



## Constitutional procedure for side letters to the CPTPP

### Tramitación Constitucional de las *side letters* al CPTPP

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#### Abstract

The purpose of this article is to elucidate which is the competent body, in accordance with the Chilean Constitution of 1980, to revoke, by means of the side letter that the Government of Chile signed on February 17, 2023 with the Government of New Zealand, the acceptance that the State of Chile had granted to the Investor-State dispute settlement mechanisms contained in the CPTPP. This side letter provides that no investor of the subscribing states may invoke Investor-State dispute settlement against the other subscribing state under the CPTPP. This article concludes that the competent body is the President of the Republic with the approval of the National Congress.

**Keywords:** *Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP, TPP-11); Trans-Pacific Partnership (TPP); International Treaties; Investor-State Dispute Settlement.*

#### Resumen

El objeto de este artículo es dilucidar cuál es el órgano competente, de acuerdo con la Constitución chilena de 1980, para revocar, mediante la *side letter* que el Gobierno de Chile suscribió con fecha 17 de febrero de 2023 con el Gobierno de Nueva Zelanda, la aceptación que el Estado de Chile había otorgado a los mecanismos de solución de controversias inversionista-Estado contenidos en el CPTPP. Esa *side letter* dispone que ningún inversionista de los Estados suscriptores podrá invocar la solución de controversias inversionista-Estado contra el otro Estado suscriptor con arreglo al CPTPP. Este artículo concluye que el órgano competente es el Presidente de la República con aprobación del Congreso Nacional.

**Palabras clave:** *Tratado Integral y Progresista de Asociación TransPacífico (CPTPP, TPP-11); Acuerdo Transpacífico de Cooperación Económica (TPP); Tratados internacionales; Solución de controversias inversionista-Estado.*

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How to cite this article:

TIJMES-IHL, Jaime (2024). "Constitutional procedure for side letters to the CPTPP", *Latin American Legal Studies*, Vol. 12 N° 2, pp. 366-398.

## I. INTRODUCTION

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP; also known as TPP-11) is an economic integration treaty to which Chile is a party. Its origin dates back to the period from 2010 to 2015, when Australia, Brunei, Canada, Chile, the United States, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam negotiated the Trans-Pacific Economic Cooperation Agreement (TPP). After the United States withdrew from the TPP in 2017, the other states resumed negotiations and signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership,<sup>1</sup> which

is a comprehensive regional trade agreement for the Asia-Pacific region that seeks to promote regional economic integration and accelerate regional trade and investment liberalization (CPTPP, Preamble), among other objectives. Through a normative reference, it incorporates the provisions of the TPP (CPTPP, art. 1), except for some which were suspended (art. 2).<sup>2</sup>

On February 17, 2023, the Governments of Chile and New Zealand signed a side letter<sup>3</sup> (hereinafter, cited as “the side letter of 2023”), whose objective is to revoke the acceptance that both states had mutually granted regarding the Investor-State dispute settlement mechanisms contained in Section B of Chapter 9 of the TPP.

The purpose of this article is to clarify which is the competent body, according to the Chilean Constitution of 1980, to incorporate the side letter of 2023 to the Chilean legal system:<sup>4</sup> is it the Presidency of the Republic or is it the Presidency of the Republic with the approval of the National Congress, in accordance with paragraph 1 of article 54 of the 1980 Constitution? It is a relevant question because this provision distributes political powers between the President of the Republic and Congress. For these purposes, first of all, it will be necessary to contextualize the CPTPP (section II). Then the side letter of 2023 will be legally qualified (section III). The relevant constitutional provisions will subsequently be reviewed (section IV). The legal qualification of the side letter of 2023 and the constitutional provisions will constitute inputs to move on to the central part of this article. In fact, using a dogmatic legal methodology it will be analyzed whether the legal qualification of the side letter of 2023 can be subsumed in the relevant constitutional provisions (sections V, VI and VII). The above procedure will allow us to conclude which is, in accordance with the Chilean Constitution of 1980, the competent body to incorporate the side letter of 2023 to the Chilean legal system. The conclusions will be presented in section VIII.

It is worth clarifying that this article will not deal with international regulation, international validity or the international legal consequences of the side letter of 2023. They have already been partially addressed by Chilean scholarship.<sup>5</sup>

Article 1 of the CPTPP incorporates provisions of the TPP by reference, but the CPTPP and TPP are separate treaties. To cite them in this article in an unambiguous, simple and technically correct manner, mentions of the chapters and provisions of the TPP belonging

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<sup>1</sup> TORO-FERNÁNDEZ & TIJMES-IHL (2022), pp. 718-723.

<sup>2</sup> TORO-FERNÁNDEZ & TIJMES-IHL (2020), p. 147.

