency of both criminal courts and police agencies in dealing with infringement of IPRs. Legislation has created the figure of prosecutors specialised in IPRs in the National Prosecutors Office. In early 2008, the Chilean police incorporated a new specialised unit devoted to investigate and prosecute crimes related to IPR infringements. The unit extends its authority over all issues related to crimes linked to industrial and intellectual property rights and

is expected to become a cornerstone of the Chilean national system for IPR enforcement. One of the purposes of the new unit is to identify and disarticulate criminal organisations involved in piracy and counterfeiting.

There are three registries: the Copyright and Related Rights Office, the Industrial Property Registry (INAPI) and the Plant Breeders Office. A new institutional framework for industrial property administration was enacted in January 2009. The INAPI replaced the Industrial Property Office (DPI). With more resources at its disposal, authorities expect the new institution will improve registration services for trademarks, geographical indications, patents, utility models, industrial designs and layout designs of integrated circuits.

Implementation of international commitments has also played an important role in strengthening enforcement for IPRs. In 2003 legislation was passed to implement specific WTO obligations regarding border measures for the suspension of release into the channels of commerce of goods suspected of IPR infringements, granted in accordance with the Industrial Property Act and the Copyright and Related Rights Act. These border measures proceedings are applicable to importation and exportation, as well as transit of suspected goods. Requests to suspend the release of goods suspected to be IPR infringements must be submitted before ordinary courts. Additionally, custom agencies have authority to adopt actions *ex officio* in cases related to suspected counterfeit trademarks or copyright piracy, including the authority to suspend the release of goods.

The Chilean authorities have noted that since the 1970s, Chile's economic strategy has been based on rule of law and strong and stable institutions as means to foster economic growth fuelled by private investment, be it foreign or domestic. The legal framework for protection and enforcement of IPRs is considered as an important element to reach those goals.

Competition

Chile's open environment for foreign investment is also supported by competition law. The Chilean authorities regard the principal goal of competition law to be the promotion of economic efficiency with the expectation that in the long-run this will maximise consumer welfare. To fulfil its stated purpose of promotion and defence of free market competition, Chilean competition law has a broad scope of application and, in general terms, there are no exclusions or exemptions required or authorised under it or under any other regulation. The competition regulations apply to nationals and foreigners, private and public entities and in goods as well as in services sectors. There is no special treatment for State-owned or managed enterprises, as these entities are subject to enforcement under the same terms applicable to private enterprises. In addition, the law explicitly forbids the granting of concessions or authorisations by the government that could create a monopoly, unless specifically allowed by law. Before the 2004 amendments to the Competition Law, the Executive had the power to grant monopolies on national interest grounds.

Chile's Competition Law describes anti-competitive practices as any act that tends to hinder, or is aimed at eliminating, restricting or obstructing competition. The law considers such acts to include competitors' agreements aiming at fixing prices, limiting output or dividing markets, as well as the abusive exploitation of a dominant position by means of abusive prices, tying, dividing markets, refusal to deal or predatory pricing. There are no mandatory pre-merger reviews.

In Chile, two separate bodies enforce competition law. Investigative functions are placed under the National Economic Prosecutors Office (*Fiscalía Nacional Económica* or FNE), while decisional powers are allocated to the Competition Tribunal (TDLC for its Spanish acronym). Each authority is totally independent from the other. The FNE is an independent body which, for administrative purposes, is

structurally connected to the Executive through the Ministry of Economy. The TDLC is a specialised body of the Judiciary composed of five competition experts; the Supreme Court can review the facts and matters of law decided by the TDLC.

The Chilean Competition Law, approved in 1973 (Decree Law 211), overhauled the old competition framework dating back to 1959 and created the FNE. The law's 2004 amendment established the TDLC and the enforcement procedures currently in place.

A new amendment to the Competition Law, aiming to improve the institutional framework and to raise the maximum of fines, is currently being discussed in Congress. The reform is intended to enhance the independence of the TDLC's members, grant the tribunal additional *ex officio* powers, establish leniency programs to improve the detection and prosecution of hard core cartels and strengthen the investigative powers of the FNE.

Recently, the FNE published guidelines on horizontal mergers, which are not binding for the TDLC or private parties. The guidelines are intended to increase predictability regarding policy and enforcement activities by explaining the methodology employed by the agency when analysing mergers. However, the TDLC resists issuing its own guidelines about mergers, on the grounds that it is a court applying the law, and it is not appropriate for it to issue additional rules. Under the Competition Law, mergers may be reviewed by the TDLC if, according to an interested party or to the FNE, such merger may prevent, restrain or obstruct free competition. Private parties may also initiate a non-adversarial procedure to obtain a judicial decision of the TDLC, approving the merger operation and/or establishing conditions which must be met in order to obtain such approval. The FNE continues to work on improving the transparency and predictability of merger control decisions.

3. OTHER CAPITAL MOVEMENTS

3.1. Macroeconomic and financial policy context

Macroeconomic perspectives for Chile, as for many other emerging countries, have deteriorated in an adverse external environment. Greater uncertainty in international capital markets has brought about tighter financial conditions and the correction in commodity markets has brought about a sharp drop in copper prices and a fall in Chile's terms of trade. A contraction in economic activity is expected for 2009. The drop in consumer and business confidence has started to restrain aggregate spending and investment is likely to be further damped by the worsening of the outlook for the mining sector. In this context, the concerns over inflation, which reached a 14 year peak in 2008, have disappeared. Instead, there is a risk that inflation could fall below the floor of the Central Bank's target band of 2-4%. Nevertheless, domestic fundamentals, including prudent financial regulation, remain strong and together with the decisive macroeconomic measures taken should help contain the effects of the global crisis. The commitment to a solid policy framework and the strong institutional background remain supportive of the longer-term outlook.

A fiscal surplus has been maintained during the recent period of high copper prices, in accordance with the budgetary rule that calls for a structural balanced budget – adjusted for cyclical deviations of output and the copper price from their long-term trends. Thanks to these prudent fiscal policies Chile has accumulated assets worth around 13% of GDP in its sovereign wealth funds, providing authorities with room for manoeuvre in the face of rising risks from abroad. In the first semester of 2009 Chile implemented a fiscal stimulus package with measures worth approximately 2.8% of GDP. The credibility in the monetary policy framework is an additional source of resilience, as medium-term inflation expectations (as measured by break-even inflation rates calculated from indexed bonds) remain relatively well anchored, particularly at longer horizons, by the Central Banks' inflation target. In this context the Central Bank has eased decisively.

In the current environment of market turmoil, the Chilean authorities have expressed the view that, given the level of interdependence for economic activity and of financial linkages among economies, traditional forms of exchange controls seem to be of no avail as tools by which governments may seek to isolate the domestic economy from external shocks. Indeed, the current crisis has not diminished Chile's commitment to open markets for FDI and freedom of capital movements.

The Chilean authorities consider that the strategy followed in liberalising capital movements has elements that limit the risk of reversal. Gradual liberalisation steps have been accompanied by prudential regulations appropriate for the new circumstances. A positive list approach has been maintained in financial regulations and authorities view this approach as a factor of strength that may allow Chile to be spared of some of the worst consequences of the international financial turmoil. It is the Chilean authorities' view that the progress achieved so far in the liberalisation of markets will not be put at risk by the spill-over from the global crisis. No measures have been taken that may impinge on capital flows.

The stability of the financial system has been maintained, in spite of the higher stress at the global level. Nevertheless, authorities had to adopt measures to respond to the need for liquidity in US dollars by local financial institutions. Thus, while the resilience of the domestic financial system and adequacy of prudential and supervisory controls have been tested, the experience so far suggests that existing regulatory

controls and prudential regulations have served Chile well. In part, this reflects the fact that the Chilean financial system does not seem to have been heavily exposed to the more sophisticated instruments – such as certain credit derivatives – that have played a central role in the current crisis.

At present Chile does not use foreign exchange controls as a macroeconomic and financial policy tool. The Central Bank of Chile has used foreign exchange controls in the past – in particular the imposition of deposit requirements on capital inflows - in order to reconcile domestic and external policy objectives. However, as the monetary policy framework has evolved towards a fully-fledged inflation targeting system, the use of exchange rate targets has been relinquished. Since September 1999, the exchange rate of the Chilean peso is determined freely in the foreign exchange market, although the Central Bank of Chile retains the capacity to intervene in the foreign exchange market, should exceptional circumstances so require. In this context of a floating exchange rate and consolidation of an inflation targeting system, the Bank has not made recourse to exchange control measures since the culmination of the process for their removal in April 2001. Other factors cited by the Central Bank as contributing to enable liberalisation of exchange controls are: the development of markets for hedging of foreign exchange risk; development of the regulatory framework for the banking system; diversification of external trade; the level of international reserves; and solvency of the financial system and of the government. All these factors improve the scope to cope with domestic and foreign risks. It has been in this context that the Central Bank has moved from setting targets for interest rates in real terms, to setting targets in nominal terms.

Presently, the Chilean capital markets are open to the rest of the world and the reforms to financial legislation approved in June 2007 are intended to encourage further international integration. Despite the fairly liberal approach in this area, the current Chilean legislation requires the lodging of a number of reservations. Some restrictions cut across many Code items, making the list of reservations somewhat lengthier. This is the case for issuance in Chile by foreigners of securities in pesos, which have been authorised only in the case of bonds. For similar operations in other instruments, there has been no request for authorisation by interested parties and, therefore, no authorisation has been issued. Thus, even though the financial authorities have expressed the view that there does not appear to be a *prima facie* reason not to authorise these operations, if and when a request is made, current regulations remain restrictive and are reflected in proposed reservations.

Restrictions on institutional investors' foreign asset portfolios also cut across many Code items. Rules for investment abroad by private pension funds have been relaxed, a far reaching measure as in Chile these funds manage the resources of the mandatory pension system. This liberalisation has taken place over a period in which export earnings have been boosted by strong copper prices - Chile's main export. The liberalisation of rules for pension funds has enabled greater diversification in portfolios of Chilean households. The broader outlets for domestic savings may have also helped to relieve pressure on domestic capital markets at a time when pension fund assets were rising rapidly.

For certain foreign exchange operations, Chile maintains requirements of rendering information to the Central Bank and for the channelling of certain operations through the Formal Exchange Market. In the past, these requirements helped to enforce exchange controls. As in other countries, following the lifting of exchange controls, the requirements have been maintained to ensure the collection of statistical data and the compliance with various domestic regulations. These requirements do not constitute restrictions under the Codes, as they do not impede the actual transaction from taking place.

3.2. Capital inflows

Securities and other financial market instruments

There are no restrictions on the admission abroad and the purchase by non-residents of domestic securities (items IV/A,C to VII/A,C of the CLCM) other than those noted in the proposed reservation under IV/C concerning the purchase of shares and other securities of a participating nature which may be affected by laws on inward direct investment.

There are registration requirements for the issue of certain securities abroad. Chilean undertakings with over 500 shareholders or with at least 10% of its capital held by over 100 shareholders are considered to be “open” or publicly-traded. They must register any new shares with the Superintendent of Securities and Insurance (SVS, by its Spanish acronym) and offer them to existing shareholders before they can be issued abroad; a measure that is intended to protect the rights of existing shareholders, including preferential rights to subscribe new share issues. Likewise, Chilean investment funds must register their shares in Chile with the SVS before they are issued abroad. The Chilean authorities have explained that the registration requirement is not a prior authorisation requirement and is not intended to act as a disincentive to foreign placements by Chilean collective investment fund administrators. It allows the SVS to have adequate information over the shares issued abroad, which is needed due to the existence of preferential subscription rights, quorum requirements in contributors meetings that deal with increases of capital and other provisions that regulate the issuing of those shares. A similar registration requirement applies to the issue abroad of asset-backed securities; the requirement is intended to ensure that issuers have adequately identified the assets backing such securities and separated them in the accounts of the undertaking.

These registration requirements need not be considered to be restrictions under the Code, to the extent they can be considered to fall within the purview of Article 5 on controls and formalities used to prevent evasion of existing domestic regulations. The Chilean authorities have confirmed that registration requirements for the issue of domestic securities on foreign markets do not constitute an authorisation procedure and are maintained only to prevent evasion from domestic regulations (e.g. to prevent dilution of existing shareholders rights). They do not amount to an authorisation procedure, since the regulator must register the securities once all registration conditions are met.

Credits and deposits

The Chilean authorities have confirmed that there are no restrictions on the granting of credits, loans, sureties, guarantees or financial back-up facilities by non-residents to residents (items VIII to X of the CLCM).

Regarding operation of deposit accounts (item XI), the opening of a deposit account with a Chilean bank requires a tax identification number (known as RUT) and a domicile in Chile or, alternatively, the domicile of a representative in Chile. While these requirements may be more burdensome for non-residents, the Chilean authorities point to their need in order to assure the fulfilment of legal and tax obligations. Recent changes have simplified the process for foreign investors in Chilean securities markets to obtain the RUT, as documented above. However, for the opening of checking accounts, since the issuance of a bad check is a felony in Chile, the domicile requirement is needed to ensure that the cheque issuer will be adequately notified before an arrest warrant is issued as a result of judicial proceedings that may be initiated by third parties in order to claim the payment of a cheque. To the extent that these controls and formalities are intended to prevent evasion of laws and regulations and that they do not impede the actual transactions from taking place, no reservations under the Code are called for.

An additional limitation to the operation of deposit accounts derives from the fact that the Central Bank has only authorised foreign currency denominated deposit accounts that do not bear interest. This restriction applies equally to both residents and non-residents and is thereby not in contradiction with the Code obligations under item XI of the CLCM.

Other operations

The Chilean authorities have confirmed that there are no restrictions on capital inflows concerning operations in foreign exchange, capital transfers arising from life assurance contracts, personal capital movements, or physical movement of capital assets (items XII to XV of the CLCM).

3.3. Capital outflows

Portfolio investment

There are three broad classes of regulations that impinge on portfolio investments in foreign securities and instruments by Chilean residents: the admission of foreign securities on the domestic capital market is subject to registration requirements and regulations on currency of denomination; investments abroad by institutional investors are regulated; and intermediation abroad by securities brokers for their Chilean customers is regulated.

a) Admission of foreign securities on the domestic financial markets

Registration requirements

Admission of foreign securities on the domestic financial markets requires prior registration with the Superintendent of Securities and Insurance (SVS). Only those foreign securities and foreign issuers that satisfy certain requirements regarding investor protection in their home market may be registered. The precise nature of these requirements has evolved as discussed below and does not impose a discriminatory treatment towards the introduction of foreign securities.

The Chilean authorities have explained that regulations in place are intended to protect investors' interests and have confirmed that the registration procedures themselves do not impose a discriminatory treatment for foreign issuers. Chilean law also provides that the SVS must have issued the rules for registration securities of a certain type, before such securities can be admitted to the Chilean market. The SVS has issued registration rules for the following types of foreign securities: stocks, domestic bonds of foreign issuers, collective investment securities and depositary receipts. The lack of registration requirements for other types of securities does not constitute a restrictive measure, more so as authorities stand ready to provide authorisation for such operations when requested. Chilean authorities have manifested that registration requirements have been issued for those types of securities for which there is an interest by market participants. It is, therefore, not proposed that Chile lodge a reservation to cover the absence of registration procedures for certain types of securities. Doing otherwise would prejudice that the Chilean authorities would refuse duly completed applications for registration of other types of securities, and would be contrary to the requirements of the Roadmap and of the Codes to avoid precautionary reservations.

In response to a request by the Investment Committee, the Chilean authorities have confirmed their commitment to openness of domestic markets for foreign securities of all types, despite their positive list approach in the issuance of registration regulations. Chile, by not lodging a reservation regarding introduction of foreign securities, indicates the authorities stand ready to provide non-discriminatory treatment for registration of foreign securities by issuance of the appropriate registration regulations.

