International Investment Arbitration under the Chilean Jurisdictional Organization: A Review*

Una revisión del arbitraje internacional de inversiones a la luz de la organización de la jurisdicción chilena

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Abstract

In an increasingly globalized world, the law has had to incorporate new figures and institutions to enable a response to the new demands in the legal trade. Thus, international investment arbitration has become renowned as the most suitable method for conflict resolution in matters pertaining to international investments. Despite the criticism and praise that it has received, its addition has certainly caused more of a challenge at a doctrinal level. This investigation intends to answer the dogmatic issue of the addition of international investments arbitration in the national legal system, under the Chilean jurisdictional framework. Although the constitutional mandate states that the courts determined by law are the ones called to carry out the jurisdictional function, the rise of investment arbitration is left in the hands of international treaties that Chile has signed and ratified.

Key Words: *International investment arbitration; Jurisdiction; Reciprocal Protection and Promotion of Investments Agreement; Bilateral Investment Treaties; International Economics Law.*

Resumen

En un mundo crecientemente globalizado, el derecho ha debido incorporar nuevas figuras e instituciones, a fin de dar respuesta a las nuevas demandas que el tráfico jurídico exige. Así, el arbitraje internacional de inversiones se ha consagrado como el método idóneo para la resolución de controversias en materia de inversiones internacionales. Pese a las críticas y elogios que ha recibido, lo cierto es que su incorporación ha importado más de un desafío a nivel doctrinal. La presente investigación pretende dar una respuesta dogmática a la cuestión de la incorporación del arbitraje de inversiones en el ordenamiento nacional, a la luz del esquema de la jurisdicción chilena. Si bien el mandato constitucional indica que los llamados a cumplir con la función jurisdiccional son los tribunales establecidos por la ley, el surgimiento del arbitraje de inversiones queda en manos de los tratados internacionales suscritos y ratificados por Chile.

* This research was based on the contents of the dissertation "Notes on the regulatory structure of international investment arbitration in Chile. Regulation and criticism", supervised by Prof. Mauricio Lagos. I am grateful for the valuable comments of Mr. Sebastián Chandia Olivares. Article received on April 28, 2021 and accepted for publication on August 16, 2021. Translated by Fluent Traducciones.

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Palabras clave: *Arbitraje internacional de inversiones; Jurisdicción; Acuerdo de Protección y Promoción recíproca de las Inversiones; Tratados Bilaterales de Inversión; Derecho internacional económico.*

I. INTRODUCTION

In the face of globalization and the liberalization of the world economy, it is possible to see that the interrelation between the actors on the international stage is becoming increasingly more intense. If sovereign States were formerly playing the lead role, today some protagonists include new people and/or entities, and different transnational companies and investors, unhindered by spatial limitations or frontiers, are coming to light.

The law has had to adapt to the new demands that come with commercial traffic and new international dynamics. The apparition of investment arbitration is viewed as part of this complex global phenomenon that affects the law. It emerges to provide answers to special legal conflicts (involving investments) between special subjects (sovereign States and private investors).

Although this figure has been subjected to both criticism and praise, it seems relevant to identify certain matters that can be striking under the internal legal order. Is it possible to claim that the existence of these arbitration courts threatens the internal jurisdiction of the States that sign the investment treaties? Is it correct to state that international investment arbitration fulfills a jurisdictional function? To what extent can this figure be reconciled with the Chilean jurisdictional structure?

To answer these questions, this essay follows a dogmatic and historical methodology, and aims to analyze international investment arbitration based on the Chilean jurisdictional framework.