<sup>3</sup> SUBSECRETARÍA DE RELACIONES ECONÓMICAS INTERNACIONALES (2023).

<sup>4</sup> Regarding the reception of international standards in the Chilean legal system, see DÍAZ TOLOSA (2023), pp. 147-148.

<sup>5</sup> VALDIVIA (2022), pp. 7-18.

to such treaty as incorporated into the CPTPP. For example, references to Article 9.20 of the TPP refer to Article 9.20 of the TPP as incorporated into the CPTPP. On the other hand, given that the TPP only exists incorporated into the CPTPP, in this article we will refer to the CPTPP as the current treaty (not the TPP).

## II. THE CPTPP AND THE *SIDE LETTER* SIGNED BY CHILE AND NEW ZEALAND IN 2023

The sides letters are relatively common tools. In fact, during the CPTPP negotiation, more than one hundred side letters were signed.<sup>6</sup> Indeed, the Message from His Excellency the President of the Republic even refers in its title to “the letters exchanged in the context of the” CPTPP<sup>7</sup> and, furthermore, expressly mentions them:

It should be noted that on the occasion of the signing of the CPTPP, the parties exchanged “side letters” or letters, of a bilateral nature, relating to various matters contained in the Treaty and for the purposes of reaffirming the content and scope of some of its regulations. In this context, Chile exchanged a total of 28 letters with the other 10 countries, of which 20 correspond to letters proposed by our country.<sup>8</sup>

The website that the New Zealand Government has dedicated to the CPTPP in its capacity as depositary of the treaty text under Article 30.7 of the TPP, includes a list of side letters in the “Side Instruments” section.<sup>9</sup>

The Chilean National Congress approved the CPTPP on October 12, 2022.<sup>10</sup> According to press releases from the Ministry of Foreign Affairs, the Chilean Government deposited the instrument of ratification to the CPTPP on December 22, 2022<sup>11</sup> and the CPTPP entered internationally in force for Chile on February 21, 2023,<sup>12</sup> in accordance with its article 3.2. From the point of view of the national legal system, the CPTPP came into force through Supreme Decree 318 of the Ministry of Foreign Affairs, which promulgates the Comprehensive and Progressive Treaty of Trans-Pacific Partnership, published on February 21, 2023.

After the CPTPP negotiations were concluded, and after it had entered into force with respect to several state parties, the Governments of Chile and New Zealand negotiated an additional side letter, which will be the subject of this article. On February 17, 2023, the Chilean

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<sup>6</sup> VALDIVIA (2022), p. 7.

Its full title is: Mensaje de S.E. el Presidente de la República con el que inicia un proyecto de acuerdo que aprueba el Tratado Integral y Progresista de Asociación Transpacífico entre Australia, Brunéi Darussalam, Canadá, la República de Chile, Japón, Malasia, los Estados Unidos Mexicanos, Nueva Zelanda, la República del Perú, la República e Singapur y la República Socialista de Vietnam, y las cartas intercambiadas en el contexto del mismo, suscritos en Santiago, Chile, el 8 de marzo de 2018.

<sup>8</sup> PRESIDENTE DE LA REPÚBLICA DE CHILE (2018), p. 11.

<sup>9</sup> NEW ZEALAND FOREIGN AFFAIRS & TRADE (2023).

<sup>10</sup> Decreto 318 del Ministerio de Relaciones Exteriores, Promulga el Tratado Integral y Progresista de Asociación Transpacífico. Published February 21, 2023. Considerando segundo. Available at <https://bcn.cl/3bv0> > and <https://www.diariooficial.interior.gob.cl/publicaciones/2023/02/21/43483/01/2273273.pdf> >.

According to the Cámara de Diputados y Diputadas, 2023, the documents referring to the processing of the approval of the CPTPP by the Congreso Nacional are available in bulletin number 12195-10.

<sup>11</sup> MINISTERIO DE RELACIONES EXTERIORES (2022).

<sup>12</sup> MINISTERIO DE RELACIONES EXTERIORES (2023).

Government signed a side letter with the New Zealand Government<sup>13</sup> which provides, in so far as relevant, that no investor of the subscribing states may invoke dispute settlement against the other subscribing state under Section B (Investor-State Dispute Settlement) of Chapter 9 of the CPTPP, although technically it is Chapter 9 of the TPP, as it has been incorporated by reference into the CPTPP. This side letter is consistent with the trend to “reduce the protections that favor investors and, consequently, [recognize] a greater legitimate regulatory scope of the states.”<sup>14</sup>

It is worth clarifying some aspects of the content of the side letter of 2023. The dispute resolution mechanisms regulated in Section B of Chapter 9 of the CPTPP cover consultations, negotiation and arbitration.<sup>15</sup> In short, the side letter of 2023 revokes the consent that the subscribing states had mutually granted regarding the Investor-State dispute settlement mechanisms contained in Section B of Chapter 9 through paragraph 2 of article 9.20 of the TPP, which provides in English:

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

and in Spanish:

1. Cada Parte consiente en someter una reclamación a arbitraje conforme a esta Sección y de conformidad con este Tratado.

