

ARNOLD & PORTER

RESOLVING INVESTMENT DISPUTES UNDER THE U.S. CHILE FREE TRADE AGREEMENT (Ch. 10)

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I. INTRODUCTION

- ❧ Chapter 10 of the USCFTA provides rights of action to investors for measures taken in violation of certain baseline standards of treatment.
- ❧ The standards are consistent with customary international law and a growing network of bilateral investment treaties and multilateral agreements (e.g., NAFTA).
- ❧ The dispute resolution procedures incorporate lessons learned from NAFTA and BIT proceedings (e.g., transparency and public participation, clarification of the status of environmental and other “public interest” regulation).

II. MEASURES REGULATED BY CHAPTER 10

Chapter 10 applies to “measures adopted or maintained by a Party relating to investors of the other Party ... [or] covered investments.”

- “***By a Party***” is not limited to actions by national government; incorporates principles of state responsibility
- “***Related to***” foreign investment or investors excludes regulations of general applicability (e.g., aimed at an industry as a whole)

II. MEASURES REGULATED BY CHAPTER 10 (cont'd)

Qualifying Investors

- Any U.S. or Chilean national that attempts to make, is making, or has made an investment in the territory of the other State
- Any enterprise organized under the laws of the U.S. or Chile, or with a branch located in these countries and carrying out business activities there.

II. MEASURES REGULATED BY CHAPTER 10 (cont'd)

Covered Investments

The protections of Chapter 10 apply to all forms of investment in the territory of one Party owned or controlled directly or indirectly by nationals or enterprises of the other Party, including:

- shares of stock and other equity interests;
- bonds, debentures, loans and other debt instruments;
- futures, options and other derivatives;
- contract rights
- intellectual property rights;
- rights conferred by local law (e.g., concessions, licenses, authorizations and permits);
- leases, mortgages, liens and pledges, and other property rights.

III. STANDARDS OF TREATMENT

- A. National Treatment (Art. 10.2)
- B. Most Favored Nation Treatment (Art. 10.3)
- C. Minimum Standard of Treatment (Art. 10.4 & Annex 10-A)
- D. Performance Requirements (Art. 10.5)
- E. Free Transfer (Art. 10.8 & Annex 10-C)
- F. Expropriation and Compensation (Art. 10.9 & Annexes 10-A and 10-D)
- G. Investment and Environment (Art. 10.12)

III. STANDARDS OF TREATMENT

A. National Treatment (Art. 10.2)

Provides for treatment no less favorable than that which the host State accords, in like situations, to investments of the host State's own nationals or companies.

Cases Involving Analogous Provision:

S.D. Myers, Inc. v. Canada, NAFTA Arb., Final Award on Merits at ¶ 256 (Nov. 13, 2000), at <http://www.naftalaw.org>

Feldman v. Mexico, NAFTA Arb. (Dec. 2002), at <http://www.naftalaw.org>

III. STANDARDS OF TREATMENT (*cont'd*)

B. Most Favored Nation Treatment (Art. 10.3)

Provides for treatment no less favorable than that which the host State accords, in like situations, to investments of nationals or companies of a third country.

Case Involving Analogous Provision:

Maffezini v. Spain, ICSID Case No. ARB/97/7, Dec. on Jurisd. at 21 (Jan. 25, 2000), at <http://www.worldbank.org/icsid/cases>

III. STANDARDS OF TREATMENT (*cont'd*)

C. Minimum Standard of Treatment (Art. 10.4 & Annex 10-A)

Provides for treatment no less favorable than that established by customary international law. Includes several elements:

1. Fair and Equitable Treatment
2. Prohibition Against Denial of Justice
(Art. 10.4(2)(a))
3. Full Protection and Security (Art. 10.4(2)(b))

III. STANDARDS OF TREATMENT (*cont'd*)

1. Fair and Equitable Treatment

Requires state parties not to impair investments through unreasonable or discriminatory means.

Cases Involving Analogous Provision:

Metalclad v. Mexico, NAFTA Arb., ICSID Case No. ARB(AF)/97/1, at <http://www.worldbank.org/icsid/cases>

CME v. Czech Republic, UNCITRAL Arb., Partial Award, at ¶ 611 (Sept. 13, 2001), at <http://www.cnts.cz>

Pope & Talbot v. Canada, NAFTA Arb., Final Award on Merits, at ¶ 195 (Apr. 10, 2001), at <http://www.naftalaw.org>

III. STANDARDS OF TREATMENT (*cont'd*)

2. Prohibition Against Denial of Justice (Art. 10.4(2)(a))

Prohibits violation of due process in criminal, civil or administrative proceedings. Requires showing of “manifest” injustice – not merely an erroneous decision.