To address these issues, the essay is structured as follows: first, we go over the jurisdiction theory (II), defining its historical origin and briefly referencing the existence of merchant courts during medieval times and the doctrinal theory that later developed, to then provide a concept of jurisdictional power as a manifestation of sovereignty (2.1.); we then offer a general outline of the jurisdictional organization in Chile (2.2). Second, we analyze the figure of investment arbitration (III); going over its origin and inclusion into the national system (3.1.); we also make the distinction between international and domestic arbitration (3.2.); the latter, in order to place the former within the Chilean jurisdictional framework. (3.3.) Next, we tackle the issue of including international investment arbitration into the national system (IV); where it is imperative to identify international treaties as the source of this method of conflict resolution (4.1.); so that we can then identify that both the problem and the answer are normative conflicts (4.2.). Finally, this we offer some conclusions on the matter (V).

II. THE JURISDICTION THEORY

2.1. Historical Origin and Development

From the start of the modern age, jurisdiction has been understood as part of the concept of sovereignty and is understood as the power to coercively apply law within a defined territory. In this sense, it is important to highlight that this idea originated from the enlightened thought,

where jurisdiction was deemed as a state function, given that the legal system and law's production pertained exclusively to the state.[1]

This coercive legal power, however, has not always been linked to sovereignty. In a way, it is possible to note that the notion of jurisdiction is much older, historically speaking. Jurisdiction comes from the Latin word *ius dicere*, which can be conceptualized as the coercive declaration of law by the person who has the power to do so.[2] In the Roman tradition, the *iudex,* or judge, was not a legal expert but rather a lay person who fulfilled an arbitration role, presiding the settlement of quarrels with formulas provided by the *preator*. The judge was not an expert in law and had very limited power; in fact, for legal queries, he was required to address the jurisconsult.[3]

Therefore, if the term jurisdiction has a Roman origin, why is jurisdiction as we know it today so far off its origin? Because of its own historical and political evolution. During Imperial Rome, conflict resolution between private individuals slowly ended up in the hands of public officials. These were people versed in law, although their main role was enforcing the emperor's will.[4] Thus, it is possible to see that the power to decide a normative solution applicable in a particular case slowly became linked to the authority of the person in charge of deciding.

This situation keeps up during European medieval times, and thus the figure of the judge gained relevance given that his power was backed up by the figure of the king. The ruling of a sentence is therefore understood as a pronouncement of justice in a particular case, as the resolution of each lawsuit according to the legal conscience embodied or represented by the king, and thus applied to that case.[5] This is how we can understand that the jurisdictional function is related not only to the declaration of the applicable law but also to the expression of the authority's sovereign power, along with the monarch's own conception of justice.[6]

After the fall of the Western Roman Empire, small kingdoms began to emerge in Europe. Their monarchs slowly began to concentrate and centralize their power by deeply reforming the mechanisms used to enforce their political power and government. Thus, the figure of a state where sovereignty lies in the hands of an absolute monarch and is extended over a determined territory began to consolidate. The king was the exclusive custodian of political power, exercising sovereignty with full autonomy, and was still the supreme judge. This process led to the strengthening of the modern State and the figure of the absolute monarch, which played a significant role in the relationship between state power with sovereignty and jurisdiction.[7]

During this period, it is possible to assert that the monarch was the bearer of jurisdiction, and the king is originally a judge; however, in order to carry out this task it was necessary for the monarch to empower his officials to aid him in doing so. It was thus necessary for the monarch to delegate his functions in his representatives to alleviate royal administration. As a result, jurisdiction was understood as the power or authority to govern and enforce the law and,

[1] DOMINGO (2008), p. 74.

[2] DOMINGO (2008), p. 74.

[3] MERRYMAN (1980), p. 68. For a historical overview of Roman law, *vid.* GUZMÁN (2013), pp. 30-34, 56-80, 113, 131-139, 171-172, and 229.

[4] MERRYMAN (1980), pp. 68-69.

[5] MARTÍNEZ (2010), p. 319.

[6] MARONGIU (1953), pp. 705-707.