Supreme Decree 318 of the Ministry of Foreign Affairs, published on February 21, 2023, promulgated the CPTPP “and the letters exchanged in the context thereof, all signed in Santiago, Chile, on March 8, 2018.” That is, it did not promulgate the side letter of 2023 subject of this article. In short, for the purposes of the Chilean legal system, the CPTPP is made up of several related instruments (by analogy with literal *a*) of paragraph 1 of article 2 of the Vienna Convention on the Law of Treaties,<sup>16</sup> hereinafter, cited as CVDT). These related instruments are not individualized in the promulgatory decree, but it is understood that they are those available on the depositary's website,<sup>17</sup> such as Annex 2-D that contains the list of Chilean tariff concessions and the side letter signed on March 8, 2018 between Chile and New Zealand regarding Chilean regulation of electronic card payment services. What is relevant for the purposes of this analysis is that the promulgatory decree does not include the side letter of 2023 and it is not available on the depositary's website either.<sup>18</sup>

The *side letter* of 2023 generated a certain level of political controversy in the press of the time. The author would like to emphasize that the reflection in this article does not refer to a political opinion. Moreover, the political nature of this controversy seems unfounded to

<sup>13</sup> SUBSECRETARÍA DE RELACIONES ECONÓMICAS INTERNACIONALES (2023).

<sup>14</sup> TIJMES (2023), p. 454.

<sup>15</sup> Regarding diplomatic and judicial means to resolve international disputes and investment arbitrations, see ESIS (2023) pp. 223-244.

<sup>16</sup> 1155 UNTS 331, concluded on May 23, 1969, entered into force on January 27, 1980. Approved by Decree Law 3633, approving the Vienna Convention on the Law of Treaties and its Annex, signed on May 23, 1969, published on March 11, 1981. Promulgated by Supreme Decree 381, which promulgates the Convention on the Law of Treaties and its Annex, signed by the Government of Chile in Vienna, on May 23, 1969, published on June 22 of 1981.

<sup>17</sup> Available from NEW ZEALAND FOREIGN AFFAIRS & TRADE (2023).

<sup>18</sup> NEW ZEALAND FOREIGN AFFAIRS & TRADE (2023).

the author, since the previous Chilean Government (and of a political leaning opposed to that of the Government which negotiated the side letter of 2023) had proposed to the New Zealand Government in 2020 a side letter with similar content to that of 2023.<sup>19</sup>

### III. QUALIFICATION OF THE *SIDE LETTER OF 2023*

As mentioned above, the purpose of this paper is to clarify which is the competent body, according to the Chilean Constitution of 1980, to incorporate the side letter of 2023 to the Chilean legal system. As a start, it is pertinent to legally qualify the side letter of 2023. It can be qualified from the perspective of international law and from the perspective of the Chilean Constitution.

From the perspective of international law, foreign scholarship has qualified the sides letters to the CPTPP as international treaties.<sup>20</sup> PARK has proposed a typology of the side letters on Agreements for the Promotion and Reciprocal Protection of Investments (APPI) according to their function: clarify the treaty, correct an error in the treaty or add a new provision to the treaty.<sup>21</sup> The sides letters that fulfill any of these functions have been classified as a renegotiation of the respective treaty.<sup>22</sup>

Now, the side letter of 2023 does not fit PARK's typology. Without explicitly referring to this typology, the scholarship has indicated that the side letter of 2023 is different from the other side letters that Chile has signed regarding the CPTPP.<sup>23</sup> Chile and New Zealand, the subscribing states of the side letter of 2023, had given their consent to be bound by Section B (Investor-State Dispute Settlement) of Chapter 9 of the TPP. The legal effect of the side letter of 2023 consists of revoking that consent with respect to investors from both subscribing states. Therefore, no new provisions are added to the CPTPP, but provisions between both parties are repealed, which constitutes a legal effect that is not covered in PARK's typology.