Prior to the June 2007 financial market reform, intended to boost internationalisation of Chilean securities markets, the issue and introduction for public offer of a foreign security could only take place if a memorandum of understanding (MOU) was in place between the SVS and the regulator of the market where the securities were being traded or of the country of origin of the issuer. Following the reform, the MOU requirement has been replaced with a recognised market requirement for admission of foreign securities (both issue and introduction). To meet this requirement, the foreign market regulator must be a member of IOSCO and meet standards similar to those prevailing for Chilean markets regarding investor protection and transparency. Securities supervised by a regulator that is a member of IOSCO, but that comes from a market that does not meet the other recognised market requirements, can only be admitted for offer in Chile to qualified investors.

The Chilean authorities have confirmed that the rules for recognition of foreign securities markets do not aim to discriminate among OECD countries and are maintained and enforced only to ensure the effective application of prudential controls for investor protection. Since the accession process began, the Chilean authorities have been active in issuing regulations in order to implement the new recognised market framework.

- In June 2008 the SVS issued a regulation establishing that, as a prudential requirement, the registration of foreign securities must be carried out by a resident sponsor: either a securities market or an authorised stock broker. The sponsor must assume obligations regarding the fulfilment of regulatory information requirements. This measure is in conformity with the Code of Liberalisation of Capital Movements, which allows Members to require that transactions and transfers be carried out through resident authorised agents.
- In January 2009 the SVS issued regulations regarding the registration of foreign collective investment securities, which set the criteria for recognition of a foreign market, as well as a list of organised exchanges and foreign markets (countries) that have been found to meet the criteria. The admission (as a new issue or as the introduction for trading of an existing security) can take place only if the issuer of the security is supervised by the prudential regulator of the relevant recognised market. In the case of existing securities, the requirement is that these are offered or traded on a recognised organised capital market. While the recognised market status can be granted only to markets that offer a degree of investor protection similar to that provided for in Chile, the list is open and any issuer or its representative can request that a market be included. Chilean authorities have manifested that they are available for consultations with any OECD Member regarding whether a particular organised market would qualify under the published rules.

Foreign securities can also be introduced into the Chilean market by means of depositary receipts. In the case of depositary receipts, the June 2007 reform did not replace the MOU requirement with the recognised market requirement. Instead, an alternative procedure was established and there are now two alternative procedures, either of which allows the introduction for trading on the domestic market. The first alternative is that the MOU requirement is fulfilled. While the Chilean authorities are ready to afford any interested OECD Member adequate opportunity to enter into such a memorandum of understanding, and thus the practice does not constitute discrimination under the Code, the procedure is no longer applied or necessary. The second alternative is for the foreign securities underlying the depositary receipt to be placed by the interested party under the custody of a domestic bank since, in this case, they are deemed to be domestic securities. Under this regulation, depositary receipts for foreign securities can be introduced for trading in Chile following the same registration requirements as for any domestic security. The authorities see this new alternative mechanism for introduction of depositary receipts for trading on the domestic market as a means to facilitate operations in foreign securities.

Currency of denomination requirements

Restrictions on the currency of denomination are in place for foreign securities. Member countries are free to establish rules regarding which currencies may be used on their domestic markets, to the extent that they apply equally to residents and non-residents alike. However, the rules in place in Chile apply only to foreign securities and, thereby, constitute restrictions under the Code. The restrictions are twofold: a) the Central Bank establishes those foreign currencies in which foreign securities may be denominated, and b) the admission of foreign securities denominated in local currency requires approval by the Central Bank for each type of operation. The former restriction is established in Article 184 of the Securities Market Law; the latter derives from Article 42 of the Constitutional Organic Law (COL) of the Central Bank of Chile.

Regarding the first restriction, the Central Bank has authorised the use of the US dollar and the euro as foreign currency denominations for foreign securities; use of other currency denominations is not acceptable for instruments that will be publicly offered. The rationale for this restriction is the lack of liquidity in Chilean markets for instruments denominated in other currencies. The Chilean authorities have not identified any market interest in widening the range of currencies in which foreign securities may be denominated. To the extent that the rule does not apply to resident issuers, it constitutes a restriction under the CLCM. This rule would require the lodging of reservations under the following items IV/B, V/B, VI/B and VII/B of the CLCM.

The second restriction derives from the requirement that foreign securities, as a general rule, cannot be denominated in local currency, unless the Board of the Central Bank grants authorisation. To this date, authorisation has only been requested and granted for the admission for public offer of foreign bonds denominated in Chilean pesos. Thus, the proposed reservations have been drafted to cover Code items IV/B.a (capital market securities, excluding bonds), V/B (money market instruments), VI/B (non-securitised claims), and VII/B (collective investment securities) of the CLCM.

The Chilean authorities have explained that the reason for maintaining restrictions on the use of domestic currency arises in the context of ensuring the enforceability of other provisions of Article 42 of the COL, which establishes the authority of the Central Bank to request that certain operations be carried-out through the Formal Exchange Market. The rule that such operations shall not be carried-out in pesos, unless expressly authorised by the Central Bank, impedes the creation of a loophole through which non-residents could obtain pesos without passing through the Formal Exchange Market. The closing of such a loophole acquired particular relevance in the period during which exchange controls were in force and the obligation to go through the Formal Exchange Market was a means to ensure the applicability of reserve requirements on capital inflows, which did reduce the profitability of foreign portfolio inflows.

At present, while the incentives to find loopholes to avoid using the Formal Exchange Market have diminished, the authorities still wish to ensure that certain exchange operations will be conducted through the formal market. However, the authorities do not have the intent of prohibiting such transactions *per se*, and the Central Bank has responded positively when interested parties have requested authorisation for issues of foreign securities denominated in Chilean pesos. In particular, in July 2006, the Board of the Central Bank issued a resolution to authorise bonds issued by foreigners in pesos, establishing information requirements that parallel those regarding foreign exchange transactions. In light of these considerations, the Chilean authorities have indicated that, although they will give positive consideration to any request that may arise, they are not in a position to adopt a commitment to grant authorisation for such issues when requested by means of the withdrawal of the proposed reservations under the Codes. Restrictions on the currency of denomination for foreign securities issued on the domestic market, including domestic currency, are an unusual practice in OECD countries. The Chilean legal framework does provide for future authorisation of such operations, when requested by an interested party. The Chilean authorities consider

that the lack of peso denominated securities issued by foreigners reflects a lack of interest in such operations. The Chilean authorities remain willing to consider requests by any OECD Member for authorisation for specific types of securities to be issued in pesos in those cases in which there may be an interest in issuing in pesos.

While welcoming the Chilean authorities' readiness to consider, when requested, the authorisation for non-residents to issue peso denominated securities, the Committee agreed that a reservation is needed to cover the current regulatory provisions set by the Central Bank.

b) Investments abroad by institutional investors

In Chile, as in most OECD countries, institutional investors face maximum limits on the share of foreign assets in their portfolios. As rules cover all investments abroad, they concern all the items of the Code covering capital outflows. The rules apply to insurance companies, housing funds, pension funds, the Retirement Bonus Fund and the Unemployment Fund.

Insurance companies face limits on the share of their technical reserves and own funds that may be invested abroad. The law authorises the Central Bank to set such limit within a range of no less than 10% and no more than 20%. In addition, insurance companies face a limit of 3% of technical reserves and own funds for investments in foreign financial derivative products.

The rules for managers of housing funds limit their investment in foreign assets to 30% of assets under management.

For pension funds the upper limits on the share of foreign assets has been gradually revised upward in a context of high prices for copper, robust export earnings and a strong peso. This is an area in which the Chilean authorities have allowed international diversification of institutional investors' portfolios that goes beyond the OECD average. This decision is all the more notable, considering that, in the case of Chile, these private pensions funds are the backbone of the mandatory social insurance system, with assets under management equivalent to 64% of GDP in 2007.

For pension funds that are related to the pension system established by Decree Law 3500, administrators of pension funds (AFPs) must conform to the less restrictive of two limits: an overall limit on the share of foreign assets in an AFP's portfolio and individual fund limits. There is an overall limit for AFPs of a maximum 45% share of foreign assets in their portfolio. AFPs may exceed such overall limits to the extent that individual fund limits are respected. Likewise, the individual fund limits may be exceeded to the extent that the overall limit is respected.

There are five different types of pension funds that individual policyholders may choose from and each type of fund has a limit. Type "A" funds offer a greater international diversification, as well as greater exposure to risk in general. Type "E" funds are the most conservative in terms of exposure to risk and offer the least opportunities for international diversification. For each type of fund the Central Bank sets an upper limit within the bounds established by law. Table 3 presents the bounds set by law, within which the Central Bank may choose an upper limit for each type of fund. The law incorporates a further relaxation of the upper and lower bounds as of October 2009, by which time the most conservative fund will be able to invest at least 15% of assets abroad.

Table 3. Table 3. Upper and lower bounds for maximum investment in foreign assets by pension funds
(In per cent)

Type of Fund	From October 2008		From October 2009	
“A”	25%	80%	45%	100%
“B”	20%	70%	40%	90%
“C”	15%	60%	30%	75%
“D”	10%	30%	20%	45%
“E”	5%	25%	15%	35%

Chilean pension funds also face limits on investment in specific asset types and on concentration of investments on securities of an individual issuer. These rules impinge on the purchase of foreign assets. The rules for the pension funds’ portfolio are set by regulations issued by the Superintendent of Pensions, taking into account, among other factors, the liquidity of each asset class. These regulations are regularly reviewed in light of changing conditions regarding the suitability of various assets for the portfolio of pension funds. Currently, limits on securities lending are less restrictive for foreign securities (1/3 of assets), than for domestic securities (15% of assets). Pension funds of all types also face a limit of 2% of total assets that may be invested in foreign time deposits. In addition, type “A” funds face a limit of 4% of all assets that may be invested in structured notes issued by foreigners, a share that is reduced to 3% for type “B” funds, to 2% for type “C” and type “D” funds, and zero for type “E” funds. Current regulations do not make any allowance for investment in domestic structured notes

The rules for the retirement bonus fund and for the unemployment fund are the same as for type “E” pension funds, which have the lowest share of foreign assets.

The Chilean authorities have explained that the limits on foreign investment by institutional investors respond to concerns regarding the stability of these intermediaries and their role in fulfilling public policy objectives. Caution regarding the potential impact on the overall economy of a sudden liberalisation has also played a role. In the case of insurance companies, liabilities are mostly in domestic currency and there is a need to avoid imbalances with the asset structure. In the case of AFPs, which are the managers of the funds of the mandatory pension system, the Chilean authorities consider that foreign investment by pension funds has brought about greater diversification to domestic portfolios, which is of importance for management of a long-term investment, despite the short-term losses on funds invested abroad that have been recorded during the recent period of financial turmoil. Regulators have felt the need to liberalise foreign investments gradually, making sure that they are capable of supervising these operations. The gradualism in the lifting of the upper limits on investment abroad has also allowed fund managers to gain experience with foreign operations, minimised interference with the conduct of monetary policy and offered greater scope for diversification as assets under management have grown relative to the size of the domestic capital market. Furthermore, while there is concern regarding the potential macroeconomic effects, as assets under their management represent 64% of Chile’s GDP and sudden shifts in AFPs investments abroad can have a significant impact on the overall economy, AFP hedge their foreign currency exposure and the exchange rate effects of shifts in AFPs investments abroad appear to be negligible or non-existent, in the authorities’ view. The caution exercised in the process of liberalisation has limited the risk that the funds in individual accounts will eventually be insufficient to fund pension payments to retirees. Such a shortfall would result in the use of fiscal resources to pay the minimum pensions that the State guarantees to policy holders.

The above-mentioned restrictions give rise to draft proposed reservations under items IV/D1; V/D1, D3; VI/D1, D3; VII/D1; VIII/B; IX/B; and XI/B of the CLCM. In the case of insurance companies and housing funds, the reservations can be expressed simply by reference to the limit set by law, while the case of pension funds is more complex. In the interest of simplicity, while preserving full legal certainty, it is proposed that the reservations regarding investment abroad by pensions funds refer to the law as amended in 2008 to cover the cases of pension funds, the Unemployment Fund and the Bonus Retirement Fund. Transparency would also be reinforced with the possible publication of relevant elements of the examination by the Investment Committee after Chile's eventual accession.

Regulations establish the authority of the Central Bank to define the markets in which pension funds and the Unemployment Fund must carry out their transactions in foreign securities. Such regulations for institutional investors do not constitute restrictions under the CLCM. The Central Bank has set criteria that markets must meet in order for institutional investors to use them. The Central Bank has also issued general rules for authorising foreign banks or specialised entities to act as custodians of pension fund assets, including at least five years of experience and a minimum credit rating for banks.

c) *Intermediation abroad by brokers for their Chilean customers*

Under regulations issued by the SVS (Circular 1046), Chilean stockbrokers face limitations to provide Chilean residents with services for trading of securities abroad:

- Firstly, the issuer of the security must be subject to prudential supervision similar to that available on the Chilean market.
- Secondly, trading is authorised only for the following securities: stocks, bonds, credit instruments, and shares in collective investment instruments.
- In addition, Chilean stockbrokers may not sell foreign securities that are not registered in Chile in the Foreign Securities Registry of the SVS from their own portfolio to Chilean residents.

To the extent that the latter restriction is intended to ensure enforcement of the first two limits, it does not require the lodging of reservations, as it is a measure intended to prevent evasion of other laws and regulations and falls under Article 5 of the Code.

Chilean authorities have explained that the first limitation is intended to ensure that prudential controls are in place to protect investors' interests and not to act as a barrier for capital flows. This limitation need not be regarded as a restriction under the Code, to the extent that the Chilean authorities stand ready to afford any interested OECD member country adequate opportunity to demonstrate that their financial supervision is not inferior to that available in Chile.

The second limitation, however, does constitute a restriction that gives rise to a proposed reservation under the CLCM, as the Chilean supervisor has established a limited list of securities for which intermediation services can be offered. The scope of the reservation, however, is narrow, as Chilean authorities take a broad interpretation of the scope of operations covered by such list, which matches most Code items regarding securities operations.

The Committee welcomes such a broad interpretation, noting that it is in accordance with the negative list approach adopted in the Codes. By adopting this broader interpretation, the above-mentioned restriction needs to be reflected in a single proposed reservation on item VI/D of the CLCM.

Credits and deposits

Regarding items VIII (Commercial Credits), IX (Financial Credits), X (Sureties, Guarantees and Back-up Facilities), and XI (Deposit Accounts) of the CLCM, Chilean financial regulations establish restrictions on the granting of sureties and guarantees by Chilean banks to foreigners. In addition, regulation of limits on investment abroad by institutional investors also have a bearing on items relating to the credits and loans granted to non-residents and to the holding of deposits abroad.

The regulations regarding institutional investor's foreign asset positions have been discussed above. They give rise to proposed reservations to items VIII/B, IX/B and XI/B of the CLCM.

The amount of sureties, guarantees and financial back-up facilities that banks operating in Chile may issue in foreign currency is limited to an amount equivalent to the banks' own capital by Central Bank regulations. This measure is of a prudential nature and applies equally to sureties and guaranties in foreign currency issued to residents and non-residents alike. However, non-residents face an additional restriction, as the amount granted to them may not exceed 25% of a bank's capital. This latter limit may be increased for well-capitalised banks. The Chilean authorities have noted that existing limits do not appear to be binding and that there have been no requests to revise them. While the rule is of a prudential nature, the stricter limit applied to non-residents is of a discriminatory nature and gives rise to proposed reservations on items X/A and B of the CLCM.

Other operations

The Chilean authorities have confirmed that there are no restrictions on capital outflows concerning operations in foreign exchange, capital transfers arising from life assurance contracts, personal capital movements or physical movement of capital assets (items XII to XV of the CLCM).