[7] BÖCKENFÖRDE (1991), pp. 26-46.

especially, the power invested in judges to administer justice in the name of the sovereign king.[8] It is therefore possible to talk about a delegated justice, as its administration was delegated by the monarch to his officials and administered by them in his name.[9]

Similarly, under the protection of the royal power, the figure of the merchant courts surfaced in some lower medieval age cities and states. These are linked to the rise of commercial law, an area of law that was separate from civil law, elaborated by and for merchants.[10] These traders were frequently grouped in corporations and guilds by which they created their own special courts to solve disputes amongst themselves.[11]

To illustrate this, it is worth highlighting *Consolat de Mar,* as a key institution that solved conflicts between merchants in Catalan medieval commerce. This figure arose at a time when merchants required speedy and efficient solutions to their problems, where knowledge of the discipline and merchant customs and practices was needed. In this context, the existing legal texts, such as the Justinian Code, were rendered insufficient and anachronistic.[12]

Merchant courts were developed to answer to the specific needs of merchant traffic and navigation, as well as guaranteeing compliance with their contracts and their activities in general. These merchant institutions depended on monarchic privileges, given that it was due to them that the existence of these special courts was justified for a specific guild. It is worth noting that the origin of this area and the formulation of these privileges was the product of the successful alliance between the monarchy and merchant families that had upheld their military campaigns – and therefore their political power.[13]

Given this, it is important to bear in mind that although these merchant courts proliferated over European Mediterranean cities, as was the case of *Consolat de Mar*, their reason of being came from the privileges granted by the king himself. The monarch was still the holder of sovereignty and jurisdiction, a judge king, and by virtue of this power was able to grant said prerogatives to certain guilds, as was the case of sailors and merchants.[14]

In the advent of the French Revolution, the jurisdictional role experienced certain transformations but did not lose its tight link to the notion of sovereignty. The changes that came along involved judges and the application of the law, as this was no longer tied to the monarch's authority but rather to the power granted by the law.[15] Revolutionaries intended to take the doctrine of the separation of powers to its limit, which led them to deny judges any power to interpret the law, as it was the expression of the sovereign will. The legislation was the only tool that could guide the work of a judge, limiting his activity to its mere, unrestricted application.[16]

Before, judges were the King's officials and administered justice in his name; now they lacked these prerogatives and were supporting actors in the law. The administration of justice

[8] HUESBE (1995), p. 342.

[9] BORDALÍ (2016), pp. 15-21.

[10] MERRYMAN (1980), pp. 32-33.

[11] MIRALLES DE IMPERIAL (2017), pp. 56-57.

[12] FERRER (1999), pp. 53-65.

[13] SOLDANI & TANZINI (2016), p. 21.

[14] SOLDANI & TANZINI (2016), p. 21.

[15] MERRYMAN (1980), p. 69.

[16] MERRYMAN (1980), p. 73.

was a task that did not leave space for interpretation or middle grounds, requiring the legislator to provide solutions to any legal interpretation issue that could arise. This was done in the revolutionary understanding that the faults in the law should be rectified whilst preventing the courts from exercising the power to create laws. This would, therefore, liberate the State from the fear of judicial tyranny. Given the impracticality of the previous solution, a new government body in charge of annulling incorrect legal interpretations made by the courts was created: the Cassation Court. Thanks to this, legislative supremacy was safeguarded; ordinary judges were barred from interpreting legal statutes and the legislature was exempt of that task.[17]

Revolutionaries criticized that – for centuries – legal rulings had been linked to the will of the man who exercised power, that is, the sovereign monarch. Therefore, if in the Old Regime the ruling was one of the king's arms that allowed him to express his power, in the modern age a significant effort was made to rationalize the exercise of jurisdiction and administration of justice. It was thus necessary to conceptualize the administration of justice not only as an expression sovereign's power, but also as the product of a rational process. Given this, the inseparable relation between the law and political power led to a symbiosis of justice and politics.[18]