From the perspective of public international law, one could analyze how this revocation of consent should be characterized, as SOLOMON analyzed regarding certain side letters to CPTPP.<sup>24</sup>

Now, mentioned above, the purpose of this paper is to clarify which is the competent body, according to the Chilean Constitution of 1980, to incorporate the side letter of 2023 to the Chilean legal system. Consequently, it is necessary to legally qualify the side letter of 2023 not from the perspective of public international law, but in accordance with the Constitution. Numeral 1 of article 54 of the Constitution mentions five relevant international legal categories

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<sup>19</sup>Note number 0204 dated February 14, 2020 that the Ministry of Foreign Affairs - Undersecretary of International Economic Relations sent to the honorable Embassy of New Zealand, in which it states: "In response to the importance given by the Government of the Republic of Chile to the ratification of the CPTPP in Congress... this Undersecretariat has decided to request each of the signatory countries of the CPTPP to reciprocally suspend the application of Section 9 (*Investor - State Dispute Settlement*) of Chapter 9 (*Investment*), to through the exchange of bilateral letters for these purposes." The Embassy of New Zealand, in its note CL-11-20 dated March 10, 2020, received by the Parties Office of the Undersecretary of International Economic Relations dated March 11, 2020 with folio 000418, indicates that the New Zealand Ministry of Foreign Affairs and Trade accepts the proposed letter. Copies of both documents are in the author's possession.

<sup>20</sup> SOLOMON (2018), pp. 24-27.

<sup>21</sup> PARK (2021), pp. 89-93.

<sup>22</sup> PARK (2021), p. 87.

<sup>23</sup> VALDIVIA (2022), p. 7.

<sup>24</sup> SOLOMON (2019), pp. 27-32.

for these purposes: reservations, interpretative declarations, denunciations or withdrawals, treaties, and the measures that the President of the Republic adopts or the agreements he or she concludes to comply with a treaty in force. Now, the Constitution does not define these categories, so it will be necessary to apply concepts of public international law to legally qualify the side letter of 2023; but it is important to keep in mind that the legal qualification will be carried out to elucidate the applicable constitutional regulations. That is to say: for the purposes of this article it is irrelevant how the side letter of 2023 is qualified from the point of view of international law; what is pertinent is to legally qualify it according to the categories invoked by the Constitution. For example, it is irrelevant whether it constitutes an amendment to international law, what is important is whether that eventual amendment was perfected by a treaty for the purposes of the Constitution. Of the five relevant international legal categories mentioned in the 1980 Constitution, reservations, interpretative declarations, denunciations or withdrawals, and treaties will be analyzed below. The category of measures that the President of the Republic adopts or the agreements he or she concludes to comply with a treaty in force will be examined in a later section.

First of all, is the side letter of 2023 a reservation or an interpretative declaration to the CPTPP? It is evident that it does not constitute a reservation, since states generally formulate reservations when expressing their consent to be bound by the treaty through signature, ratification or accession.<sup>25</sup> In a very exceptional way, later reservations are admitted,<sup>26</sup> but it would be somewhat far-fetched to classify as such the side letter of 2023.

Second, it does not constitute an interpretative declaration either, because they do not modify the obligations that emanate from the treaty,<sup>27</sup> unlike the side letter of 2023.

Third, is the side letter of 2023 a complaint or partial withdrawal of the CPTPP? The denunciation refers to bilateral treaties and withdrawal to multilateral ones,<sup>28</sup> but in the rest they are synonymous concepts<sup>29</sup> and consist of "the unilateral expression of will of one of the parties to a treaty, in which it expresses its intention to no longer be bound for this one".<sup>30</sup> It would be partial in the sense that it only involves two parties to the CPTPP (partial withdrawal *ratione personae*) and in the sense that it only covers certain obligations (partial withdrawal *ratione materiae*).<sup>31</sup> As can be seen from the aforementioned definition of "complaint" and "withdrawal", this is a unilateral legal act.<sup>32</sup> The side letter of 2023, on the other hand, is not a unilateral act, but rather a bilateral act. Consequently, the side letter of 2023 cannot be classified as a denunciation or partial withdrawal of the CPTPP. For completeness, the CPTPP regulates complaints in its article 4 and requires that they be notified simultaneously to the other parties of the treaty through the general contact points designated in accordance with article 27.5 (Contact Points) of the TPP, but there appears no public record that this provision has been complied with.

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<sup>25</sup> FUENTES TORRIJO (2023), p. 88; LLANOS MANSILLA (2009), p. 283; VARGAS CARREÑO (2007), p. 145.

<sup>26</sup> WALTER (2012), p. 257; SWAINE (2012), p. 289.

<sup>27</sup> SHAW (2017), pp. 694-695; SWAINE (2012), p. 279; WALTER (2012), p. 240.

<sup>28</sup> FUENTES TORRIJO (2023), p. 98.

<sup>29</sup> GRIEGERICH (2012), pp. 952-953.

<sup>30</sup> VARGAS CARREÑO (2007), p. 181.

<sup>31</sup> GRIEGERICH (2012), pp. 952-953.

<sup>32</sup> VARGAS CARREÑO (2007), p. 181; LLANOS MANSILLA (2009), p. 437; HELFER (2012), p. 635; GRIEGERICH (2012), p. 951.