3.4. The Formal Exchange Market

Article 39 of the Constitutional Organic Law (COL) of the Central Bank establishes the freedom of any person to engage in foreign exchange transactions. Notwithstanding this provision, the Central Bank may require, on a non-discriminatory basis, that certain transactions be conducted exclusively through the Formal Exchange Market (FEM), and/or be reported. The FEM consists of all banks plus authorised agents. To become part of the FEM an entity must be incorporated in Chile. The transactions on which the Central Bank may impose such requirements include:

- The repatriation of foreign funds under requirements of repatriation of export proceeds, which may be in force if and when exchange controls are established in accordance with the provisions set out in Article 49 of the COL, including proceeds from the exports of goods, services, net freight balances, commissions earned on foreign trade transactions, indemnities from insurance or other sources and, generally, payments accrued abroad by Chilean residents.
- The exchange for Chilean currency of the foreign currency received by Chilean residents on any account of transactions entered either in Chile or abroad.
- Payments in foreign currency of imports of goods and services, commissions earned as a consequence of foreign trade activities, transport services, royalties, technical assistance, premiums for, or indemnities from insurance or otherwise, and any other payment made in foreign currency abroad or to persons not having their residence in Chile.

- The remittance of foreign currency for purposes of investments, capital contributions, loans or deposits abroad.
- Transfers for credits, deposits, investments and capital contributions from abroad.

The current regulations of the Central Bank require that the following operations be conducted in the FEM:

- Foreign exchange operations of insurance and reinsurance companies established in Chile.
- Operations in derivative instruments with non-residents and in derivative instruments referenced to a foreign underlying with the entities constituting the FEM.
- Investments, deposits and credits that non-bank Chilean residents undertake, constitute or grant abroad.
- Credits and investments undertaken by banks established in Chile with non-residents.
- Credits, deposits, investments and capital contributions from abroad.
- Foreign exchange operations arising from the Latin American Integration Association Convention on Reciprocal Credits and Payments.
- Foreign currency received by non-profit organisations regulated under Law 1.183 of 1975.
- Payments and transfers related to royalties, author's royalties and for licences for use of patents and trademarks.
- Subscriptions to foreign investment funds under Law 18.657.

The regulation applicable to some institutional investors, including pension funds, requires them to use the FEM for certain foreign exchange operations.

As established in Article 6 of the Codes on the execution of transfers, and to the extent that operations conducted through the FEM take place at prevailing market exchange rates, the requirement to use authorised agents to conduct certain transactions is not a restriction under the CLCM; or under the obligations regarding freedom of transfers and payments under the CLCIO. It does, nevertheless, establish a restriction to the cross-border provision of financial services, as non-resident agents may not form part of the FEM and perform certain operations for residents. This restriction is covered by the proposed draft reservation under item E/2 (Banking and Investment Services) of the CLCIO (see Annex 3).

4. FINANCIAL SERVICES: ESTABLISHMENT AND CROSS-BORDER TRADE

Reflecting the openness of Chile's financial sector to foreign investment, foreign-owned banks, insurance companies and pension fund managers have large shares of Chile's market in their respective industries. Branching is allowed in banking and insurance subject to capital requirements, but establishment of other types of intermediaries requires incorporation in Chile.

On cross-border trade in financial services, Chilean residents are generally free to seek and contract financial services abroad. However, non-residents face restrictions to offer or provide financial services in Chile. Authorities consider that existing limitations have provided protection for domestic consumers, while the benefits from further liberalisation are limited, as sophisticated investors can already freely purchase these financial services from abroad.

The Investment Committee requested that Chile consider narrowing the scope of proposed reservations under the items for cross-border financial services, in particular when users of financial services are corporate entities or sophisticated investors. In the light of this request, the Chilean authorities revised their proposed list of reservations to narrow their scope, without impinging on the effective application of domestic financial regulations for the protection of consumers of financial services.

4.1. Banks, securities firms and other non-bank intermediaries

Establishment

A total of 24 banks were operating in Chile at end-2008; 12 were domestically-owned¹⁶ and 12 foreign-owned. In terms of the total assets of the banking system in December 2008, the former held 59.4% of the total and the latter 40.6%. There is only one State-owned bank, the BancoEstado, which is the third largest bank in the system. The regulator for BancoEstado is the Superintendent of Banks and Financial Institutions, which applies the same rules to all banks.

The regulatory framework in banking offers flexibility as to the form of establishment for foreign participation. The granting of banking licences is the responsibility of the Superintendent of Banks and Financial Institutions. Subsidiaries as well as branches of foreign institutions may be established, with the proviso that branches must meet specific capital requirements, which limit the scale of their operations in Chile. The Chilean authorities confirm that these requirements conform with all the provisions of Annex II to Annex A regarding item E/7 (Conditions for Establishment of Branches), including the 6 month maximum time limit for processing applications for authorisation and the requirement that consolidated financial requirements should not exceed what is required of a locally incorporated bank. In fact, the latter requirement is set by law to be the same as that for banks incorporated in Chile.

Recently two foreign branches have been converted into subsidiaries. The Chilean authorities report that in both cases the decision responds to commercial interests, rather than to any difference in regulatory treatment between one and the other form of establishment.

¹⁶ Includes Banco de Chile which merged with Citibank's branch in Chile in 2008.

Prior authorisation is required before foreign banks may open representative offices in Chile; a restriction that is reflected in a proposed reservation under item E/7 of the CLCIO (see Annex 3).

For securities firms and other non-bank financial services, branching is not available as a form of establishment. Stockbrokers and securities agents, as well as securities deposit and custody agencies, must be legal entities incorporated under Chilean law and directors, administrators, managers or legal representatives must be Chileans or foreigners with residence in Chile. Incorporation requirements also apply to securitisation agents, administrators of pension funds, mutual funds, investment funds, foreign capital investment funds, foreign risk capital investment funds and housing funds. The incorporation requirement is waived for foreign capital investment funds created by foreign institutional investors, which can be managed by a legal representative that has domicile in Chile. These restrictions give rise to proposed reservations under item I/A of the CLCM and under item E/7 of the CLCIO.

Incorporation requirements also apply to stock exchanges, cattle and agricultural commodities exchanges, clearing houses for futures, options and other similar contracts, The incorporation requirement for organised exchanges is not deemed to be a restriction, as branching is not viewed as a feasible form of organisation for these activities.

Cross-border banking and financial services

Payment services, including payment instruments and fund transfer services, are reserved for resident providers, leading to a proposed reservation under items E/1 (Payment Services) of the CLCIO.

Regarding banking and investment services (item E/2), for underwriting and broker/dealer services only authorised resident agents may engage in the promotion and sale of securities, leading to the proposed reservations noted in Annex 3. The rule that only locally established and supervised entities may offer these services is seen as a key element in assuring the effective protection of investors operating in the domestic market. As noted at the end of section 4.4 on the Formal Exchange Market, certain foreign exchange transactions must be performed by resident authorised agents, a requirement that limits the cross-border provision of these services and is also reflected in a reservation. In the light of the Committee's call for a narrowing of reservations, in particular for corporations and sophisticated investors, the Chilean authorities have reviewed the exact scope of application of measures currently in force. In light of this review, Chile can assume an additional commitment regarding the provision in Chile of underwriting services that do not involve the public offer of securities in Chile, as reflected in the draft reservation under this item.

Settlement, clearing and custodial and depositary services (item E/3) in Chile must also be provided by residents. For settlement and clearing systems, obligations under the Code concern only access to such systems and no reservation is called for on this account. Regarding custodial services, the Central Bank does regulate the provision of custodial services for foreign assets of pension funds and other institutional investors. However, these rules, which establish minimum requirements for custodians of said assets, are prudential in nature and non-discriminatory towards non-residents. Thus, the proposed reservation under item E/3 (Settlement, Clearing and Custodial and Depositary Services) of the CLCIO concerns only the provision of custodial and depositary services by non-residents in Chile.

Regarding asset management services (item E/4 which covers cash management, portfolio management, pension fund management, safekeeping of assets and trust services) the Chilean authorities revised the proposed reservation in light of the request from the Investment Committee to narrow its scope and to carry out further work in conjunction with the Secretariat. The review of Chile's position has helped

the Chilean authorities to clarify the scope of the obligations under item E/4.¹⁷ The proposed reservation entails one restriction for residents to seek such services abroad and for non-residents to provide them in Chile – in the case of management of collective investment schemes and pension funds – and several restrictions on the provision of such services in Chile.

Firstly, cross-border trade in items covered by item E/4 is limited by rules for collective investment schemes and pension funds. These must be provided for by resident authorised agents; with an exception for offer of services in Chile by non-resident asset managers to Chilean fund managers for investments abroad, as long as such investments are in accordance with DL3500 and the investment regime authorised for each type of fund.

In general, the offer in Chile by non-residents of asset management services is not restricted, provided certain conditions are met. Firstly, they cannot be offered if they entail the provision by a non-resident of financial operations which are reserved for established authorised financial institutions (such as deposit taking activities of banks or public offer of securities by broker/dealers). In particular, they are allowed only to the extent that no offer of securities is being made in Chile and there are certain restrictions on services for any form of collective investment securities, as the later are reserved for authorised resident institutions. These measures are not necessarily deemed to be restrictions under the Code, as they may be considered to fall within the scope of measures allowed under Article 5 on controls and formalities. Thus, as Chile has proposed to lodge reservations under item E/2 covering the provision of broker/dealer services in Chile by non-residents, it could be redundant to propose a similar reservation under E/4. However, for transparency purposes, Chile would like these restrictions to be reflected in the text of the proposed reservation, more so as there is an exception to the general restriction that may generate ambiguity in interpreting the scope of commitments made. The exception to the restriction allows the provision of services in Chile by non-resident asset managers to Chilean fund managers for the purpose of handling investments abroad.¹⁸ The proposed draft reservation under E/4 reflects the more liberal treatment in the case of professional fund managers.

In addition, for items covered by E/4 concerning trust services, Chile maintains certain measures which require that the provision of certain trust-like services be carried-out by authorised established institutions. Thus, only banks may offer the service of *comisión de confianza* (assignment of trust) and only securities firms and administrators of mutual and investment funds may offer *administración de cartera* (portfolio management).

The proposed reservation under E/4 covers all three types of measures noted above and narrows considerably the scope of restrictions on cross-border services offered by non-residents in Chile. It also clarifies the restrictions regarding cross-border asset management services for collective investment schemes and pension funds.

For advisory and agency services (item E/5), Chile narrowed somewhat its proposed reservation in the light of clarification regarding the scope of obligations in response to the Committee's request.¹⁹ To the extent that Chile proposes to lodge reservations under item E/2 covering the provision of broker/dealer services in Chile by non-residents, it would be redundant to propose a similar reservation under E/5.

¹⁷ The review of the scope of the obligations has made use, in particular, of the report from the Joint Working Group on Banking and Related Financial Services DAFPE/MC/SF/88.2 DAFPE/INV/88.2 (3rd Revision).

¹⁸ Chile has made a commitment not to introduce restrictions on these assets management services for professional managers in its free trade agreements with the US and Australia.

¹⁹ In particular as clarified in the report from the Joint Working Group on Banking and Related Financial Services DAFPE/MC/SF/88.2 DAFPE/INV/88.2 (3rd Revision).

Restrictions on the cross-border provision in Chile by non-residents apply to securities rating. Investment research and advice and services related to mergers, acquisitions, restructurings, management buy-outs and venture capital are not restricted. These restrictions are reflected in draft proposed reservations under item E/5 of the CLCIO.

In the area of credit reference and analysis, Chile does not maintain restrictions on the provision of such services by non-residents. Chile is in the process of developing legislation which would regulate the collection of information on debtors that authorities expect would improve the functioning of credit markets. Chile is aware of the obligation to maintain equivalent treatment for non-resident providers of credit reference and analysis services and will report to the Committee if and when new measures are adopted which may have a bearing on the cross-border provision of these services.

Regarding the Chilean requirement that any investment research and advice services offered by non-residents should not involve the public offer of securities in Chile by non-residents, it is relevant to note that all forms of broker/dealer services are already covered under item E/2 and that item E/5 covers only “ancillary services to the principal activities of commercial banks or investment houses”. Thus, under item E/5 Chile does not require an additional reservation on this account to that already lodged under item E/2.

4.2. Insurance and private pensions

Establishment

Of the 29 life-insurance companies operating in Chile in December 2008, 12 were foreign-owned and held 53.4% of the insurance premia. Foreign-owned non-life insurance companies also dominate that market with 69.2% of the premia. There are 23 non-life insurers in Chile, of which 14 are foreign-owned. Branches have been allowed only since 2007 and as of end-2008 no foreign insurers had chosen this form of establishment.

Foreign insurance companies may operate in Chile through both branches and subsidiaries; however, incorporation is required to carry out the activities of insurance brokerage, claim settlement and the brokerage of annuities certain in relation to the mandatory pension regime of DL3500. Separate companies conduct life and non-life insurance operations in Chile. Branches, like incorporated insurers, must specialise in either life or non-life insurance. Resident reinsurers may operate both risks within the same company, but must keep separate accounts and meet separate financial requirements for equity, debt and investment of technical reserves.²⁰ These specialisation requirements regarding life and non-life insurance apply to all established market participants, and do not constitute restrictions under the CLCIO.

In insurance, branches are allowed but, as in the case of banking, they are subject to specific capital requirements, which are equivalent to those imposed on a subsidiary. Branches of insurance companies may perform the same operations as companies incorporated in Chile and face the same requirements regarding technical reserves and capitalisation, as required by liberalisation obligations under item D/6 of the CLCIO. The specific capital requirement for the branch is intended for the protection of policyholders and does not impose more burdensome conditions than those required of other market participants. These specific capital requirements are intended to ensure that there are sufficient local assets to back-up domestic contracts in the event of failure of the insurer. The Chilean authorities have confirmed that financial guarantees required of branches of a single insurer are consolidated so that they do not exceed in total what is required of a locally incorporated insurer. They have also confirmed that legislation conforms with all the other provisions set out in Part III of Annex I to Annex A regarding item D/6.

²⁰ Non-resident reinsurers are free to operate in both types of operation.

Regarding the obligations falling under item D/7 (Entities Providing Other Insurance Services), Chile's proposed reservation is narrow in scope and accurately reflects existing measures.

Item D/7 comprises a variety of obligations regarding provision of intermediation and auxiliary services, both on a cross-border basis and through branches. The offer in Chile (through branches or cross-border) of intermediation services is curtailed, except for services linked to those insurance or reinsurance contracts that may be offered cross-border in Chile (i.e. all reinsurance and retrocession operations covered by D/5 and those contracts not covered by reservations under D/2). The Insurance Law establishes requirements of residency for natural persons and of local incorporation for enterprises to provide intermediary services in the case of those insurance contracts that can only be offered in Chile by locally established insurance companies. Regarding the provision of auxiliary services, there are restrictions on the cross-border provision in Chile of claim settlement services, which do not apply for contracts entered into abroad. All other auxiliary services, including consultancy, actuarial and risk-assessment services, can be provided cross-border or through branches, with the exception of consultancy services for the mandatory pension fund regime. Advisors for pension fund related contracts must be locally registered and established. These measures are reflected in a revised proposed reservation under item D/7 of the CLCIO.

Item D/7 also covers the establishment and operation of representative offices. The Chilean authorities confirm that there are no restrictions on the opening of representative offices in Chile and these are permitted to promote cross-border services that have been authorised in the host country on behalf of their parent enterprises.

Under item D/8 on private pensions, Chile records a number of restrictions related to the operation of the social insurance system which relies on private fund managers. Only financial institutions established in Chile and authorised by law may manage pension funds related to the Decree Law 3500 regime. Examples of such institutions are pension fund managers (AFPs), collective investment schemes (mutual funds, investment funds), insurance companies and banks.

The pension system of Decree Law 3500 is mandatory. Workers must deposit 10% of their wages in a pension fund established in Chile. Contributions to the pension fund and assets accumulated in the pension fund may not be transferred to non-resident providers, either before or after retirement. The assets accumulated in the pension fund may only be used to receive the pension benefits established by law. The system contains an explicit government minimum pension guarantee for those contributors that do not accumulate sufficient assets to obtain a pension above that minimum and have contributed for at least 20 years in the system. In order to avoid abuse of the system, the modalities of withdrawal of funds after retirement are limited. Upon retirement, a person has to choose among four modalities of pension benefit: programmed withdrawal of funds, immediate annuity certain, temporary income with annuity at a later date, and programmed withdrawal and annuity certain simultaneously. The system also provides for additional voluntary contributions to pension funds. Foreign technical employees of resident enterprises can choose not to contribute to Chile's pension fund system if they make contributions to a social security or insurance regime abroad, whatever its legal nature, that provides benefits in case of illness, disability, retirement and death and the worker explicitly states in the work contract that he or she wishes to continue contributing to that system.