Case Involving Analogous Provision:

Loewen v. United States, ICSID Case No. ARB(AF)/98/3,
Dec. on Jurisd. (Jan. 5, 2001)

III. STANDARDS OF TREATMENT (*cont'd*)

3. Full Protection and Security (Art. 10.4(2)(b))

Requires host States to provide police protection at levels required by customary international law; imposes obligation of “due diligence” or “vigilance and care” to protect investors from wrongful acts of others (including non-State actors as well as other State organs).

Cases Involving Analogous Provisions:

Wena v. Egypt, ICSID Case. No. ARB/98/4 (Award Dec. 8, 2000)

Maffezini v. Spain, ICSID Case No. ARB/97/7, Award at 27 (Nov. 13, 2000), at <http://www.worldbank.org/icsid/cases/awards.htm>

III. STANDARDS OF TREATMENT (*cont'd*)

D. Performance Requirements (Art. 10.5)

Prohibits States from imposing export or domestic content quotas, local purchase requirements, or restrictions on imports and exports.

Confirms that States may nonetheless adopt or maintain environmental measures *consistent* with USCFTA, provided such measures are not applied in an arbitrary or unjustifiable manner and do not constitute a disguised restriction on international trade and investment.

III. STANDARDS OF TREATMENT (*cont'd*)

E. Free Transfer (Art. 10.8 & Annex 10-C)

Permits investors to transfer funds into and out of the host State without delay and according to the market rate of exchange.

Includes, for example, transfers related to contributions to capital; repatriated profits, dividends, interest, and capital gains; proceeds from sale or liquidation; and loan payments.

III. STANDARDS OF TREATMENT (*cont'd*)

F. Expropriation and Compensation (Art. 10.9 & Annexes 10-A and 10-D)

Incorporates customary international law standards barring expropriation or nationalization of assets except:

- ✦ if undertaken for a public purpose;
- ✦ in a nondiscriminatory manner;
- ✦ in accordance with due process of law; and
- ✦ accompanied by payment of prompt, adequate and effective compensation (fair market value of investment immediately prior to expropriation).

III. STANDARDS OF TREATMENT (*cont'd*)

F. Expropriation and Compensation (*cont'd*)

Covers both *direct expropriation* (nationalization, formal transfer of title or outright seizure of asset) and *indirect expropriation* through measures equivalent to expropriation.

Indirect expropriation claims require fact-based inquiry into economic impact of government action; character of action; and extent to which action interferes with distinct, reasonable investment-backed expectations.

Nondiscriminatory regulatory actions designed and applied to protect legitimate public welfare objectives (including the environment) generally do not constitute indirect expropriations.

III. STANDARDS OF TREATMENT (*cont'd*)

F. Expropriation and Compensation (*cont'd*)

Cases Involving Analogous Provisions:

Metalclad v. Mexico, ICSID Case. No. ARB(AF)/97/1 (2000)

Goetz v. Burundi, ICSID Case No. ARB/95/3

Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1 (2000)

all at <http://www.worldbank.org/icsid/cases/awards.htm>

III. STANDARDS OF TREATMENT (*cont'd*)

G. Investment and Environment (Art. 10.12)

Catch-all provision confirming that host States may adopt, maintain or enforce measures that are *consistent* with the specified standards of treatment, to ensure that investments are undertaken in a manner sensitive to environmental concerns.

IV. DISPUTE RESOLUTION PROCEDURES

- A. Applicable Disputes (Art. 10.15(1))
- B. Time Window for Initiating Proceedings
- C. Arbitration before ICSID or under UNCITRAL Rules (Art. 10.15(5))
- D. Relationship to Other Proceedings
- E. Establishment of Tribunal, Jurisdictional Challenges and Interim Measures
- F. Governing Law
- G. Transparency and Public Participation
- H. Awards

IV. DISPUTE RESOLUTION PROCEDURES

A. Applicable Disputes (Art. 10.15(1))

Arbitration procedures apply to USCFTA violations *as well as* breaches of new investment agreements.

This provides clarity to an area that has bedeviled arbitration tribunals – whether treaty claims may be brought arising out of the same operative facts for which contract claims (alleging breach) are exclusively committed to some other dispute resolution mechanism.