Fourth, is the side letter of 2023 an international treaty? The national definition of treaties may diverge from the international definition.<sup>33</sup> Therefore, an instrument may constitute a treaty from the perspective of public international law, but not from the perspective of the Constitution. However, since the Constitution and Chilean legislation do not define international treaties, and since Chilean scholarship usually applies the international definition for the purposes of the Chilean legal system, below we will refer to the international definition.

In accordance with literal *a*) of article 2 of the CVDT,

“Treaty” is understood to be an international agreement concluded in writing between states and governed by international law, whether contained in a single instrument or in two or more related instruments and whatever its particular name;

Therefore,

The title and form of a document [...] will be less important than its content in determining whether it is a treaty or international agreement. An exchange of notes or letters, a protocol, an agreement, a memorandum of understanding and even a unilateral declaration may be registrable under Article 102 [of the Charter of the United Nations].<sup>34</sup>

According to Chilean scholarship,

The treaty can be defined by expressing that it is an agreement of wills concluded in writing between subjects of international law and governed by international law.

From the concept that we have formulated, it can be deduced that the essential elements of every treaty are: a) that it is an agreement of wills; b) that all the parties involved in it are subjects of international law; c) that it be concluded in writing, and d) that it be governed by international law.<sup>35</sup>

By applying the same criteria and arguments presented above, we can conclude that the side letter of 2023 has the legal nature of an international treaty. This is how Chilean scholarship has described it.<sup>36</sup> Although this reflection refers to the Chilean Constitution, it is worth mentioning that international scholarship has also qualified other side letters to the CPTPP as international treaties.<sup>37</sup> As a consequence, the constitutional provisions referring to treaties apply to the side letter of 2023; for this article, paragraph 15 of article 32 and paragraph 1 of article 54 are especially relevant.

Regarding the side letter of 2023, Chile and New Zealand, upon signing it, expressed their consent through the exchange of instruments, in accordance with article 13 of the CVDT:

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<sup>33</sup> HOLLIS (2012), pp. 13-16; SCHMALENBACH (2012), p. 46.

<sup>34</sup> UNITED NATIONS OFFICE OF LEGAL AFFAIRS TREATY SECTION (2013), section 5.3.2.

<sup>35</sup> VARGAS CARREÑO (2007), p. 124.

<sup>36</sup> VALDIVIA (2022), p. 19, states that the side letter of 2023 is an international treaty: “it is required to know the text of the side letters and the effects that its parliamentary approval will bring as an international treaty”.

<sup>37</sup> SOLOMON (2018), p. 26.

Article 13. Consent to be bound by a treaty manifested through the exchange of instruments constituting a treaty.

The consent of the states to be bound by a treaty constituted by instruments exchanged between them will be expressed through this exchange:

- a) When the instruments provide that their exchange will have that effect;
- or,
- b) When it is otherwise established that those States have agreed that the exchange of instruments has that effect.

The side letter of 2023 with the Government of New Zealand complies with the regulatory assumptions of article 13 of the CVDT and corresponds to the description contained in the United Nations glossary of concepts related to actions referred to treaties:

States may express their consent to be bound by an “exchange of letters/notes”. The basic characteristic of this procedure is that the signatures do appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of both letters or notes, each of the parties having in their possession one letter or note signed by the representative of the other party. In practice, the second letter or note, usually the letter or note in response, will typically reproduce the text of the first. In a bilateral treaty, letters or notes may also be exchanged to indicate that all necessary domestic procedures have been completed.<sup>38</sup>

The side letter of 2023 corresponds to the usual practice of one party sending a note and the other party responding affirmatively, reproducing the original note and expressing its consent.<sup>39</sup> The text of the side letter of 2023, drafted by the Undersecretary of International Economic Relations, states in its first paragraph: “Particularly, I have the honour to confirm the following agreement reached by the Republic of Chile and New Zealand.” The last paragraph indicates: “I have the honour to propose that this letter and your letter of confirmation in reply shall constitute an agreement between the Republic of Chile and New Zealand which shall enter into force on the date of entry of the CPTPP for both Chile and New Zealand”. That is, the text on the side letter of 2023 unambiguously indicates that both parties express their mutual consent to be bound by a treaty constituted by instruments exchanged between them.

The above is corroborated by the fact that, in the terminology of public international law, the verb “shall” indicates a binding obligation, unlike other words, such as “should” or “may”, which are used to express the lack of legal obligation.<sup>40</sup> That is, the phrase “shall constitutes an agreement” translates into Spanish as “constituirá un pacto/acuerdo.” That is, the legal purpose of the side letter of 2023 is to modify the rights and obligations contained in

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<sup>38</sup> UNITED NATIONS (s.f.).

<sup>39</sup> HOFFMEISTER (2012), p. 177.