In Chile there are five pension funds managers, of which 3 are majority foreign-owned funds and administer 56.6% of the assets of the system. One manager is more than 50% owned by foreign investors and manages 24.5% of the system's assets. Thus, foreign-investor controlled funds manage 80% of the assets of the pension fund regime. There is only one pension fund manager in which Chileans have majority ownership; it manages 18.9% of the system's assets.

The incorporation requirement for pension funds gives rise to proposed reservations under item I/A of the CLCM and under item D/8 of the CLCIO.

Cross-border insurance and private pension services

The cross-border provision of insurance is generally free when transactions are entered at the initiative of the proposer. In fact, the freedom for Chilean residents to acquire insurance abroad is enshrined in Article 4 of Chile's insurance law and is only limited in the cases noted in the paragraphs below. On the other hand, the promotion or offer of insurance services by enterprises not established in Chile is not allowed, with some exceptions that are noted below, calling for the proposed lodging of reservations on items D2, D/3 and D/4. There are no restrictions regarding reinsurance services.

The Chilean authorities wish to notify the application of tax withholding on insurance contracts entered into with non-resident providers of 22% of premiums for life as well as for non-life insurance contracts, and of 2% for premiums ceded through reinsurance and retrocession contracts. In the opinion of the Working Party of Governmental Experts on Insurance (WPGEI), the Chilean system of tax withholding attains broad tax neutrality between insurance contracts acquired inside and outside Chile.²¹ Chile's authorities wish to note that they are in the process of reviewing taxes applied to insurance and reinsurance contracted with non-resident providers, as a result of the application of double-taxation agreements, and that no decision has yet been made regarding the replacement of existing withholding taxes with excise or another type of tax. They also reaffirm their commitment to maintaining the broad tax neutrality that exists today between insurance contracts acquired inside and outside Chile, in order to maintain a level playing field and avoid unfair competition between established and cross-border providers of these services.

Under the heading for insurance relating to goods in international trade, Article 4 of the Insurance Law introduces an exception to the above-mentioned prohibition on the cross-border offer of insurance products in Chile. The exception is granted to entities established in countries with which Chile has entered an international agreement and concerns insurance on international maritime transport, international commercial aviation and goods in international transit. The Chilean authorities have confirmed that they are prepared to extend to all OECD Members the liberalisation measures as the OECD Codes of Liberalisation qualify as such an international agreement regarding the cross-border provision of these services under Article 4 of the Insurance Law. Thus, adherence by Chile to the OECD Codes of Liberalisation will enable all OECD insurers to enjoy the benefit of the liberalisation provisions under Article 4 of the Insurance Law. No reservations are needed to cover these cross-border insurance services.

In addition, Chile has taken steps to further liberalise services covered by D/2 in response to the Investment Committee's request for Chile to narrow the scope of its reservations regarding cross-border financial services addressed primarily to corporate clients and sophisticated investors. Proposed legislation, if enacted by Congress, will remove restrictions on cross-border insurance services for satellites and satellites liability. Thus the only insurance services for which Chile will need to retain a reservation under D/2 will be for road and rail transport insurance services. Regarding insurance for international road transport, which is regulated by agreements between Chile and its neighbours (Argentina, Bolivia, Brazil, Paraguay, Peru and Uruguay), Chilean authorities have informed the Committee that they are unable to make additional liberalisation commitments. International obligations, derived from international peace treaties, are also in place for railroads providing neighbouring countries with access to Chilean ports. Thus, the other areas in which Chile is prepared to make a commitment are for non-resident insurers to seek contracts for: satellites and satellites liability. The proposed reservation regarding item D/2 has not been revised to make it narrower; such a step would take place once the proposed legislation has been enacted.

²¹ See Annex 10: Letters from the Chair of the Working Party of Governmental Experts on Insurance regarding Chile's Accession Examination.

The contracting abroad of insurance product is not allowed in the cases of compulsory insurance and of contracts connected with the mandatory pension fund regime of Decree Law 3500. This calls for a wider reservation in the case of D/3, which covers life insurance in the CLCIO. However, for item D/4 (All Other Insurance) mandatory and group insurance are excluded from the disciplines of the Codes and there is no need for a broader reservation, to the extent that contracts connected with the pension regime of DL3500 can be judged to fall within the definition of mandatory or group insurance.

Chile has examined the issues that would arise from a further narrowing of the proposed reservation under item D/4, particularly with a view to accommodate the Committee's interest in further liberalisation of operations impinging on corporate and sophisticated investors. The proposed reservation under D/4 only covers cross-border insurance services that are not contracted under the proposers' (customers') initiative. It is Chile's view that taking the further step of allowing non-resident insurers to actively seek to provide such services in Chile without being established might reduce the ability of prudential supervisors to properly regulate the insurance market. Tailoring such a liberalisation measure only for corporate and sophisticated investors would pose challenges, while sophisticated consumers of insurance services can already benefit from acquiring insurance services abroad. Chile is open to further consideration of this issue in the light of the experiences of those OECD Members that have taken such a step towards further liberalisation under item D/4.

Regarding the deductibility of insurance premiums paid, the Chilean tax system does not foresee any deductibility of premiums paid.

Under item D/5 (Transactions and Transfers in Connection with Reinsurance and Retrocession), Chile does not require the lodging of reservations. There are certain measures which limit the netting of technical reserves when certain insurance contracts linked to the mandatory pension system are ceded to a non-established reinsurer. The treatment of these measures under the Code was not settled during the 7th Examination by the Investment Committee and the Insurance and Private Pensions Committee [C(2008)4] and was left for further consideration.²² Therefore, as pointed-out in the letter of the WPGEI Chair to Chile following its examination of 1 April 2009, Chile does not need a reservation on D/5 at this time. Thus, when obligations will be clarified regarding the netting of technical reserves, all Members would be entitled to lodge reservations regarding the clarified obligations.

The provisions of the CLCIO regarding re-insurance and retrocession (item D/5) establish an obligation to allow foreign re-insurers to open bank accounts. In Chile, the opening of bank accounts is subject to non-discriminatory requirements of domicile and presentation of a tax identification number. As suggested above, in relation to deposit accounts under the CLCM, these requirements do not amount to requiring an establishment in Chile and, therefore, do not impede cross-border re-insurance and retrocession.

Cross-border provision of other insurance services (under item D/7) faces the same treatment as services offered by branches, as discussed in the section above dealing with establishment and as reflected in the revised proposed reservation under this item.

Regarding operations covered by D/8, there is no impediment for residents to invest in pension funds abroad and they may voluntarily make deposits to a non-resident institution to this end. However, unlike

²² The report notes in its paragraph 75 that regarding the issue of “whether the netting of technical provisions and other prudential measures related to reinsurance and retrocession are subject to the liberalisation disciplines of the Code and in particular to Item D/5. No consensus could be reached within the Committees on this question. The Committees therefore agreed that such measures could deserve further consideration in the framework of the Code of Liberalisation of Current Invisible Operations.”

contributions to DL3500 funds, contributions, investments in non-resident pension funds are not deductible for tax purposes. Furthermore, only financial institutions established in Chile and authorised by law and/or regulation can provide services related to the compulsory pension funds regime of DL3500. These restrictions are reflected in the proposed draft reservation under item D/8.

5. CURRENT INVISIBLE OPERATIONS OTHER THAN FINANCIAL SERVICES

5.1. Current transfers and payments

In the field of *exchange controls*, the free convertibility of the domestic currency enables residents and non-residents to freely carry out payments and transfers in connection with current international transactions, as well as with capital account operations. Chile accepted the obligations of Article VIII of the Articles of Agreement of the International Monetary Fund in July 1977. The Central Bank of Chile culminated the process of elimination of all exchange control measures, i.e. measures falling within the scope of Article 49 of the Constitutional Organic Law (COL) of the Central Bank, in April of 2001.

5.2. Trade in non-financial services

Transport

There are various restrictions regarding transport services in Chile, which give rise to proposed reservations under the CLCIO.

Chile maintains some restrictions in the area of maritime freights:

- Chile may restrict harbour access to fishing vessels that do not comply with certain regulations. The enforcement of limits on fishing by foreign vessels in Chilean waters has taken on particular relevance in the context of concerns regarding sustainable fishing. In this context, Chilean authorities have been pursuing further measures in order to ensure that vessels entering Chilean waters, or accessing Chilean ports, abide by regulations in force, including restrictions on fishing by foreign vessels in Chilean waters. To the extent that such measures are undertaken only to prevent the evasion of Chilean laws and regulation, no reservation is called for on this account under items C/1, C/5 or C/6.
- Under the Chile-Brazil maritime transport agreement, cargo between the two countries is reserved to national flag vessels. This restriction calls for a proposed reservation under item C/1 (Maritime Freights) of the CLCIO.
- Cabotage is reserved to Chilean vessels, both for cargo and for passengers. Cabotage includes shipping on the ocean, rivers and lakes and between such points and naval artefacts installed on territorial waters or in the exclusive economic zone. Exceptions may be made for cargo exceeding 900 tons or when no Chilean vessels are available. The Chilean authorities propose entering a reservation under item C/2 (Inland Waterway Freights, Including Chartering) of the CLCIO.

Chile does not maintain restrictions vis-à-vis OECD countries in the area of maritime transport, other than those linked to application of the Chile-Brazil maritime transport agreement. However, Chilean authorities may impose a national flag requirement for international maritime transport of cargo as a countervailing measure. Chilean authorities have explained that the intent of the measure is to dissuade protectionist measures from other countries; it can be used by authorities as a response to new protectionist measures introduced by another country. The Chilean authorities have indicated that they consider as

sufficient the protection offered by the standstill provisions and other rights established under the OECD Codes of Liberalisation, as these provide a preferable means by which to assure progressive liberalisation. They therefore commit to relinquish the application of reciprocity provisions concerning maritime transport to OECD Members. Should an OECD Member erect new barriers on Chilean maritime transport of cargo, Chile would bring the matter to the Committee and seek redress.

International road transport is reserved to Chilean firms and those of Argentina, Bolivia, Brazil, Paraguay, Peru and Uruguay. The practical relevance of this restriction may be nil for OECD Members, but the rule that only firms that are majority owned by nationals of these countries may engage in international road transport services between them does give rise to a proposed reservation under item C/3 (Road Transport: Passengers and Freights, Including Chartering) of the CLCIO.

Films

Chile does not impose restrictions on the exportation, importation, distribution and use of printed films and other recordings –whatever the means of reproduction- for private or cinema exhibitions, or for television broadcasts. Thus, no reservation is needed under item H/1 of the CLCIO. Chile also accepts the Recommendation concerning the Conclusion of Bilateral Agreements for the Co-Production of Films [C(64)124], which recommends Members to take into account the guidance provided when drawing-up such agreements.²³

Professional services

Chile maintains restrictions on the provision by foreigners or non-residents for some professional services: lawyers, customs brokers, operators of multi-modal transport, auditing of financial institutions and advisors for activities related to the mandatory pension system. Regarding lawyers, only residents of Chile are authorised to plead a case in Chilean courts; foreign legal consultants may, nonetheless, practice and advise on international law or on foreign laws. For operators of multi-modal transport, there is a residency requirement to obtain the certification which is needed to use this title in Chile. In addition, Chile does maintain restrictions on activities that are supplied by governmental bodies or delegated to private providers by such bodies, such as justice ancillaries, public defenders, public notaries, custodians, archivists, process servers, superior court attorneys, public auctioneers and receivers in bankruptcy. However, the list of reservations need not cover all these activities because activities supplied by governmental bodies or delegated to private providers by such bodies fall outside the scope of the Code. Furthermore, not all of the services on which restrictions apply fall within the customary interpretation of item L/6 (Professional Services) of the CLCIO, which covers those liberal professions for which cross-border provision of services is feasible.

The draft proposed reservation to item L/6, therefore, need only cover auditing of financial institutions, the provision of legal services in Chile and operators of multi-modal transport.

²³ Chile has made four observations to the guidance: the fact that Chile's practice has been to 1) include in agreements a share in coproductions that can be as low as 20%, rather than the 30% suggested in the guidance; 2) to require that technical and artistic participation be proportional to financial contributions for a coproduction to receive the benefits established under agreements; 3) to exclude from the benefits of agreements third parties that are not signatories to the agreements; and 4) to ensure that co-produced films refer to projects that have yet to be developed, including documentaries, and other types of audiovisual productions which, although using pre-existing film material, fulfil this condition.

6. FOREIGN EXCHANGE TRANSACTIONS UNDER THE CENTRAL BANK'S JURISDICTION AND THE CODES.

The Chilean authorities wish to draw the Committee's attention to the fact that under its Constitutional Organic Law the Central Bank of Chile has the right to impose restrictions on current payments and transfers and capital movements as listed in Article 49. Pursuant to Article 50, this right can only be exercised, by decision of a majority of all Board members, when restrictions are considered necessary for ensuring the stability of the currency or the financing of the country's balance of payments. A set period must be determined for the duration of the restrictions, which can only extend for up to one year, unless a decision to renew them is made by a majority of Board members. The Board's decision can be subject to veto by the Finance Minister, which can be overturned only by a unanimous vote of the Board. Specifically, the Bank has the authority to impose the following restrictions to foreign exchange transactions:

- a. Establish the obligation of repatriation into the country, in foreign currency, of the corresponding payment value obtained from the export of goods, export of services, net freight balances, commissions earned on foreign trade transactions, indemnities from insurance or other sources, and generally payments accrued abroad by individuals or entities resident in Chile as a consequence of acts or transactions conducted abroad. In addition, the Central Bank has the authority to establish the obligation to convert into Chilean currency the foreign currency received by Chilean residents on any account or in any transactions entered either in Chile or abroad.
- b. Determine that credits, deposits or investments in foreign currency originating or to be sent abroad be subject to a reserve requirement. This measure may not exceed 40% of the respective transaction and only concerns transactions entered into after the date of the establishment of restrictions.
- c. Establish the obligation of prior authorisation under such terms and conditions as the Bank may set forth for the payment or remittance obligations for the payment in foreign currency of imports of goods or services, commissions earned as a consequence of foreign trade activities, transport services, royalties, technical assistance, premiums for, or indemnities from insurance or otherwise, and any other payment made in foreign currency abroad or to persons not having residence in Chile, as well as the remittance of foreign currency for purposes of investments, capital contributions, loans or deposits abroad, and investments abroad by pension funds. Imports of goods and their corresponding expenses are exempted from the prior authorisation requirement, but access to the Formal Exchange Market to make such payments may be delayed by no more than 180 days from the date of shipment of merchandise.
- d. Establish that the entities which form the Formal Exchange Market may only execute those transactions expressly authorised by the Central Bank. In any event, payments and remittances may be engaged freely for foreign exchange transactions related with the import and export of goods and with remittance of foreign currency arising from investments, capital contributions or credits from abroad.

- e. Set limits, under generally applied criteria, to the holdings in foreign currency or investments denominated in foreign currency that banking entities or other authorised entities of the Formal Exchange Market may maintain within the country or abroad.
- f. In addition, Article 182 of the Securities Market Law grants authority to the Central Bank to impose, pursuant to the procedures foreseen in Article 50 of the Constitutional Organic Law of the Central Bank, limits or restrictions on the changes in the net foreign asset position of institutional investors.

In addition, Article 42 of the Constitutional Organic Law states that the Central Bank may request that transactions covered by the said Section must only be conducted through the Formal Exchange Market and may not be carried out whether in Chilean currency or by means of other assets, unless expressly authorised by the Bank. (“Other assets” refer for instance to investment made in the form of a cession of shares). The operations covered by these various provisions concern virtually all operations covered by the two Codes, although mainly in connection with related transfers and payments.