Whilst this effort to rationalize was implemented, a theory of jurisdiction, that was intimately linked to sovereignty, gradually came about. The theory that the sovereign was the holder of jurisdiction was also picked up by the current political philosopher Thomas Hobbes (1588-1679). His Leviathan states that judiciary law is inherent to sovereignty,[19] understanding that the former is hearing and deciding all potential conflicts pertaining to the law and its relation to the facts. The Englishman reminds us of the importance of this power and provides a practical vision of the State in terms of its role to provide security to its members and achieve certain social peace among the population. It is therefore clear that, to Hobbes, jurisdiction is akin to sovereignty.[20]

Although we can appreciate that the notions of jurisdiction and sovereignty were not born together, today they are undeniably deemed inseparable. The idea of jurisdiction underwent a transformation alongside the European political and historical path, which led it to be coupled with the king's or the State's sovereign power.

Jurisdiction has become an expression of sovereignty as the fruit of the illustrated rationalization effort, aiming to overcome its intimate link to the monarch of the Old Regime. Now, it is interesting to question this marriage of convenience: should jurisdiction be a power of statutory nature and origin? History shows us that the answer is not affirmative, that the union between these two notions came from a political process that understood jurisdiction as a power inherent to sovereignty.

However, it is also correct to assert that commercial activity always required special conditions to be carried out, which arose with the emergence of commercial law in the main Mediterranean cities. Merchants and sailors came together in guilds and corporations and, thanks to royal privileges, were able to also have special courts for their operations, which allowed them to solve their own legal issues. It is impossible to ignore the similarities between this regulation and current international commerce and investment, which have developed with the evolution of globalization and the rise of international commercial ties between States and private persons.

[17] MERRYMAN (1980), pp. 73-76.

[18] HUESBE (1995), p. 343.

[19] HOBBES (1999), p. 27.

[20] HUESBE (1995), p. 342.

2.2. The jurisdictional legal framework in Chile

The idea that the theory of jurisdiction is linked to sovereignty has been picked up by various legal systems that follow the continental legal tradition. Chile is no exception. This is given that the Political Constitution of the Republic, hereafter CPR, states that the exercise of sovereignty is carried out by the people through referendums and periodical elections, as well as by the authorities mentioned therein (article 5, paragraph i.I, CPR). Given this, in its Chapter VI the constitutional text states that one of these authorities are the courts determined by law.[21] Thus, the Chilean theory of jurisdiction is framed in the vision that couples it with state sovereignty.

Scholars allow us to define the jurisdictional function as the state function that aims to exhaust the legal components of a conflict; it is understood that this exhaustion comes from both the perspective of *res judicata* and from the possibility of coercively enforcing said decision.[22]

Although the Constitution does not offer a concept of jurisdiction, it states that: "the power to hear civil and criminal cases, solve them and enforce what has been judged belongs exclusively to the courts determined by law" (article 76 i. I, CPR). Considering this constitutional provision, doctrine has understood that there is somewhat of a reference to jurisdiction. Therefore, it has been said that the Constitution, on one hand, refers to the moments where the jurisdictional activity is important (hear, resolve, and enforce) and, on the other, mentions that it falls exclusively on the courts determined by law.[23]

As we anticipated, one interpretation of the constitutional text allows us to affirm that the exercise of jurisdiction is reserved exclusively to the courts that have been determined by law. Therefore, it is possible to ask what the scope of this constitutional mandate is, in order to elucidate which are the bodies in charge of exerting this power. Doctrine has notes that this activity is not linked to a determined state body, and that is enough that this function is established as such by law.[24]

Given this, it has been said that there is no Judicial Branch in Chile, as it is impossible to refer to the Judicial Branch in terms of a unitary power. Therefore, when we mention the Judicial Branch in Chile, we are indeed using it as an abbreviation to refer to the existing judges and courts. Each separate court are in charge of the performance of the jurisdictional function, rather than the Judicial Branch as a whole.[25]

Now, are all the courts established by law part of the Judicial Branch? Not necessarily, as only the ordinary courts are part of this group; that is, those that are governed by one same organic statute: Chapter VI of the Constitution and the Organic Code of Courts [*Código Orgánico de Tribunales (COT)*].[26] We can therefore find other courts in Chile that are not only outside of the Judicial Branch but are linked to other branches, such as the Executive and Legislative.[27]

[21] COLOMBO (1968).