<sup>40</sup> In contrast, the side letter to the CPTPP between New Zealand and Chile entitled “Chile - New Zealand: Agricultural Chemical Test Data”, signed on March 8, 2018 (available at NEW ZEALAND FOREIGN AFFAIRS & TRADE, 2023) contains the phrase “I have the honour to confirm the following understanding” and “will constitute an understanding”, which indicates that this side letter does not contain binding legal norms (SOLOMON, 2018, p. 25). On the other hand, the side letter between New Zealand and Malaysia entitled “New Zealand - Malaysia: ISDS”, also signed on March 8, 2018, does contain formulations almost identical to those of the side letter of 2023.

the CPTPP, therefore modifying the legal relationship between both states.<sup>41</sup> Its purpose is not merely political,<sup>42</sup> but legal: the side letter of 2023 is legally binding in accordance with the *pacta sunt servanda* principle (article 26 of the CVDT).

In conclusion, the legal nature of the side letter of 2023 is that of an international treaty.

Through the side letter of 2023, Chile and New Zealand modify or complement each other's rights and obligations contained in the CPTPP. The Chilean Constitution does not distinguish according to the international legal effects of treaties. Therefore, for the reflections developed in this article, it is irrelevant whether the side letter of 2023 to the CPTPP from the perspective of international law constitutes a treaty that modifies the CPTPP between some of the parties only in accordance with Article 41 of the VCLT,<sup>43</sup> a subsequent treaty that partially terminates or suspends the CPTPP with respect to Section B (Investor-State Dispute Settlement) of Chapter 9 of the TPP between Chile and New Zealand, in analogy with article 59 of the CVDT, or a successive treaty concerning the same matter of the CPTPP in the sense of article 30 of the CVDT.<sup>44</sup> The relevant fact is that, according to the Chilean Constitution, it is an international treaty.

#### IV. RELEVANT CONSTITUTIONAL PROVISIONS

The discussion in the previous section allows us to conclude that the side letter of 2023 is an international treaty for the purposes of the Chilean Constitution. Is it necessary to incorporate it into the Chilean legal system?<sup>45</sup> From the perspective of national law, the side letter of 2023 must be incorporated into the Chilean legal system for three main reasons. First, due to Chilean dualism regarding international treaties that deal with matters other than human rights.<sup>46</sup> Second, there is the possibility that the absence of intervention by the competent body could eventually lead to the application of article 46 of the CVDT: a vice of consent could be alleged if the “violation of a provision of its domestic law concerning the competence to conclude treaties” was manifest and affected “a norm of fundamental importance of its internal law.” Third, because the promulgatory decree incorporated part B of chapter 9, so now it is necessary to incorporate the side letter of 2023 to expel it from the Chilean legal system; otherwise, if (in a laboratory case that, it must be admitted, is extravagant) an international arbitral tribunal were to act *ultra vires* and admit a claim and condemn Chile, then it could be debated whether the state would be obliged to comply with the arbitration award.

In short, paragraph 15 of article 32 and paragraph 1 of article 54 are applicable. Consequently, the side letter of 2023 is an international treaty and, in accordance with the aforementioned provisions, the competent body to conclude, sign and (where applicable) ratify

<sup>41</sup> SCHMALENBACH (2012), p. 40.

<sup>42</sup> HOLLIS (2012), pp. 33-34; AUST (2012), pp. 48-54.

<sup>43</sup> SOLOMON (2018), pp. 17-33, with respect to other side letters that New Zealand signed before 2019 with Australia, Peru, Singapore, Malaysia, Brunei and Vietnam with objectives similar to those of the side letter of 2023 with Chile, it has classified them as agreements to modify multilateral treaties between some of the parties only, in accordance with Article 41 of the VCLT.

<sup>44</sup> ODENDAHL (2012a), pp. 514-516; ODENDAHL (2012b), pp. 720-721.

<sup>45</sup> The international aspect of this question is beyond the scope of this article and the author would not like to dwell on it. Probably the side letter of 2023 will have international legal effects even if it is not incorporated into the Chilean legal system. Specifically, any international arbitral tribunal should reject for lack of jurisdiction a claim brought under part B of chapter 9 of the CPTPP, so that, from an international point of view, it would not be necessary to incorporate the side letter of 2023.