However, the Chilean authorities also wish to stress that today Chile has no general exchange controls in place and has demonstrated a long-standing record of progressive liberalisation. In practice, restrictions currently applied under the Constitutional Organic Law of the Central Bank are very limited, and concern only issuance by non-residents of peso-denominated securities other than bonds. These restrictions are reflected in Chile’s proposed reservations under items IV/B.a (capital market securities excluding bonds), V/B (money market instruments), VI/B (non-securitised claims), and VII/B (collective investment securities) of the CLCM. In accordance with the spirit of the OECD Codes and the requirements established in the Roadmap for Accession of Chile, no precautionary reservations have been lodged.

Outside the lodged reservations, Chile undertakes to respect the Codes’ provisions and states that the current measures and practices under its domestic law are in compliance with the Codes.

Chile also appreciates that OECD Members have the following rights under the Codes:

- a. No standstill obligations apply to operations in List B of the Capital Movements Code, for which a reservation may be lodged at any time. Operations on List B concern short-term capital operations, financial credits and non-resident acquisitions of real estate.
- b. Article 7(b) of the Codes stipulates that if any measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a) result in serious economic and financial disturbance in the member State concerned, that member may withdraw those measures. No limit to the duration of such withdrawal is specified by Article 7(b).

- c. Article 7 (c) of the Codes stipulates that if the overall balance of payments of a member develops adversely at a rate and in circumstances, including the state of its monetary reserves, which it considers serious, that member may temporarily suspend the application of measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a).²⁴
- d. Under Article 4 of the OECD Codes of Liberalisation, a member retains the right to introduce capital and exchange controls which may be requested by the IMF pursuant to Article VI of its Articles of Agreement.

Finally, the Chilean authorities appreciate the tasks ascribed to the Investment Committee under Article 18, including its availability to arrange consultations among the Members if issues of interpretation of Article 7 were to arise. Provisions equivalent to those embodied in the Central Bank law are not uncommon among OECD member countries. Members did not change these provisions for the purpose of meeting Codes' obligations, including in cases of independent Central Banks charged with responsibilities in exchange control matters, and rights under the Codes have been sufficient to accommodate Members' concerns in this regard.

The Chilean authorities have indicated that they wish to make use of the preceding text of this section as a basis for a declaration by Chile as part of its Final Statement which would form part of the international agreement between the OECD and Chile on the terms and conditions of Chile's accession to the Organisation. During the December 2008 examination, the Chilean authorities expressed their satisfaction regarding the balance of rights and obligations set forth in the OECD Codes of Liberalisation, as they provide adequate scope for handling disturbances to its economy and financial system, including risks to currency stability, while preserving Chile's commitment to liberalisation.

The Investment Committee did not object to this proposal, noting that such observation shall not be construed as modifying Chile's acceptance of the rights and obligations undertaken by Members under the Codes and in particular does not extend the scope of Chile's proposed reservations as contained in Annexes 2 and 3 of this Report.

Chile also confirmed that it understands that, in accordance with Article 4 of the Codes, an eventual invocation of Article 7 or other safeguards would not alter the obligations undertaken by Chile under Article VIII of the Agreement of the IMF and that the application of any new foreign exchange restrictions which might be introduced pursuant to Articles 49 and 50 of the Central Bank's Constitutional Organic Law shall not discriminate between OECD countries, in accordance with the provisions of Article 7e of the Codes and the Central Bank's own rules.

²⁴ Investment Committee work has documented that there have been no cases in the past - among the 44 instances of invocation of Article 7 by some 18 Members in total - where recourse to Article 7 following the justifications presented by the members in accordance with the procedures under Article 13 have been disapproved by the OECD Council. It is also to be noted that the safeguards a) to c) described in this paragraph are unique to the OECD Codes and different in scope from those found in other international agreements.

7. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Chile adhered in 1997 to the OECD Council Declaration on International Investment and Multinational Enterprises. It is an adherent to the revised OECD Guidelines for Multinational Enterprises and International Investment and the related Decision on Implementation Procedures.

Regarding Chile's adherence to international instruments cited in the Guidelines, Chile has signed, adhered to or ratified the following instruments:

- United Nations Universal Declaration of Human Rights.²⁵ Signed by Chile on December 10, 1948.
- ILO Declaration on Fundamental Labour Principles and Rights.²⁶ Signed by Chile on June 18, 1998.
- 1992 UN Rio Declaration on Environment and Development. Signed by Chile on June 13, 1992.
- UN 21 Agenda. Signed by Chile on June 13, 1992.
- UN Copenhagen Declaration for Social Development. Signed by Chile on February 8, 1995.
- Chile ratified in April 2001 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Chile has signed numerous FTAs with labour and environmental clauses. It is worth highlighting that in the Joint Declarations that are part of the Chile-European Union Association Agreement, special mention is made of compliance with the OECD Guidelines for MNEs. Likewise, Chapter 19 of the Chile-US FTA includes an article (19.10) on "Entrepreneurial Management Principles". In addition, Annex 19.3 of the environment chapter establishes principles and objectives regarding sustainable development.

7.1. Experience and performance of the Chilean National Contact Point

Structure and operation of the NCP

The National Contact Point (NCP) is located within the OECD Department of General Directorate for International Economic Relations (DIRECON) of the Ministry of Foreign Affairs. It has an advisory committee comprised of representatives from business, worker, and consumer organisations, as well as other public entities and some NGOs.

In April 2008, the NCP decided to review its organisational model. The OECD Department of the General Directorate for International Economic Relations (DIRECON) of the Ministry of Foreign Affairs

²⁵ Chile was a member of the Drafting Commission of the Declaration.

²⁶ Refers to the ILO Declaration adopted in Geneva in 1998 which establishes the four fundamental rights pre-established in four Conventions already ratified by Chile.

continues to perform the role of NCP; however other ministries, in particular the Labour Ministry, will now actively participate. In addition, the Advisory Committee has been reinforced with the inclusion of a new representative from business organisations.

Since it began to operate in 2001, the NCP has submitted an annual report to the OECD Investment Committee detailing the main activities undertaken during the year in accordance with the implementing OECD Decision.

The NCP has dealt with and resolved two specific instances. These cases were closely followed by trade unions, business and NGOs, both in Chile and internationally.

The first case, resolved in August 2004, involved the multinational fish farming company Marine Harvest and the NGOs Amigos de la Tierra (Friends of the Earth) from Holland and Ecocéanos from Chile. The controversy revolved around labour and environmental issues. The resolution involved the active participation of regional authorities from the X (tenth) Region and also from civil society organisations. The final report made recommendations to resolve the controversy.

The second case, resolved in October 2005, involved Unilever, its Trade Union No. 1 and the Trade Union Congress of Chile (Central Unitaria de Trabajadores de Chile, CUT). The controversy surrounded labour aspects related to the closure of one of the company's plants upon its relocation. The dispute was resolved by facilitating the negotiation of compensations for the workers that had lost their jobs and ensuring work stability for the remaining labour force. The final NCP report includes a Protocol of Agreement signed by the Parties.

Activities to promote the Guidelines

Through its experts, DIRECON actively participates in events aimed at explaining the importance of corporate responsibility within the new international context and, in particular, to promote the MNE Guidelines among Chilean companies that operate abroad and foreign companies operating in Chile.

The OECD/NCP Department of DIRECON has carried out the following specific promotion and dissemination activities of the MNE Guidelines:

- Meeting on the Guidelines, with the participation of around 70 trade union leaders related to multinational enterprises (Santiago, June 2001).
- Meeting on the contents of the Guidelines with representatives of multinational enterprises and trade unions, involving the participation of 60 persons (Santiago, January 2002).
- Seminar about the Guidelines, with the participation of representatives from multinational enterprises, trade unions and NGOs. BIAC and TUAC also participated. One hundred persons attended (Santiago, April 2002).
- Meeting with trade union leaders linked to companies that export agricultural products, with participation of 50 trade union representatives (Santiago, December 2004).
- Meeting on the contents of the Guidelines, organised jointly with the CUT, with the participation of trade union leaders and a CPC representative as panellist (Santiago, December 2005).
- Meeting with trade union and NGO representatives organised by the Pastoral Obrera del Obispado de Chiloé (Workers' Pastoral of the Chiloé Bishopric) and the Universidad Academia de Humanismo Cristiano on the contents of the Guidelines (Ancud, March 2006).

- First meeting of representatives of the NPC from four Latin American countries. The meeting ended with a roundtable to analyse the Guidelines, and included presentations by representatives from Unilever and from that company's Trade Union No. 1. They explained the handling of that case in the NCP. Around 60 trade unions and NGO representatives participated in this event (Santiago, April 2007).
- Within the framework of the Salmon Farming Discussions, a meeting with trade unions and entrepreneurs of the fish farming sector in the region was jointly organised with the Dirección Regional del Trabajo (Regional Labour Directorate) of the X region about the Guidelines and corporate social responsibility. This meeting involved the participation of the fish farmers' organisation (Salmón Chile), trade union federations of regions X and XI, and some representatives of the most important fish farming companies in both regions (Puerto Montt, July 2007).
- Promotion of the Guidelines in Latin America in the "International Workshop on the Role of Government in Social Responsibility", Panel #1 Tools for Government to Promote Social Responsibility, 29 August 2008, ILO Headquarters, Santiago de Chile.
- Meeting on Implementation of the Guidelines for Multinational Enterprises, organized by TUAC and the Friedrich Ebert Stiftung 20-21 November 2008, Buenos Aires, Argentina.
- Meeting on Performance of the Guidelines for Multinational Enterprises and the National Contact Points in Latin America, Andean Trade Union Confederation (CSA) and FESUR Regional Trade Union, 27 November 2008, Buenos Aires, Argentina.

Presentation on the experience of Chile in connection with the NCP at the seminar on Peru and the OECD: Scopes and Challenges for Enterprises and Civil Society: Reflections on the National Contact Points, Program of Labour Development (PLADES), OECD Watch, Friedrich Ebert Stiftung and the Andean Confederation Trade Unions, 29-30 April 2009, Lima, Peru. While Chilean firms regularly participate in the NCP's events, Chilean multinationals have not been the main focus of authorities' efforts to promote the Guidelines. However, the Chilean NCP has recently started to plan activities focused mainly on foreign ventures of Chilean investors. Among these activities is a meeting in 2009 with Chilean multinationals that is expected to receive BIAC's support.

The website of DIRECON (www.direcon.cl) provides access to the text of the Guidelines, the final NCP reports on specific instances, its main activities and information to access the NCP.

Activities to promote other codes of corporate responsibility

Chile has also carried out other activities to promote codes of responsible business conduct and participated in efforts to further develop instruments in this area including:

- the organisation, within the Framework of the Chile-Canada Environmental Cooperation Agreement,²⁷ of two roundtables on trade and environment in 2003 and 2004, focusing on corporate responsibility in the mining and forestry sectors;
- active governmental participation with the ISO in the development of its social responsibility guidance (ISO 26,000);
- PROCHILE, together with *Vincular* (a local think-tank associated with the Universidad Católica de Valparaíso), held a series of Seminars on corporate responsibility for export sector companies in five regions in 2007.

²⁷ This is a parallel agreement to the PTA with Canada.

Chilean private initiatives include:

- the Council of the Antofagasta Mining Cluster on Sustainable Development that brings together 1200 companies;
- the Wine Cluster that brings together 800 companies;
- the Fruit Exporters' Industry applies Global Good Agricultural Practices (GAP);
- the Wood Exporters certify around 60% of their production;
- in 2005, the Confederation of Production and Commerce of Chile, which brings together the largest business associations from agriculture, mining, manufacturing, banking and commerce hosted and co-organised the 3rd Inter American Conference on corporate social responsibility;
- the chemical industry refers to Responsible Care; the wood industry to the Forest Stewardship Council (FSC); the fruit industry to global Good Agricultural Practices (GAP); and the mining industry to the International Council on Mining and Metals (ICMM).

7.2. Recent regulatory developments impacting on responsible business conduct

Through its Circular No. 1501, issued in 2001, the SVS adopted regulations so that companies listed on the Registry of Securities and Insurance include in their annual financial statements both disbursed as well as projected environmental investments by enterprises.

Other significant initiatives in this sphere include: the amendment of the Labour Code regarding sub-contracted labour. Article 3 of Law No. 20123 of 16 October 2006 introduces significant modifications to Title VII of the Labour Code that establish the joint responsibility of the main company regarding the labour and social security obligations of its subcontractors towards the latter's workers. A second initiative aims at changing provisions in the Labour Code regarding collective bargaining. Both initiatives seek to induce good practices in relations between employers, workers and trade unions. Regarding training of workers, there is a national policy, implemented through the National Training and Employment Service, in which both the State and enterprises that benefit from tax incentives implement programmes to improve the qualification of workers.

Proposed amendments to the Public Works Concessions Law seek to establish compliance with labour and social security regulation, including protection for subcontractors as the weaker party in their relation with contractors. Compliance with these norms will be evaluated by the public administration as a condition for being included in and remaining on registers of private operators of concessions. In addition, the bill to create a Superintendent of Public Works, which is currently before Congress, would make it possible to obtain information about the conduct of operators, their evaluation and sanctions.

CORFO, Chile's economic development agency, in association with the industrial sector and with *Vincular*, is presently implementing a set of subsidies for SMEs that incorporate responsible business conduct in their practices, including their suppliers and sub-contractors. The Clean Production Agreements²⁸ and the Clean Production Mechanism²⁹ have been signed and implemented. The "Chile Calidad" public entity has included measures on sustainability within the national definition of excellence.

²⁸ The Clean Production Council (Consejo de Producción Limpia) was created in 1998, bringing together the public and private sectors: to date 41 agreements have been signed, involving 2500 enterprises.

8. OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT

At the request of the Investment Committee, the Working Group on International Investment Statistics (WGIIS) reviewed Chile's position under the Benchmark Definition of Foreign Direct Investment and related reporting requirements as set out in the Accession Roadmap [C(2007)100/FINAL]. The examination of Chile's position by the WGIIS, which took place on 25 March 2009, was conducted on the basis of a report prepared by the Secretariat. As noted in the Summary Record of the meeting, the WGIIS agreed to ask the Chair to address a letter to Chile requesting confirmation of commitments and additional clarifications (see Annex 11). The WGIIS received written responses to its requests and formulated its final assessment in the relevant areas requested by the Investment Committee.

The final assessment of the WGIIS notes that:

- (i) The Working Group appreciated the presentation by the Chilean delegation and their responses to the many questions put to it during and after the meeting on 25 March 2009;
- (ii) The Working Group welcomed:
 - 1) Chile's acceptance of the Recommendations on the Benchmark Definition of Foreign Direct Investment, 4th edition, both for standard and supplemental FDI series, and its commitment to make changes to its FDI statistics system to meet BMD4 requirements and to establish an action plan for that purpose;
 - 2) Chile's detailed response to the OECD Survey of Implementation of Methodological Standards for Direct Investment (SIMSDI);
 - 3) Chile's commitment to report FDI data (a) by partner country and industry classification as from 2009 for flows and 2010 for positions according to current definitions (not in line with BMD4) and (b) standard FDI series according to BMD4 as from April 2011 (first reference year 2009), for the compilation of the OECD International Direct Investment Yearbook and public reports on FDI trends published by the OECD in accordance with the timetable and template agreed by Members.
- (iii) The Working Group was pleased to note that:
 - 1) Chile has agreed to undertake a comprehensive programme to renovate and significantly improve its data collection and compilation system in order to implement BMD4 recommendations. In particular, Chile will: (a) use the 10% equity ownership threshold in defining an inward FDI; (b) use market values (or recommended proxies); (c) apply the directional principle, including for reverse investments; (d) identify separately resident special purpose entities (SPEs); (e) classify FDI by bilateral partners and apply the debtor/creditor principle; (f) classify FDI by economic activity and use ISIC4; (g) apply internationally accepted accounting standards;

²⁹ This mechanism is related to the Kyoto Protocol and is coordinated by CONAMA as the Designated National Authority. By 2008, 49 projects have been registered with varying degrees of implementation.

- 2) Chile will provide a full updated SIMSDI questionnaire response at the time of its submission of FDI statistics according to BMD4 in April 2011.
- (iv) The Working Group recognises that accomplishing these reforms will require important changes in Chile's statistical system and sustained efforts to ensure their implementation. It therefore looks forward to receiving regular progress reports and a comprehensive implementation report three years after accession to OECD membership.