[22] ALDUNATE (1995), p. 16.

[23] LARROUCAU (2020), pp. 29-31.

[24] ALDUNATE (1995), pp. 16-17.

[25] ATRIA (2004), pp. 134-135 and BORDALÍ (2013), pp. 611-612.

[26] BORDALÍ (2009), pp. 226.

[27] BORDALÍ (2009), pp. 215-216.

The constitutional text states that an organic constitutional law shall define the courts' organization and powers needed for "the swift and adequate administration of justice throughout the Republic's territory" (Art. 77 i. I, CPR). Hence, the COT indicates which courts are in charge of hearing these matters and states which ones are part of the Judicial Branch, either as special or ordinary courts; notwithstanding the exceptions laid down in the Constitution or the law (Article 5 i. I, COT).

It seems like the constitutional creators did not choose the type of bodies that would be in charge of fulfilling the jurisdictional function, since is possible to find courts that are outside of the Judicial Branch, such as the Environmental Court; but there are also courts that are linked to other State powers, such as – for example – the Senate when it acts as a court in impeachment cases (article 53 N°1, CPR).[28]

Given all this, it seems correct to state that although the jurisdictional power has been enshrined in the Constitution, its institutional framework is granted by the law, which is the one in charge of the creation and establishment of the courts, and bestowing them with jurisdictional functions.[29] Hence, we can affirm that any organ authorized by law to resolve legal matters can be called a court of justice. Therefore, courts of justice, legislative organs or those that are part of the State administration can exercise jurisdiction if they have been enabled to do so by law.[30]

III. INTERNATIONAL INVESTMENT ARBITRATION

3.1. How it has been Established in Chile

Chile has gradually included international arbitration into its internal legislation as a special method for commercial and investments dispute resolution. It is therefore possible to state that this institution operates according to the subjects that intervene in the legal issue (international investment arbitration), or according to the nature of the matter itself (investment arbitration).

From a historical viewpoint, Chile has implemented a series of macroeconomic reforms[31] that have irreversibly transformed its commercial and investment policies[32] since the second half of the 20th century – and these changes were also replicated in legal areas. The latter was done within the Chilean framework, where its traditional legislation did not acknowledge submission to foreign jurisdictions or legislations; and, similarly, was distrusting of foreign investments due to the legal and diplomatic risks they could entail (Calvo and Drago doctrine).[33]

The Calvo doctrine prevailed in most Latin American countries, and Chile was one of them. This can be seen as a Pan-American doctrine that states that foreigners shall deal with their

[28] BORDALÍ (2009), pp. 226.

[29] BORDALÍ (2009), pp. 216-217.

[30] BORDALÍ (2008), pp. 209-210. Similarly, see BORDALÍ (2016), pp. 63-94.

[31] HARVEY (2005), pp. 7-9.

[32] HUNEEUS (2007), pp. 199-204 and 271-306.

[33] Created in 1902, by the Argentinian Minister of Foreign Affairs, Luis María Drago (1859-1921). It rejects the diplomatic protection figure and denies the forceful collection of debts contracted by States. Similarly, *vid.* TAMBURINI (2002), pp. 85-88.

legal claims according to local jurisdiction; that is, they must submit to national courts and avoid seeking diplomatic protection or intervention[34] or pressure from their State.[35]

To carry out these economic reforms in the Chilean system, the State and the economic system was required to gradually open in order to become an investment hub in the region. The economic impact caused by opening to commerce and investments made it necessary to adapt the national legal order to the new reality.[36]

This sparked the strengthening of a neoliberal political system in Chile that propels national and international private investment, as well as the liberalization of the economy.[37] It has been said that this process was inaugurated with Executive Order N° 600 of 1974, also called the Law on Foreign Investment. As the name suggests, its goal was to promote international investment in the country.