<sup>46</sup> DÍAZ TOLOSA (2023), p. 141; VARGAS CARREÑO (2007), pp. 215-216.

the side letter of 2023 is the President of the Republic. It must be clarified whether, in addition, the approval of Congress is required in accordance with the provisions of paragraph 1 of article 54 of the Constitution. The answer to that question will depend on three independent normative assumptions:

- 1) If the side letter of 2023 to the CPTPP does not deal with matters of law, then the President of the Republic may adopt or conclude it in the exercise of his/her regulatory power, without requiring the approval of Congress.
- 2) If the side letter of 2023 to the CPTPP does deal with matters specific to the law, then:
  - a) As a general rule, it will require approval by Congress.
  - b) Exceptionally, it will not require the approval of Congress, if the President of the Republic has adopted or concluded the side letter of 2023 for CPTPP compliance.
- 3) If the side letter of 2023 constitutes a denunciation or withdrawal of the CPTPP, the President of the Republic has the exclusive power to adopt or conclude it. In such case, as the National Congress approved the CPTPP, the President must request the opinion of both Chambers of Congress and must inform Congress within fifteen days of the denunciation or withdrawal, but the President will not require the approval of Congress.

Therefore, to elucidate whether Congressional approval is required, it will be necessary to analyze the disjunctive regulatory assumptions just mentioned. The following sections will be dedicated to that.

#### **V. FIRST NORMATIVE ASSUMPTION: DOES THE SIDE LETTER OF 2023 DEAL WITH MATTERS OF LAW?**

As the scholarship has pointed out, "the Constitution relates the possible contents of the treaty to the matters of the legal domain, reiterating the distribution planned for the internal level between matters reserved for law and autonomous regulatory power."<sup>47</sup> The President of the Republic is obliged to submit treaties that deal with matters of law to the approval of Congress. Regarding treaties that do not deal with matters of law, the President is empowered to submit them to Congress for approval.<sup>48</sup>

As a start, it should be noted that this normative assumption refers to whether the side letter of 2023 deals with matters specific to the law in accordance with the provisions of article 63 of the Constitution. Specifically: we can affirm that the side letter of 2023 deals with matters of law if it modifies provisions of the CPTPP that deal with matters of law. Therefore, it is necessary to pay attention to the content of the individual provisions. Similarly, the scholarship indicates that the quorum for Congressional approval applies to each provision of the treaties, not to the treaties as a whole.<sup>49</sup>

Paragraph 1 of article 54 of the Constitution provides:

The measures that the President of the Republic adopts or the agreements that he or she concludes for the fulfillment of a treaty in force will not require new approval from Congress, unless they are matters specific to the law.

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<sup>47</sup> HENRÍQUEZ VIÑAS (2016), p. 164.

<sup>48</sup> HENRÍQUEZ VIÑAS (2016), p. 164; ALDUNATE LIZANA (2010), pp. 192-195.

<sup>49</sup> GARCÍA BARZELATTO (2006), pp. 75-76.

For its part, article 63 of the Constitution establishes:

Matters of law are only:

2) those that the Constitution requires to be regulated by law;

Article 76 of the Constitution provides:

The power to hear civil and criminal cases, to resolve them and to enforce what is judged, belongs exclusively to the courts established by law...

And section 6 of paragraph 3 of article 19 of the Constitution establishes:

Any ruling by a body that exercises jurisdiction must be based on a prior legally finished process. It will be up to the legislator to always establish the guarantees of a rational and fair procedure and investigation.

The side letter of 2023 refers to the Investor-State dispute settlement mechanisms contained in Section B of Chapter 9 of the TPP and, specifically, paragraph 1 of its article 9.20. The side letter of 2023 revokes the consent that Chile and New Zealand had granted for the arbitrators regulated in Section B of Chapter 9 of the TPP to resolve disputes between the relevant investors and the states.

The question arises whether these arbitrations can be classified as a jurisdictional activity. The scholarship in general considers that the arbitration judgment carried out in accordance with Chilean legislation has a jurisdictional legal nature.<sup>50</sup> Chilean scholarship reaches the same conclusion regarding international investment arbitrations.<sup>51</sup> The above statements make sense in light of the fact that in disputes between investors and states the applicable rules are not contractual, but are rules emanating from international treaties concluded between states.<sup>52</sup> Consequently, due to the jurisdictional nature of the arbitration trial, any arbitrator who resolves a dispute between investors and states in accordance with Section B of Chapter 9 of the TPP, will be hearing and resolving civil cases for the purposes of the Chilean legal system.

Therefore, the side letter of 2023, when referring to courts and arbitration procedures, regulates bodies empowered to hear certain civil cases and exercise jurisdiction and, ultimately, deals with matters of law.

This conclusion is consistent with Chilean constitutional practice. The content of Chapter 9 of the TPP, as pertinent, corresponds to the content of other APPIs that Chile has signed. They contain provisions that subject possible disputes between the state and investors to arbitration, in a manner analogous to paragraph 1 of article 9.20 of the TPP. It can be seen that Chilean constitutional practice is homogeneous in the sense of having submitted all the listed APPIs to the approval of the National Congress. Although the APPIs do not revoke (like the side letter of 2023), but rather contain the consent to submit to courts and arbitration procedures, at least they serve as proof to the contrary: if any APPI had not been submitted to the approval of the National Congress, we could have observed a constitutional practice of considering that Investor-State dispute settlement mechanisms do not exercise jurisdiction.