The Investment Committee endorsed the final assessment of the WGIIS.

9. OECD PRINCIPLES FOR PRIVATE SECTOR PARTICIPATION IN INFRASTRUCTURE

The Accession Roadmap for Chile provides that its position under the Recommendation of the Council on the OECD Principles for Private Sector Participation in Infrastructure [C(2007)23] should be assessed by means of a technical review by the Secretariat.

Chile accepts the Recommendation and has indicated that its policy is consistent with the principles therein. The Secretariat has reviewed the information submitted by the Chilean authorities and has concluded that Chile is convinced of the relevance of private sector involvement in infrastructure and has developed mechanisms to confront the challenges posed by increased private sector participation.

9.1. Chile's experience with private participation in infrastructure development

By the early 1990s, a sizable infrastructure gap had emerged in Chile, and significant investment was needed to prevent infrastructure and transport bottlenecks from becoming a major obstacle to growth. In common with other Latin American countries, fiscal adjustment under economic stabilisation programs during the 1980s weighed heavily on public investment in infrastructure and on infrastructure maintenance. Rapid economic growth during the second half of the 1980s and into the 1990s quickly exposed infrastructure inadequacies. Traffic speeds markedly declined, road accidents increased, and ports and airports became congested. Estimates by the Ministry of Public Works at the time placed investment needs in infrastructure for the second half of the 1990s at the equivalent of 20% of GDP.

A challenge for the government was to close the infrastructure gap while maintaining fiscal discipline, which had placed public debt on a rapidly declining path. The Chilean solution was to promote private sector involvement through build-operate-transfer (BOT) schemes. The so-called Public-Private Partnerships (PPPs), whereby private firms would build infrastructure assets and operate them for a number of years transferring them to the State, do not exclude foreigners. In fact, road shows have been conducted outside Chile to widen the investor base.

Forty-eight projects, representing a total investment outlay for the equivalent of 5% of 2007 GDP, have so far been developed under PPPs. These include eight projects financed with tolls, for the upgrade of the country's main north-south highway; twelve other highway projects; ten airport projects; seven urban road projects; and eleven other projects including prisons, public buildings and a reservoir.

Chilean authorities consider that PPPs have contributed to progress in rehabilitation of the highway network, but that an enormous challenge must still be faced as strong economic growth generates new demands for infrastructure. Recent estimates by authorities place the infrastructure gap at some 17% of 2004 GDP.

9.2. Position of Chile under the Principles

Deciding on public or private provision of infrastructure services

Principle 1:

Chile accepts the principle that: “The choice by public authorities between public and private provision should be based on cost-benefit analysis taking into account all alternative modes of delivery, the full system of infrastructure provision, and the projected financial and non-financial costs and benefits over the project lifecycle.”

Chile’s Public Works Concessions Law³⁰ stipulates that "prior to putting pre-investment studies and projects to be developed under the concessions system out to tender, the national planning entity (Mideplan) must provide a report, as an internal document of the Public Administration³¹ that provides a technical-economic analysis of its return.” In addition, the Ministry of Finance must approve all the contract documents, taking into account the project’s public-finance impact and its social return.

A bill currently before Congress would give formal status to the *Consejo de Concesiones* (Concessions Council) that has existed in practice for a number of years. It is formed by the Minister of Public Works, two members appointed by the President, two engineering experts and two academics from relevant fields. This consulting body provides an expert technical opinion on each new concession project as well as on subsequent decisions affecting a contract once it is in operation. In this way, it contributes to the transparency, correct assessment and efficiency of decisions.

Principle 2:

Chile accepts the principle that: “No infrastructure project – regardless of the degree of private involvement – should be embarked upon without assessing the degree to which its costs can be recovered from end-users and, in case of shortfalls, what other sources of finance can be mobilised.”

Demand studies carried out as preparation for a concession project provide an estimate of likely income in different tariff scenarios. These studies may be carried out by the Ministry of Public Works, another Ministry or, even, the private sector, depending on the particular project. Subsidies or other financing mechanisms are allocated on the basis of these studies so that the project offers a private return considered reasonable. If necessary, a minimum income guarantee is also provided to permit a project’s financing in cases in which user payments, in the form of tariffs, would be insufficient. These guarantees are designed in such a way as to permit a project’s financing and the loss of the capital contributed by the concession holder, thereby encouraging the market to evaluate the project’s economic rationale.

³⁰ *Ley de Concesiones de Obras Públicas* (Public Works Concessions Law) and its subsequent modifications (Decree with Force of Law 164, 1991; Law 19.252, 1993; and Law 10.460, 1996), and the *Reglamento de Concesiones* (Concessions Regulation) contained in Supreme Decree 956 (1997).

³¹ The Public Administration is defined in Article 1 of the *Ley Orgánica Constitucional de Bases Generales de Administración del Estado* (Constitutional Statute on General Principles of Administration of the State): “The Public Administration will comprise the Ministries, Regional and Provincial Governments and the entities and public services created to fulfil the state’s administrative function, including the Comptroller General’s Office, the Central Bank, the Armed Forces and Police Services, Municipal Governments and the state enterprises established by law.”

Principle 3:

Chile accepts the principle that: “The allocation of risk between private parties and the public sector will be largely determined by the chosen model of private sector involvement, including the allocation of responsibilities. The selection of a particular model and an associated allocation of risk should be based upon an assessment of the public interest.”

All the risks implicit in a concession contract, together with the rights to take decisions related to these risks, must be allocated either to the state or the concession holder. This allocation takes into account their respective capacity to: a) affect the risk factor; b) affect the sensitivity of the project’s total value to the risk factor (by, for example, taking measures to avert it); and c) absorb the risk. Contracts are designed in such a way as to allocate risks to the party that is in a position to take measures to avert them. As a result, in order to approve a project, the Ministry of Finance requires the Ministry of Public Works to present a risk matrix, setting out a project’s possible risks and the way in which the contract would allocate them.

Principle 4:

Chile accepts the principle that: “Fiscal discipline and transparency must be safeguarded, and the potential public finance implications of sharing responsibilities for infrastructure with the private sector fully understood.”

Chile’s concessions system includes a number of mechanisms that put it in compliance with this principle. By requiring the approval of projects by the Ministry of Finance, it ensures the sustainability of the fiscal resources entailed by a project and its compatibility with fiscal discipline. Law 20128 (2006) on Fiscal Responsibility instructs the Ministry of Finance’s Budget Office (DIPRES) to publish information on maximum fiscal exposure and an estimation of payments arising from the contingent liabilities associated both to each project individually and to the system as a whole.

In addition, the Ministry of Public Works and the Ministry of Finance have agreed on the use of tools that permit long-term budget planning of infrastructure investment, taking into account projects developed using traditional public financing methods as well as those developed under the PPP programme.

Enhancing the enabling institutional environment

Principle 5:

Chile accepts the principle that: “A sound enabling environment for infrastructure investment, which implies high standards of public and corporate governance, transparency and the rule of law, including protection of property and contractual rights, is essential to attract the participation of the private sector.”

Chile considers this principle to be of fundamental importance since the legal framework of the concessions programme is one of the pillars of its success. In Chile, solid constitutional principles guarantee respect for and compliance with the law. The immediacy of this obligation is also safeguarded through constitutional mechanisms to provide protection against possible abuses by the public administration and possible discrimination by public bodies in economic matters. These principles are enshrined in Chile’s Political Constitution which guarantees the right to property and the freedom to undertake economic activities as well as equality before the law and the right to non-discriminatory treatment from the public administration in economic activities (*Constitución de la República*, Article 19).

The principles and guarantees established by the Constitution underpin Chile’s entire legal system and are components of the principles, fundamental norms and protection mechanisms on which economic

public order is based. In this latter area, the most important mechanisms include the *recurso de protección* (appeal to the courts for protection of constitutional rights) and the *recurso de amparo económico* (appeal to the courts for protection of economic rights). In addition, the law provides special administrative mechanisms for the redress of administrative abuses.

The concessions system itself also includes norms to guarantee respect for and compliance with the rights and duties created by a concession contract. These norms would be further improved by the bill currently before Congress. This would, for example, establish a regulated system for the modification of contracts and dispute resolution mechanisms of both an administrative and special judicial nature. These latter options would have the advantage of specialised expertise and of providing a rapid ruling.

Principle 6:

Chile accepts the principle that: “Infrastructure projects should be free from corruption at all levels and in all project phases. Public authorities should take effective measures to ensure public and private sector integrity and accountability and establish appropriate procedures to deter, detect and sanction corruption.”

Chile has general norms on the probity required of public employees in the exercise of their duties. These include a definition of offences against probity relating to recusals and incompatibilities and the obligations of public officials and their subordinates in the public administration. In addition, public employees are obliged to abstain from participating in discussion and decisions on matters in which they have a conflict of interest. Chile’s criminal law also establishes a number of norms that sanction acts of corruption on the part of public employees and private individuals. These include special provisions on the penalties for public employees found guilty of abuses and harm against private individuals.

Principle 7:

Chile accepts the principle that: “The benefits of private sector participation in infrastructure are enhanced by efforts to create a competitive environment, including by subjecting activities to appropriate commercial pressures, dismantling unnecessary barriers to entry and implementing and enforcing adequate competition laws.”

Under Chile’s Public Works Concessions Law, contracts must be awarded through public tenders, offered either domestically or internationally, in which any company or individual may participate providing they comply with the general and universal requirements established in the tender term sheets. Only those companies or individuals with general legal recusals applying to any public sector contract may be excluded. The terms of a tender encourage competition because this results in better economic conditions for the provision of the infrastructure in question.

Principle 8:

Chile accepts the principle that: “Access to capital markets to fund operations is essential to private sector participants. Restrictions in access to local markets and obstacles to international capital movements should, taking into account macroeconomic policy considerations, be phased out.”

Under a government initiative, banking and financial regulation has been modified so as to provide easier access to financing for infrastructure projects. This is reflected in the large amounts in Infrastructure Bonds traded on the financial market which has, as a result, also been deepened. So far, infrastructure bonds worth USD 6 billion have been issued and continue to trade constantly on the fixed-income market. Some concession contracts carry a minimum income guarantee so as to facilitate financing as well as an

exchange rate guarantee in the case of concession holders that have opted to use international markets to raise financing.

Goals, strategies and capacities at all levels

Principle 9:

Chile accepts the principle that: “Public authorities should ensure adequate consultation with end-users and other stakeholders including prior to the initiation of an infrastructure project.”

Chile considers this principle to be of crucial importance for the success of concession projects and their proper social and environmental insertion. The environmental impact evaluation system created by Law 19300 (1994) on the General Framework for the Environment includes a process of consultation with those persons who would be affected by a project. Similarly, the Concessions Council, which would be given formal status by the bill currently before Congress, would require the participation of different government authorities when a concession project would have an impact in their sphere of responsibility.

Principle 10:

Chile accepts the principle that: “Authorities responsible for privately-operated infrastructure projects should have the capacity to manage the commercial processes involved and to partner on an equal basis with their private sector counterparts.”

The specialised staff of the Ministry of Public Works’ Coordination Office for Public Works Concessions (CCOP) puts Chile in compliance with this principle. The CCOP’s responsibilities include advising the Ministry of Public Works on: a) the acceptance or rejection of private sector proposals for concession projects; b) the scheduling of tenders for studies, projects and the construction of public works through the concessions system; c) the administrative and economic conditions of tenders; d) supervision norms for concession contracts; and e) modifications that may be required to concession projects that are already under construction or in operation.

Before the end of 2008, the government has undertaken to present to Congress a bill that would modify this institutional framework in the light of the experience acquired since the launch of the concessions system. Recommendations for the design of a modern and optimum system correcting weaknesses that have been detected so far were contained in an independent study carried out by the University of Chile in 2007.

Principle 11:

Chile accepts the principle that: “Strategies for private sector participation in infrastructure need to be understood, and objectives shared, throughout all levels of government and in all relevant parts of the public administration.”

At present, communication and consultation within the public administration take place on an informal basis. However, the Concessions Council, which would be created by the bill currently before Congress, would formally establish the obligation to request the opinion of the relevant public authorities on each project or programme to be implemented under the PPP system.

Principle 12:

“Mechanisms for cross-jurisdictional co-operation, including at the regional level, may have to be established.” Chile has indicated that it accepts this principle although it is not applicable to its domestic situation, as Chile is a unitary state and, as a result, its national norms apply throughout the country.

Making the public-private co-operation work

Principle 13:

Chile accepts the principle that: “To optimise the involvement of the private sector, public authorities should communicate clearly the objectives of their infrastructure policies and they should put in place mechanisms for consultations between the public and private partners regarding these objectives as well as individual projects.”

There is widespread awareness of the nature and objectives of concession projects. In addition, the procedure for tendering and awarding contracts is regulated by the Public Works Concessions Law and this framework seeks to guarantee transparency in all stages of the process. The launch of a tender is advertised in the Official Gazette and at least one national newspaper while the terms sheets, studies and other relevant documents are available on request. During the tender, standard channels of communication are open to all participants and replies to questions and queries are published in the form of Clarification Circulars which are distributed to all participants. Once a concession has been awarded and for the duration of the contract, relations with the holder are managed through the corresponding Fiscal Inspector, appointed by the Ministry of Public Works, and the Project Register, which is the official channel of communication established for this purpose.

In highly complex projects, co-ordinating committees are also established to facilitate communication between the different public and private parties involved in their implementation.

Principle 14:

Chile accepts the principle that: “There should be full disclosure of all project-relevant information between public authorities and their private partners, including the state of pre-existing infrastructure, performance standards and penalties in the case of non-compliance. The principle of due diligence must be upheld.”

As from the launch of a tender, concession contract documents include clauses that seek to uphold the process of due diligence throughout the lifetime of the contract.

All studies and reference documents on the state of the pre-existing infrastructure are made available. These explicitly set out each participant’s obligation in terms of in-depth analysis of these documents and any others required for the construction, repair and operation of the infrastructure and services involved in the concession. In addition, all types of infraction, fines and penalties arising from non-compliance with the terms of the concession contract are explicitly established.

Principle 15:

Chile accepts the principle that: “The awarding of infrastructure contracts or concessions should be designed to guarantee procedural fairness, non-discrimination and transparency.”

In the fifteen years since the concessions system was launched, the tender mechanism for the award of contracts has never been challenged, reflecting the fact that it guarantees the objective evaluation of bids. Moreover, the entire process has to be approved by the Comptroller General's Office.

Principle 16:

Chile accepts the principle that: "The formal agreement between authorities and private sector participants should be specified in terms of verifiable infrastructure services to be provided to the public on the basis of output or performance based specifications. It should contain provisions regarding responsibilities and risk allocation in the case of unforeseen events."

Contract specifications are at present set in terms of technical standards. However, in line with international trends, service standards have gradually been introduced. A bill currently before Congress would create a Superintendent of Public Works to complete this process. It would be responsible for enforcing the service standards of infrastructure with private sector participation as well as that built using traditional public financing.

Principle 17:

Chile accepts the principle that: "Regulation of infrastructure services needs to be entrusted to specialised public authorities that are competent, well-resourced and shielded from undue influence by the parties to infrastructure contracts."

In order to provide the public administration with the necessary human resources, a specialised unit was created within the Ministry of Public Works, which reports directly to the Director General of Public Works, the third level of authority in the ministry. Its exclusive function is to act as the counterpart of concession holders from the launch of a project through to the contract's conclusion.

This arrangement is now, however, considered insufficient and it was for this reason that the University of Chile was hired in 2007 to assess different institutional options for increasing the capacity, competence and independence of what the study termed the "Concessions Agency". Some of its recommendations would require legislation, including a special statute to provide employees with remunerations and incentives that are in line with the particular function they fulfil. The bill currently before Congress to improve the present Public Works Concessions Law would, in any case, strengthen the system by creating new entities such as a Technical Panel, with independence from the public authorities responsible for infrastructure policy and management. This Panel would be able to propose and recommend non-judicial solutions in the case of differences between the authorities and private operators and is based on the model of the dispute review boards found in the construction industries of Anglo-Saxon countries.