It is important to highlight that this Executive Order was repealed in one of the latest tax reforms (Law N° 20.780), and the regulation was replaced by Law N° 20.484. It is vital to note that this normative body set a new structure for direct foreign investment in Chile and created InvestChile, a new institutional framework. This legal text entered into force on January 1st, 2016, replacing the repealed Executive Order.

Additionally, during the 90's, Chile made the most of the changes that took place in its internal policies and the opening of its economic system, which allowed the country to take on a lead role in the international arena. Given this, an intense process of negotiating and signing of bilateral agreements on investments has taken place, starting an important phase of integrating policies in the economic sphere.[38] On a bilateral plane, Chile has entered into over thirty agreements to mutually promote and protect investments (APPI) or bilateral investment treaties (BIT), with countries from all five continents.[39]

These APPI can be seen as international treaties involving two or more states that undertake ensuring non-discriminatory treatment to the other party's investors and their investors from the legal system of the State that receives the investment. Additionally, these treaties include conflict resolution methods for issues that may arise between investors and the State that receives

[34] Diplomatic protection is the action of a State exercised by way of diplomacy or other peaceful outcome methods, to invoke the international responsibility of another State, due to a damage caused by an internationally illegal act to a national member of the first State. To review diplomatic protection, *vid.* VARGAS (2017), pp. 472-481 and PASTOR (2013), pp. 247-249.

[35] TAMBURINI (2002), pp. 82-84. The Calvo Clause came about as a reaction to this situation. According to this a foreign investor must enter into a contract with the receiving State by which they agree that the legal conflicts that arise shall be resolved solely by the State's competent courts and according to their law and cannot resort to any diplomatic protection or international claim. All in all, the issue's importance has dwindled compared to the past decades. Today the trend, aside controlling investments, is stimulate them and provide the necessary legal security. For more on this discussion, see VARGAS (2017), pp. 481-483; PASTOR (2013), pp. 247-252 and BROWNLIE (2008), pp. 545-546.

[36] BIGGS (2007), pp. 351-360 and GUERRERO (2021), pp. 539-544.

[37] CARRILLO (2010), pp. 145-154. In the same vein, *cfr.* LARRAÍN & VERGARA (2001), pp. 69-108.

[38] LOPEANDÍA (2001), p. 17.

[39] CAMPUSANO & BOLADO (2015), pp. 272-273 and MAHU & ROJAS (2016), p. 10.

the investment.[40] Given all this, dispute resolution is usually allocated to an international arbitration panel.[41]

We can therefore assert that investment arbitration loosely reminds us of the merchant courts that existed in European medieval times. This is because the current political power allows and encourages the removal of certain legally relevant conflicts from ordinary justice. However, it is not a monarch who has the alliance with the merchants' guild, but the State that bequeaths these prerogatives to specific individuals – investors – to promote economic growth in its territory.

All in all, it is essential to note the differences between this figure and commercial international arbitration, as the historical link with these courts relates not only to the nature of the conflict but also to the parties that face each other: merchants. Therefore, even though in investment arbitration the parties are always, on one hand, a State, and on the other, a private investor, the tie to this historical figure is closely linked to the nature of the conflict: the investment.[42] It is thus necessary to appreciate this figure as an institutional answer to special conflicts that take place in the international arena, considering the growth of economic and commercial relations between States and different individuals and/or entities.

3.2. Differences with Domestic Arbitration

It is plausible to consider to arbitration within the framework of the Chilean jurisdiction and the courts determined by law. Arbitrators are one of the courts stated by the law and are enabled to resolve civil conflicts that may arise between the parties (Art. 5 and 222 COT).