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<sup>50</sup> AYLWIN AZÓCAR (2009), pp. 30-65.

<sup>51</sup> SCHÄFER RODRÍGUEZ (2021), pp. 260-262.

<sup>52</sup> SALACUSE (2015), pp. 393-396.

However, Chilean constitutional practice does require such approval, which at least does not refute that Investor-State dispute settlement mechanisms exercise jurisdiction.

In conclusion, the constitutional provision that establishes that “the treaties approved by the President of the Republic in the exercise of his/her regulatory power will not require approval by Congress” is not applicable to the side letter of 2023.

#### **VI. SECOND NORMATIVE ASSUMPTION: HAS THE PRESIDENT OF THE REPUBLIC ADOPTED OR APPROVED THE SIDE LETTER OF 2023 FOR CPTPP COMPLIANCE?**

Chilean constitutional practice knows cases in which a treaty has been approved by the National Congress, but the President of the Republic has signed side letters that have not been approved by Congress. Such is the case of the Free Trade Agreement between the Government of the Republic of Chile and the Government of the Republic of Korea, signed on February 15, 2003 and promulgated by Decree 48 of the Ministry of Foreign Affairs of 2004,<sup>53</sup> approved by the National Congress. The treaty was modified by verbal notes dated March 9 and 15, 2005 that correct the Spanish text of the treaty, promulgated by Decree 85 of the Ministry of Foreign Affairs, published on June 6, 2005,<sup>54</sup> in accordance with the provisions in article 79 of the CVDT. Now, from the content of this side letter signed between Chile and Korea dated March 9 and 15, 2005, it is clear that it was adopted or concluded for compliance with the treaty with Korea. Therefore, it did not require congressional approval.

On the other hand, the side letter of 2023 has the legal purpose of revoking the acceptance that both states granted reciprocally regarding the Investor-State dispute settlement mechanisms contained in Section B of Chapter 9 of the TPP. The objective and purpose of revoking consent is precisely to terminate the legal effects of the respective provisions, so as not to comply with them. Therefore, the President of the Republic obviously did not adopt or conclude the side letter of 2023 for CPTPP compliance.

In conclusion, the constitutional provision that establishes that “the measures that the President of the Republic adopts or the agreements that he or she makes for the compliance of a treaty in force will not require new approval by Congress” is not applicable.

#### **VII. THIRD NORMATIVE ASSUMPTION: DOES THE SIDE LETTER OF 2023 CONSTITUTE A DENUNCIATION OR PARTIAL WITHDRAWAL OF A TREATY?**

Does the side letter of 2023 can be characterized as a denunciation or withdrawal of the CPTPP? This question is pertinent because paragraph 1 of article 54 of the Constitution and article 63 of Constitutional Organic Law 18918 of the National Congress provide that the President can denounce the treaties or withdraw from them without the approval of Congress, but with the mere opinion of Congress.

Now, as has been clarified in a previous section, the side letter of 2023 does not constitute a complaint or withdrawal. Consequently, the side letter of 2023 is not covered in the third regulatory assumption of paragraph 1 of article 54 of the Constitution.

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<sup>53</sup> Decree 48 of the Ministry of Foreign Affairs, Promulgates the Free Trade Agreement with the Government of the Republic of Korea and its Annexes, with Subsequent Corrections in its Spanish Language Version. Published on April 1, 2004. Available at < <https://bcn.cl/2sgkf> >.

<sup>54</sup> Decree 85 of the Ministry of Foreign Affairs, Correction to Paragraph 5 of Article 5.4, of the Spanish Text of the Free Trade Agreement with Korea of 2003. Published on June 6, 2005. Available at < <https://bcn.cl/35bab> >.

### VIII. CONCLUSION

Chile and New Zealand signed the CPTPP and have signed side letters regarding this treaty. From the point of view of the Chilean legal system, it is necessary to discern which is the competent body so that the legal norms contained in those side letters come into force.

This article has raised which is the competent body, in accordance with the Chilean Constitution of 1980, to revoke the acceptance that the State of Chile granted to the Investor-State dispute resolution mechanisms contained in Section B of Chapter 9 of the TPP with respect to New Zealand, through the side letter signed on February 17, 2023.

To answer that question, it was first reasoned that the side letter of 2023 has the legal nature of an international treaty. The side letter of 2023 was then subsumed in the constitutional provisions that define the competent bodies that must intervene so that international treaties come into force with respect to the Chilean legal system. By making this subsumption, it is concluded that the competent body is the President of the Republic with the approval of the National Congress, in accordance with paragraph 15 of article 32 and paragraph 1 of article 54 of the Chilean Constitution of 1980.

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