The bill would, in addition, strengthen the judicial dispute resolution mechanism by requiring a legal ruling from the arbitral tribunal. This would better safeguard the legal norms in force and the administrative components of the terms of the respective concession, thereby protecting the principles of contract law or *pacta sunt servando* (agreements are made to be fulfilled).

As regards the effectiveness of the proceedings and their ability to guard against the use of delaying tactics for the benefit of particular interests, limits are established on the duration of each stage of the process and common sense assessment of evidence is permitted in order to ensure that due weight is given to the different elements of proof. Disputes may also be taken to the ordinary courts (Santiago Appeals Court) instead of arbitration when it is considered that the latter is not appropriate.

Principle 18:

Chile accepts the principle that: “Occasional renegotiations are inevitable in long-term partnerships, but they should be conducted in good faith, in a transparent and non-discriminatory manner.”

Good faith is one of the pillars of Chilean law on contracts and underpins the entire legal system, including administrative law. In the case of the principle of non-discrimination, this is enshrined in the Constitution which guarantees equality before the law and freedom from discrimination by the public administration on economic matters, together with protection of the essence of these rights in the face of the power of the law.

A bill currently before Congress would increase the transparency of contract renegotiations by defining *de facto* cases arising from the principle of *ius variandi*³² and of renegotiation by mutual consent. Similarly, the bill would clearly establish the situations in which a premature end may be put to a concession, the limits that can be applied and the system of compensation for the contract holder. Another bill before Congress would also increase the transparency of renegotiations through the powers of a new autonomous supervisory agency, a Superintendent of Public Works.

Principle 19:

Chile accepts the principle that: “Dispute resolution mechanisms should be in place through which disputes arising at any point in the lifetime of an infrastructure project can be handled in a timely and impartial manner.”

At present, the mechanism for settling disputes that arise between concession holders and the authorities is regulated by Article 36 of the Public Works Concessions Law. This involves a panel of three members, one appointed by each of the parties and the third by common consent. This panel initially attempts conciliation and, if this fails, serves as an arbitral tribunal.

The impartiality and speed of dispute resolution would be increased under a bill before Congress that would create a Technical Panel. Its members would be appointed by an independent body with conditions for eligibility and recusal that would ensure its impartiality. The bill would also establish short time limits on the Panel’s proceedings and, if its recommendations are rejected, envisages immediate referral to special arbitral tribunal or the ordinary courts.

The impartiality of the special arbitral tribunal is guaranteed by the fact that its three members must be selected from a list of lawyers drawn up by the Supreme Court and a list of construction and engineering experts prepared by the *Tribunal de Defensa de la Libre Competencia* (Tribunal for the Defence of Free Competition). Moreover, the requirement that the tribunal must present a legal ruling provides protection against decisions that infringe the law and arbitrary rulings. In the case of both this special tribunal and the ordinary courts, rapid proceedings are also envisaged.

Encouraging responsible business conduct

Principle 20:

Chile accepts the principle that: “Private sector participants in infrastructure should observe commonly agreed principles and standards for responsible business conduct.”

³² The power of the state to modify contracts.

The bill before Congress to modify the Public Works Concessions Law would establish requirements as regards compliance with labour and social security regulation and also envisages protection for subcontractors as the weaker party in their relation with contractors. Compliance with these norms will be evaluated by the public administration as a condition for being included in and remaining on registers of private operators. In addition, the bill to create a Superintendent of Public Works, which is currently before Congress, would make it possible to obtain information about the conduct of operators, their evaluation and sanctions.

Principle 21:

Chile accepts the principle that: “Private enterprises should participate in infrastructure projects in good faith and with a commitment to fulfil their commitments.”

This principle is safeguarded through publicity, equality in the treatment of a project’s proponent and a period for clarifying queries about the terms of a tender. Financial guarantees of the seriousness of a bid and of fulfilment of a concession holder’s obligations are also required and, together with the definition of serious non-compliance; provide an incentive for the fulfilment of commitments. The bill to create a Superintendent of Public Works, which is currently before Congress, would, in addition, establish safeguards as regards the level and conditions of service that concession holders undertake to provide on penalty of incurring the corresponding sanctions.

Principle 22:

Chile accepts the principle that: “Private sector participants, their subcontractors and representatives should not resort to bribery and other irregular practices to obtain contracts, gain control over assets or win favours, nor should they accept to be party to such practices in the course of their infrastructure operations.”

Regulation on the probity of public officials and criminal law, as well as regulation on public works, provide important disincentives for irregular practices and the use of undue advantages. This helps to ensure that the award of concessions and the renegotiation of contracts take place in the best possible conditions, guaranteeing appropriate prices for projects.

In addition, the government plans to tighten limits on the direct, non-tendered renegotiation of contracts and to establish new bodies to participate in and control these processes. These include a Consultative Advisory Council for important decisions affecting projects and an independent Superintendent to supervise operators and the public bodies that interact with them.

It is also important to note that Chile is a signatory of the United Nations Convention against Corruption and is subject to permanent monitoring of compliance with the Convention’s norms.

Principle 23:

Chile accepts the principle that: “Private sector participants should contribute to strategies for communicating and consulting with the general public, including vis-à-vis consumers, affected communities and corporate stakeholders, with a view to developing mutual acceptance and understanding of the objectives of the parties involved.”

Obligations towards the public administration and users are established in the Service Rules included as part of the contract for each concession and would be further guaranteed by the proposed Superintendent of Public Works. The latter would have powers to request information from operators for communication

to users and, in the case of concession holders' service obligations, the options of using the tools of benchmarking and accountability.

Principle 24:

Chile accepts the principle that: "Private sector participants in the provision of vital services to communities need to be mindful of the consequences of their actions for those communities and work, together with public authorities, to avoid and mitigate socially unacceptable outcomes."

Concession holders must respect Chile's general laws, including Law 19.300 on the General Framework for the Environment, which regulates mitigation and compensation for the adverse effects of public works projects.

ANNEX 1 EXTRACTS FROM THE ROADMAP FOR THE ACCESSION OF CHILE TO THE OECD CONVENTION

APPENDIX A.I

Investment Committee

Candidate countries should commit to the following set of core principles on cross border capital movements and services, foreign direct investment and multinational enterprises:

- full compliance with the principles of non-discrimination, transparency and standstill, in accordance with the OECD Codes of Liberalisation and the National Treatment instrument of the OECD Declaration on International Investment and Multinational Enterprises (reservations under the Codes must be limited to existing restrictions);
- an open and transparent regime for FDI including in key sectors. Restrictions must be limited and concern sectors where restrictions are not uncommon in OECD countries;
- liberalisation of other long-term capital movements, including equity investment and debt instruments of a maturity of one year or more; commercial credit and other capital operations relating to international trade are also to be liberalised; a timetable for the abolition of remaining controls on short-term capital movements is required;
- no restrictions on payments or transfers in connection with international current account transactions; the candidate countries must comply with all IMF Article VIII requirements;
- relaxation of restrictions on cross-border trade in services, particularly banking, insurance and other financial services;
- fair and transparent implementing practices and proportionality of the measures relative to the stated objective pursued;
- effective enforcement of intellectual property rights;
- key commitments under investment protection and other international agreements;

capacity to present a credible plan for the establishment of a visible, accessible, transparent and accountable National Contact Point for the OECD Guidelines for Multinational Enterprises; evidence of the candidate's commitment to the various international instruments cited in the Guidelines.

These principles are reflected in the Instruments, Recommendations, Guidelines and Best Practices outlined below.

A) OECD Decisions and other legally binding instruments

- Decisions on the Codes of Liberalisation of Capital Movements and Current Invisible Operations (1961 and subsequent amendments).
- Decisions related to the Declaration on International Investment and Multinational Enterprises (1976 and subsequent amendments).

The Investment Committee (and its subsidiary bodies) will review and assess the willingness and ability of the candidate countries to accept the obligations of these instruments.

B) OECD Recommendations and Declarations

i) The following key instruments have specific policy implications requiring an assessment of the candidate countries' position through a review by the Investment Committee and the subsidiary bodies concerned:

- Recommendation on the OECD Benchmark Definition of Foreign Direct Investment (1995, currently being revised).
- Declaration on International Investment and Multinational Enterprises (1976 and subsequent amendments).

In addition, the candidate countries would be required to complete the IMF/OECD Survey of Implementation of Methodological Standards for Direct Investment and agree to report data for the compilation of the OECD International Direct Investment Yearbook and the annual report on FDI trends published in International Investment Perspectives, in accordance with the timetable and template agreed by Members.

ii) The following instruments are primarily of a technical or operational nature. The position of the candidate countries will be assessed through a technical review by the Secretariat:

- Recommendation on OECD Principles for Private Sector Participation in Infrastructure (2007).

OECD LEGAL INSTRUMENTS UNDER THE PURVIEW OF THE INVESTMENT COMMITTEE FOR THE PURPOSE OF THE ACCESSION DISCUSSIONS

Decisions

Decision of the Council on the OECD Guidelines for Multinational Enterprises C(2000)96

Decision of the Council on National Treatment C(91)147

Decision of the Council on Conflicting Requirements being imposed on Multinational Enterprises C(91)73

Second Revised Decision of the Council on International Investment Incentives and Disincentives C(84)92

Decision of the Council adopting the Code of Liberalisation of Capital Movements OECD/C(61)96

Decision of the Council adopting the Code of Liberalisation of Current Invisible Operations OECD/C(61)95

Recommendations

Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security C(2009)63

Recommendation of the Council on the OECD Benchmark Definition of Foreign Direct Investment C(2008)76

Recommendation of the Council on Principles for Private Sector Participation in Infrastructure C(2007)23

Recommendation of the Council on Member Country exceptions to National Treatment and Related Measures concerning Access to Local Bank Credit and the Capital Market C(89)76

Recommendation of the Council on Member Country Exceptions to National Treatment and National Treatment related Measures in the Category of Official Aids and Subsidies C(88)131

Recommendation of the Council on Member Country Exceptions to National Treatment and National Treatment related Measures concerning the Services Sector C(88)41

Recommendation of the Council on Member Country Exceptions to National Treatment and National Treatment related Measures concerning Investment by Established Foreign-Controlled Enterprises C(87)76

Recommendation of the Council on Member Country Measures concerning National Treatment of Foreign-Controlled Enterprises in OECD Member Countries and Based on Considerations of Public Order and Essential Security Interest C(86)55

Recommendation of the Council concerning the Conclusion of Bilateral Agreements for the Co-Production of Films C(64)124

Other Instruments

Declaration on Sovereign Wealth Funds and Recipient Country Policies C/MIN(2008)8/FINAL

Declaration on International Investment and Multinational Enterprises C(76)99, including the Guidelines for Multinational Enterprises

1967 Draft Convention on the Protection of Foreign Property

ANNEX 2
CHILE'S RESERVATIONS TO THE CODE OF LIBERALISATION OF CAPITAL
MOVEMENTS

List A, I/A Direct investment:

- In the country concerned by non-residents.

Remark: The reservation applies only to:

- i) the requirement of incorporation in Chile for auditors of financial institutions;*
- ii) establishment of branches of non-resident financial institutions except banks and insurance companies;*
- iii) the registration of aircraft which is reserved for Chilean natural persons or Chilean enterprises that are majority-owned by Chilean nationals;*
- iv) the registration of shipping vessels for which there is a requirement of incorporation in Chile and, in the case of vessels for water transportation, fishing, cabotage and tugging activities performed in Chilean ports which is reserved for Chilean natural persons or Chilean enterprises that are majority-owned by Chilean nationals, and - in the case of vessels - to co-ownerships in which a majority of members are Chilean nationals residing in Chile and in which the majority of rights belong to Chilean nationals;*
- v) international land transport which must be carried out by enterprises that are majority-owned by Chileans or by nationals of Argentina, Bolivia, Brazil, Paraguay, Peru or Uruguay;*
- vi) stowage and dockage which must be carried out by enterprises that are majority-owned by Chileans;*
- vii) small scale fishing, which must be carried out by enterprises that are constituted by Chileans or permanent resident foreigners;*
- viii) granting and use of concessions for radio broadcasting, which is limited to enterprises with no more than 10% foreign ownership;*
- ix) mining (including exploration, exploitation and treatment) of hydrocarbons, liquid or gaseous, of uranium and lithium is subject to prior authorisation.*

List A, IV/B Operations in securities on capital markets

C1,DI

- Admission of foreign securities on the domestic capital market.

Remark: The reservation applies only to:

- i) foreign currency denominated securities that are not denominated in either euros or US dollars;*

- ii) *shares or other securities of a participating nature denominated in Chilean pesos, for which admission on the domestic market is subject to authorisation by the Central Bank.*

- Purchase in the country concerned by non-residents.

Remark: The reservation applies only to the purchase of shares and other securities of a participating nature, which may be affected by laws on inward direct investment.

- Purchase abroad by residents.

Remark: The reservation applies only to the purchase of foreign securities by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets or convertible bonds to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

List B,
V/B
D1, D3

Operations on money markets

- Admission of foreign securities and other instruments on the domestic money market.

Remark: The reservation applies only to securities denominated in Chilean pesos, for which admission on the domestic market is subject to authorisation by the Central Bank, and to foreign currency denominated securities that are not denominated in either euros or US dollars.

- Purchase or lending abroad by residents.

Remark: The reservation applies only to the purchase of foreign securities or lending abroad by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

List B,
VI/B
D1, D2, D3

Other operations in negotiable instruments and non-securitised claims

- Admission of foreign instruments and claims on a domestic financial market.

Remark: The reservation applies only to securities denominated in Chilean pesos, for which admission on the domestic market is subject to authorisation by the Central Bank, and to foreign currency denominated securities that are not denominated in either euros or US dollars.

- Purchase, sale or exchange for other assets abroad by residents.

Remark: The reservation only applies to:

- i) *the acquisition, through purchase or exchange for other assets, by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration;*
- ii) *the acquisition, through purchase or exchange for other assets, of foreign financial derivative products that would cause such products to exceed 3% of technical reserves or risk patrimony of insurance companies;*
- iii) *the purchase, sale or exchange for other assets by Chilean stockbrokers on account of Chilean residents.*

List A,
VII/
B
D1

Operations in collective investment securities

- Admission of foreign collective investment securities on the domestic securities market.

Remark: The reservation applies only to securities denominated in Chilean pesos, for which admission on the domestic market is subject to authorisation by the Central Bank, and to foreign currency denominated securities that are not denominated in either euros or US dollars.

- Purchase abroad by residents.

Remark: The reservation applies only to the purchase of foreign securities by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

List B,
VIII/B

Credits directly linked with international commercial transactions or with the rendering of international services.

- Credits granted by residents to non-residents.

Remark: The reservation applies only to the granting of credits to non-residents by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

List B,
IX/B

Financial credits and loans.

- Credits and loans granted by residents to non-residents.

Remark: The reservation applies only to the granting of credits and loans to non-residents by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

List A,
X/A2

Sureties, guarantees and financial back-up facilities

- Sureties and guarantees granted by residents in favor of non-residents.

Remark: The reservation applies only to the granting of sureties, guarantees and financial back-up facilities by a domestic bank to non-residents in foreign currency that would cause the total value of such operations to exceed the equivalent of 25% of the bank's effective net worth.

List B,
X/B2

Sureties, guarantees and financial back-up facilities

- Financial back-up facilities granted by residents in favor of non-residents.

Remark: The reservation applies only to the granting of sureties, guarantees and financial back-up facilities by a domestic bank to non-residents in foreign currency that would cause the total value of such operations to exceed the equivalent of 25% of the bank's effective net worth.

List B,
XI/B

Operation of deposit accounts.

- Operation by residents of accounts with non-resident institutions.

Remark: The reservation applies only to the deposit of funds with non-resident institutions by insurance companies that would cause foreign assets to have a share in technical reserves or own funds greater than 10%; by managers of DL3500 pension funds, the Retirement Bonus Fund of Law 19882 and the Unemployment Fund of Law 19728 that would cause foreign assets or time deposits to represent an amount greater than the limits established for them in DL3500 as amended in 2008; and by managers of housing funds that would cause foreign assets to have a share of more than 30% in total assets under administration.