However, it is possible to say that in Chilean law we can find two kinds of arbitration: national and international. This distinction makes sense because they are ruled by different legal bodies, they aim to govern different individuals and activities, and have different link with the national legal system.

a) National or domestic arbitration finds its legal grounds in national legislation. Thus, the arbitration trial is regulated as a special trial (articles 628 to 244 CPC), as is also the case of arbitrator judges (articles 222 to 243 COT). This type of arbitration pertains to matters between national individuals that take place within the Republic's territory. However, in the case of Chile, it is said that the arbitration trial involves extraordinary public jurisdiction.[43]

b) On the other hand, international arbitration is a tool for conflict resolution, rather than a way to exercise jurisdictional powers. The link between international arbitration and the legal system is limited to residual aspects; an arbitrator, in this matter, does not administer justice in the name

[40] For example, the APPI signed between Chile and Iceland states in its art. 8 that the controversies between an investor and a contracting party can be resolved, at the investor's choice, by a) the competent court of the party whose country made the investment, b) arbitration according to the CIADI agreement, or c) arbitration according to CNUDMI.

[41] LOPEANDÍA (2001), pp. 17-18 and MUJICA & RIVERA (2018), pp. 9-10. For a closer look at the international development of APPIs and its new trends, see SORNARAJAH (2010), pp. 172-235.

[42] The idea of investment involves, according to the Salini test, the following elements: a contribution volume, a certain duration of the contractual relation, the presence of the risk factor for the investor, and a contribution to the economic growth of the State that receives the investment. Now, not all contractual relationship can be catalogued as investment; it is possible that there are other contracts between investors and the receiving State that are not investments but reference the commercial relations between them. Thus, the controversies that emerge could also be resolved via arbitration, but not investment arbitration, but by commercial international arbitration. For a better look at the notion of investment, see MEREMINSKAYA (2010), pp. 39-40 and LIM *et al.* (2018), pp. 210-231.

[43] MEREMINSKAYA (2006), pp. 98-105.

of any State; his or her power comes from the agreement between the parties. The international arbitration procedure is extremely respectful of the parties' autonomy; it has a brief regulation and leaves the steering of the procedure in the hands of arbitrators and the parties.

According to some authors, it is essential to recognize the *sui generis* nature of international arbitration to prevent embracing concepts and doctrines that have developed in domestic arbitration.[44] As we anticipated, its regulation is not as detailed as in national arbitration, but as an institution, international commercial arbitration has been acknowledged in law N° 19.971 and, on the other hand, investment arbitration is governed by international treaties that have been signed and ratified by Chile.

3.3 International Investment Arbitration within the Jurisdictional Framework

The Constitution does not mention the nature or quality of the entity called to resolve legal matters. According to the formula used by article 76, jurisdiction falls on every court of justice that has been determined by law. The Constitution also states that certain matters should be dealt with by a special court, as is the case of the Constitutional Court (Chapter VIII, CPR).[45]

Similarly, we have already mentioned that the national legal system includes organs that are linked to other State powers, which also exercise jurisdictional power and are deemed courts established by law according to the terms laid down by the Constitution. On the other hand, international arbitration, particularly investment arbitration,[46] is not regulated in national legislation. On the contrary, given that investment arbitration – understood as the method to be used for the resolution of legal conflicts between foreign investors and the State – emerges from different international treaties that have been signed and ratified by Chile. As we previously explained, the Chilean State has gradually included the investment courts system into its legal system as part of the international policy the country has embraced to position itself as an attractive hub for foreign investment in the Latin American region.[47]

Investment arbitration emerges from international treaties that deal with economic matters, APPIs being general rule. All in all, these are not the only international instruments that include international investment arbitration. This, bearing in mind that Chile has ratified over twenty commercial agreements with chapters that refer to investments.[48]

To illustrate this, it is worth highlighting the Free Trade Agreement (FTA) between the Republic of Chile and the United Mexican States. Chapter 9 of this treaty discusses investments and lays down the ability of the foreign investor[49] to subject his legal claims to arbitration panel,

[44] MEREMINSKAYA (2006), pp. 105-106.