See, e.g., Compañia de Aguas v. Argentina, ICSID Case No. ARB/97/3, Award of Nov. 21, 2000, *available at* 16 ICSID Rev.—FILJ 641 (2001); Annulment Decision of July 3, 2002, *available at* 41 ILM 1135 (2002).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

B. Time Window for Initiating Proceedings

- ✿ Events giving rise to claim must post-date entry into force of USCFTA (Art. 10.1 n.1).
- ✿ Six months must have elapsed since events giving rise to claim. (Art. 10.15(5)).
- ✿ Written notice of intent to arbitrate must be provided at least 90 days before submission of claim (Art. 10.15(4)).
- ✿ Parties “should” seek to resolve dispute through consultation and negotiation (Art. 10.14).
- ✿ No claim may be submitted more than three years after claimant learned or should have learned the alleged wrong and its injury (Art. 10.17(1)).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

C. Arbitration before ICSID or under UNCITRAL Rules (Art. 10.15(5))

1. Differences in Structure of Arbitration
2. Differences in Enforcement Mechanisms

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

C. Arbitration before ICSID or under UNCITRAL Rules (Art. 10.15(5))

1. Differences in Structure of Arbitration

- ✦ **ICSID:** institutional oversight, with ICSID Secretariat and staff providing infrastructure, procedures for setting arbitration in motion, and resources to assist arbitrators with unusual issues.
- ✦ **UNCITRAL:** *ad hoc*, with no institutional administration. Parties must cooperate to keep procedure moving, otherwise local court intervention is necessary under arbitration law at place of arbitration.

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

2. Differences in Enforcement Mechanisms

- ✦ **ICSID:** under ICSID Convention, awards are enforceable as if they were final judgments of the highest courts of each State Party (almost 140). Imprimatur of World Bank and sovereign concern not to deter foreign investment help persuade sovereigns to honor awards.
- ✦ **UNCITRAL:** awards must be enforced under New York Convention or Inter-American Convention. Carries risk that local courts where the arbitration took place, or of country whose law was applied, may try to annul the award. Both Conventions recognize such annulment as a ground for refusing enforcement.

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

D. Relationship to Other Proceedings

Estoppel provision for U.S. investors

Fork in the road

Interim injunctive relief

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

D. Relationship to Other Proceedings

- ✿ *Estoppel*: U.S. investors may not submit a claim to arbitration under USCFTA if they already have commenced proceedings concerning same dispute before a Chilean court or administrative tribunal (Annex 10-E). *There is no parallel estoppel provision for Chilean investors.*

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

- *Waiver:* Submission to ICSID or UNCITRAL arbitration waives right to initiate or continue any other dispute settlement proceedings with respect to the alleged violation or breach (Art. 10.17(2)(b)). There is no going back: once a Chapter 10 arbitration has been commenced, the investor may not resort to local courts for additional relief.
- There is an exception for actions for interim injunctive relief to preserve investors' rights during pendency of the Chapter 10 arbitration (Art. 10.17(3)).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

E. Establishment of Tribunal, Jurisdictional Challenges and Interim Measures

- ⌚ Three member panel, with one arbitrator appointed by each party and the presiding arbitrator by agreement or by ICSID Secretary-General (Art. 10.18(1),(2)).
- ⌚ Arbitral seat determined by agreement or by tribunal, provided that seat shall be in a country that is a party to the New York Convention (Art. 10.19(1)).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

- Jurisdictional challenges heard as preliminary issues and trigger automatic suspension of merits proceedings until resolved (Art. 10.19(4)(b)).
- Tribunal may “suggest” interim measures to preserve rights of disputing parties, but may not order attachment or enjoin the application of measures alleged to constitute a breach (Art. 10.19(8)).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

F. Governing Law

- ✿ For actions alleging USCFTA breach, dispute to be decided under USCFTA and applicable rules of international law (Art. 10.21(1)).
- ✿ For actions alleging breach of investment agreement, dispute to be decided in accordance with law specified in such agreement or, if unspecified, then under law of the host State (including its rules on conflict of laws), applicable rules of international law, and USCFTA (Art. 10.21(2)).

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

G. Transparency and Public Participation

Incorporates several provisions addressing hot-button issues that arose during NAFTA proceedings:

- *Amicus* submissions accepted (Art. 10.19(3)).
- Pleadings, memorials, hearing transcripts and awards made available to public (Art. 10.20(1)) and hearings open to the public (Art. 10.20(2)), with protections for confidential business information or privileged material.

IV. DISPUTE RESOLUTION PROCEDURES *(cont'd)*

H. Awards

1. Available Relief (Art. 10.25(1),(3))

Monetary damages including interest; restitution; costs and attorneys fees; no punitive damages.

2. Waiting Period for Enforcement (Art. 10.25(6))

ICSID: 120 days after award, if no party requests revision or annulment (or such proceedings have been completed).

UNCITRAL: 90 days after award, if no party commences proceedings to revise, set aside or annul award (or court has resolved such proceedings and there is no further appeal).