ANNEX 3
CHILE'S RESERVATIONS TO THE CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS

C/1 Maritime freights (including chartering, harbor expenses, disbursements for fishing vessels, etc.)

Remark: The reservation applies only to maritime freights between Chile and Brazil, which are reserved under the Chile-Brazil International Maritime Freight Transportation Agreement of 1974.

C/2 Inland waterway freights, including chartering.

Remark: The reservation applies only to cabotage.

C/3 Road transport: passengers and freights, including chartering.

Remark: The reservation applies only to international road transport between Chile and Argentina, Bolivia, Brazil, Paraguay, Peru and Uruguay.

D/2 Insurance relating to goods in international trade.

Annex I to Annex A, Part I, D/2

Remark: The reservation, which includes the activity of promotion, applies only to the insurance of international road and railway transport and of satellites and satellites liability.

D/3 Life assurance.

Annex I to Annex A, Part I, D/3, paragraph 1

Remark: The reservation, which includes the activity of promotion, does not apply to the provision of insurance services if the insurance policy is taken out at the proposer's initiative and it is not a policy that is compulsory by law or insurance, pension products or services offered by insurance companies that are linked to the pension regime established by Decree Law 3500.

D/4 All other insurance.

Annex I to Annex A, Part I, D/4, paragraph 4

Remark: The reservation, which includes the activity of promotion, does not apply if the insurance policy is taken out at the proposer's initiative.

D/7 Entities providing other insurance services.

Annex I to Annex A, Part IV, D/7.

Remark: The reservation, which includes the activity of promotion, applies only to:

- i) intermediation services for insurance contracts other than those relating to goods in international trade and that are not covered by the reservation under item D/2;*
- ii) consultancy services in connection with the mandatory pension system established by Decree Law 3500; and*
- iii) claim settlement services for contracts entered into in Chile.*

D/8 Private pensions

Annex I to Annex A, Part IV, D/8.

Remark: The reservation, which includes the activity of promotion, applies only to:

- i) the cross-border provision of services, except if the contract is taken out at the proposer's initiative and it is not a pension product or a service that is linked to the pension regime established by Decree Law 3500;*
- ii) the establishment of branches of pension funds in Chile; and*
- iii) the deductibility for tax purposes of contributions to pension funds purchased from non-residents.*

E/1 Payment services

Remark: The reservation applies to the provision of payment instruments and to fund transfer services by non-residents in Chile.

E/2 Banking and investment services

Remark: The reservation applies only to the provision of:

- i) broker dealer services by non-residents in Chile;*
- ii) underwriting services by non-residents in Chile that include the public offering of securities in the Chilean market;*
- iii) banking and investment services for foreign exchange for those transactions which in accordance with Central Bank regulations must be conducted through authorised agents.*

E/3 Settlement, clearing and custodial and depositary services

Remark: The reservation applies only to the provision of custodial and depositary services by non-residents in Chile.

E/4 Asset management

Remark: The reservation applies only to:

- i) the offer in Chile by non-residents of asset management services which involve the offering of securities or collective investment schemes to resident investors, except for those asset management services for investments abroad offered in Chile by non-residents to resident funds managers;*
- ii) the provision in Chile by non-residents of trust services reserved for resident financial institutions;*
- iii) asset management services for collective investment schemes or pension funds, except for those asset management services for investments abroad offered in Chile by non-residents to resident fund managers.*

E/5 Advisory and agency services

Remark: The reservation applies only to securities rating by non-residents in Chile.

E/7 Conditions for establishment and operations of branches, agencies, etc. of non-resident investors in the banking and financial services sector.

Annex II to Annex A, paragraphs 1 and 4a

Remark: The reservation on:

- i) paragraph 1 concerns the fact that the establishment of branches is only allowed in banking;*
- ii) paragraph 4a concerns the fact that the establishment of representative offices of non-resident banks is subject to prior authorisation.*

L/6 Professional services (including services of accountants, artists, consultants, doctors, engineers, experts, lawyers, etc.)

Remark: the reservation applies only to auditing of financial institutions, operators of multi-modal transport and legal services except advice on international law or foreign laws.

ANNEX 4
CHILE'S UPDATED LIST OF EXCEPTIONS UNDER THE NATIONAL TREATMENT
INSTRUMENT

A. Exceptions at national level

I. *Investment by established foreign-controlled enterprises*

Road transport: International road transportation service between Chile and Argentina, Bolivia, Brazil, Paraguay, Peru or Uruguay is reserved to companies controlled by nationals of those countries.

Authority: Accord on International Land Transport Agreement signed by Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay. Decree Law 257, January 1990.

Shipping: Ownership of Chilean flag vessels is limited to Chilean natural persons, Chilean majority-owned corporations with principal domicile and real effective seat in Chile, and to co-ownerships in which a majority of members are Chilean nationals residing in Chile and in which the majority of rights belong to Chileans. Cabotage and tugging activities performed in Chilean ports are reserved to Chilean flag vessels.

Authority: Decree Law 3059, Official Gazette 22 December 1979; Supreme Decree 24, Official Gazette 10 March 1966; Decree Law 2222, Official Gazette 31 May 1978.

Stowage and dockage: Activities of stowage and dockage on Chilean ports must be carried out by Chilean majority-owned enterprises.

Authority: Decree Law 90, January 2000.

Fishing: Ownership of Chilean fishing vessels is limited to Chilean natural persons or Chilean majority-owned corporations with principal domicile and real effective seat in Chile, unless otherwise authorised. An owner of a fishing vessel registered in Chile prior to 30 June 1990 is not subject to the nationality requirement. Resident enterprises constituted by foreign non-residents are not permitted to engage in small-scale fishing.

Authority: Law 18892, Official Gazette 22 December 1992, Decree Law 2222, Official Gazette 31 May 1978.

Mining: Exploration, exploitation and treatment of hydrocarbons, liquid or gaseous, of uranium and lithium is subject to prior authorisation.

Authority: Political Constitution of the Republic of Chile; Constitutional Organic Law 19.097, of Mining Concessions; Law 18.248, Official Gazette 14 October 1983; Mining Code.

Air transport: Only Chilean natural persons or Chilean majority-owned corporations with principal domicile and real effective seat in Chile may register an aircraft in Chile.

Authority: Law 18916, Official Gazette 8 February 1990; Decree Law 2564, Official Gazette 22 June 1979.

Radio broadcasting: granting and use of concessions is limited to enterprises with no more than 10% of foreign ownership, unless otherwise authorised.

Authority: Law 18,168, Official Gazette, 2 October 1982, General Telecommunications Law, Titles I, II and III; Law 18,838, Official Gazette, 30 September 1989.

II. *Official aids and subsidies*

None.

III. *Tax obligations*

None.

IV. *Government purchasing*

None.

V. *Access to local finance*

None.

B. *Exceptions by territorial subdivisions*

None.

ANNEX 5
CHILE'S UPDATED LIST OF OTHER MEASURES REPORTED FOR TRANSPARENCY
UNDER THE NATIONAL TREATMENT INSTRUMENT

A. Measures Reported for Transparency at the Level of National Government

I. Measures based on public order and essential security considerations

a. Investment by established foreign-controlled enterprises

Nuclear Energy: The production of nuclear energy for peaceful purposes may only be carried out by the Chilean Nuclear Energy Commission, or, with its authorisation, jointly with third persons. Should the Commission grant such an authorisation, it may determine the terms and conditions thereof.

Authority: *Political Constitution of the Republic of Chile*, Chapter III. *Law 18.097*, Official Gazette, January 21, 1982, Constitutional Organic Law on Mining Concessions, Titles I, II and III. *Law 18.248*, Official Gazette, October 14, 1983, Mining Code, Titles I and II.

Defence Industry: Foreign participation in the defence industries is subject to authorisation by the Ministry of Defence.

Authority: Law 17.798, Official Gazette 13 April 1978; Law 16.319, Official Gazette, 23 October 1965

Maritime transport: For reasons of national security restrictions can be imposed on the operation of foreign-owned vessels flying the Chilean flag.

Authority: Decree Law 2.222, Official Gazette, 31 May 1978, "Navigation Act".

Real estate: Enterprises may not acquire land in the border zone if they are a) are headquartered in the territory of one of Argentina, Bolivia or Peru, b) have a participation of 40% or more from nationals of these countries, or c) are under the effective control of such persons.

Authority: Decree Law 1939, Official Gazette, 10 November 1977

Mining: the exploration, exploitation and treatment of mineral deposits of any kind in sea waters subject to national jurisdictions and in areas classified as important to national security can only be undertaken by private investors through administrative concessions or operating contracts under the conditions established for each case by Presidential decree;

Authority: Political Constitution of the Republic of Chile; Constitutional Organic Law 19.097, of Mining Concessions; Law 18.248, Official Gazette 14 October 1983; Mining Code; Law 16.319, Official Gazette 23 October 1965, creating the Chilean Commission of Nuclear Energy.

b. Corporate organisation

None.

c. Government purchasing

None.

d. Official aids and subsidies

None.

II. Other measures reported for transparency

a. Investment by established foreign controlled enterprises

None.

b. Corporate organisation

Trans-sectoral: At least 85% of the personnel of an enterprise with 25 or more employees must have Chilean nationality or have been a resident of Chile for more than five years; persons with technical skills unavailable in Chile are excluded from this calculation.

Authority: Decree Law No. 1 of the Ministry of Labour and Social Security, Official Gazette, 24 January 1994, "Labour Code"

Financial services: Chilean nationality or residency permit for foreigners is required:

- for the directors, administrators, managers or legal representatives of stockbrokers and securities agents;
- for the administrators and legal representatives of firms providing insurance brokerage and claim settlement services;
- for representatives of reinsurance brokers.
- for the partners, administrators, legal representatives, and employees that provide social security advisory services, including brokerage services for contracts related to the pension system of DL3500.

Authority: Law 18,045, Securities Market Law, Title VI, Articles 24, 25 and 27; DFL No. 251, Insurance Law, Title III, Articles 57,58 and 62; Law 20,255, Pension Funds Reform Law, Articles 91 No. 50 and 32° Transitory.

Social Communications Media: Only Chilean nationals may be presidents, administrators, or legal representatives of the juridical person of a written social communication media such as newspapers, magazines, or regularly published texts whose publishing address is located in Chile. The legally responsible director and the director's substitute must be Chilean with domicile and residence in Chile.

Authority: Law 19733, Official Gazette, 6 June 2001, Law on Freedom of Opinion and Information and the Exercise of Journalism, Titles I & II.

Radio-broadcasting: Only Chilean natural persons may be presidents, managers, administrators, or legal representatives of the juridical persons at stake. Also, the majority of the members of the Board of Directors must be Chilean natural persons.

Authority: Law 18,168, Official Gazette, 2 October 1982, General Telecommunications Law, Titles I, II and III; Law 18,838, Official Gazette, 30 September 1989.

Limited television services and television broadcasting: Only Chilean nationals may be presidents, directors, managers, administrators, and legal representatives of the juridical person.

Authority: Law 18.168, Official Gazette, 2 October 1982, General Telecommunications Law, Titles I, II and III Law 18,838, Official Gazette, 30 September 1989, National Television Council, Titles I, II and III. Law 19.733, Official Gazette, June 4, 2001,

Maritime transport and fishing vessels: Chilean nationality is required for:

- the president, manager and majority of the directors or administrators of an enterprise operating a vessel flying the Chilean flag;
- the captain, officers and crew of such vessels (but temporary exceptions can be granted for any of those functions, except that of the captain).
- shipping agents or representatives of ship operators, owners, or captains,

Authority: Decree Law 2222, Navigation Law, Official Gazette, 31 May 1978, Navigation Law.

Stowage and dockage: Chilean nationality is required for the presidents, administrators, managers or directors, and empowered agents (representatives).

Authority: Decree Law 90, 24 January 2000.

Air transport: The president, managers and a majority of the directors of an enterprise operating an aircraft flying the Chilean flag must have Chilean nationality.

Authority: Decree Law 2.564, Official Gazette, 22 June 1979, "Commercial aviation standards"

c. *Government purchasing*

None.

d. Official aids and subsidies

None.

B. Measures Reported for Transparency at the Level of Territorial Subdivisions

None

C. Monopolies

I Public Monopolies

Chilean Postal Corporation, only for specific types of postal services.

National Pawning Credit Bureau.

Commercial Bulletin of the Santiago Chamber of Commerce.

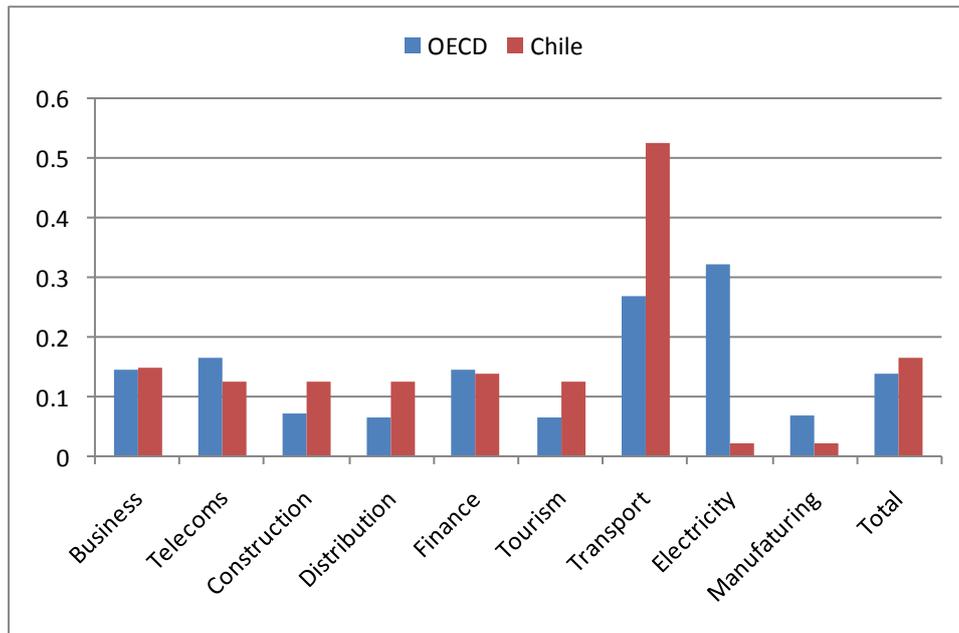
Chilean Juridical Press. Only for publication of the official version of the legal codes of the Republic of Chile.

II. Private Monopolies or Concession

Chile has the right of first offer at market prices and terms for the purchase of mineral products when thorium and uranium are contained in significant quantities. Furthermore, only the Chilean Nuclear Energy Commission, or parties authorised by the said Commission, may execute or enter into juridical acts regarding extracted natural atomic materials and lithium, as well as their concentrates, derivatives and compounds.

Concessions are required in: mining, infrastructure projects, electricity, gas, aquaculture, fishing, telecommunications (including radio and television broadcasting) and gaming casinos.

ANNEX 6
CHILE'S FDI REGULATORY RESTRICTIVENESS INDEX



Source: OECD Secretariat

Methodology:

The OECD FDI Regulatory Restrictiveness Index covers investments in the following sectors: i) professional services (including legal, accounting, architectural and engineering services); ii) telecommunications (fixed and mobile); iii) transport (air, road and maritime); iv) finance (insurance and banking); v) distribution; vi) construction; vii) tourism; viii) electricity and ix) manufacturing.

For each sector, the level of foreign equity ownership permitted; the screening and discriminatory notification requirements; and other restrictions (including nationality and residency requirements for companies' key personnel and restrictions on branching) are measured. The restrictions are evaluated on a 0 to 1 scale ("0" is the absence of restrictions and "1" is a closed sector). The overall restrictiveness index is a weighted average of the indices, using fixed average FDI and trade shares as weights.

There are a number of important qualifications in using the index, in particular: national security related investment measures are not reflected and primary sectors are not covered. While only statutory restrictions are taken into account and not their actual enforcement, when combined with other factors beyond statutory restrictions, the index has proven to be a good predictor of FDI performance.