[45] BORDALÍ (2009), p. 217.

[46] Although international commercial arbitration is in a similar situation, it is possible to find laws that regulate it, such as Law N° 19.971 of 2004. On this, see VÁSQUEZ (2005).

[47] According to the figures of the Economic Commission for Latin America and the Caribbean (ECLAC), during 2020 Chile was placed as the third country receiving direct foreign investment in the region, surpassed only by Brazil and Mexico. CEPAL (2021), p. 81.

[48] SUBSECRETARY OF INTERNATIONAL ECONOMIC RELATIONS (2021).

[49] Although international treaties are the ones in charge of providing a definition of foreign investor, this differs according to each treaty. Similarly, in order to elucidate if an individual or company has this quality, it is imperative to fulfill both conditions: be an investor and be a national of the State that Chile entered the APPI or FTA with. To further study the concept of foreign investor, *vid.* PASCUAL-VIVES (2019), pp. 47-108. See DOLZER & SCHREUER (2008), pp. 46-59; MAHU & ROJAS (2016), pp. 21-24, and SORNARAJAH (2010), pp. 323-331.

according to the rules of the International Center for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) (Art. 9-21 Chile-Mexico FTA).

However, investment arbitration does not usually emerge from a contract or agreement between the parties, as is the case with domestic or international commercial arbitration. Investment arbitration is governed by bilateral or multilateral international conventions that have been signed and ratified by the member States.[50]

For example, the agreement signed between Chile and Spain follows this logic: if any conflict pertaining investments arises between one of the member States and the national investors of the other State, the investors can choose to be subjected to either national jurisdiction or international arbitration. If the investor opts for arbitration, there is yet another choice: choosing to submit to the ICSID or to an *ad hoc* arbitral court, according to the rules of the UNCITRAL (Article 10, Chile-Spain APPI). The same formula is used in the investment agreement celebrated with Italy (Ninth Article, APPI Chile-Italy). The investment treaty signed with France also has this clause but with the caveat that the only admissible arbitral court is that set by the ICSID Convention (Eighth Article, APPI Chile-France).

It is worth emphasizing how easy it is to acknowledge and enforce the decisions resulting from the arbitral trial in investments courts. However, there are some differences between arbitration carried out under ICSID and other arbitration procedures.

a) The States that are members of ICSID must acknowledge the mandatory nature of the ruling and must perform the pecuniary obligations that arise therein within their territory as if it were a firm ruling rendered by a national court (articles 53 and 54, ICSID Agreement).[51] Therefore, it is worth stressing that the obligation of performing the ruling is an international obligation that arises from the Convention.[52]

b) If the arbitration is not done under the ICSID rules, in a procedure – regardless of whether it is *ad hoc* or institutional – the ruling must be acknowledged and enforced according to the rules in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Given this, it is worth questioning if the investment arbitral panels are courts determined by law under the terms stated by the Constitution. The Constitution regulates the jurisdictional institutions and declares that the bodies called to fulfill this role are the courts that have been determined by law. However, what is the situation of investment arbitration? It is not governed by law but by bilateral or multilateral international treaties that have been signed and ratified by Chile.

Thus, the question is geared to determine whether the investment courts system is an arbitral court established by law. International treaties are not laws and do not have the same normative hierarchy. Bearing this in mind, it is necessary to check what their role is within the national legal order, as well as in the source's hierarchy. A possible answer to this question is provided by the regulatory conflicts that occur within the legal system, to elucidate the normative rank of international treaties on investment matters when they have been signed and ratified by the State of Chile.

[50] LIM *et al.* (2018), pp. 87-88.

[51] BUNGENBERG & REINISCH (2020), pp. 156-160. See FERNÁNDEZ (2009), p. 22.

[52] LIM *et al.* (2018), pp. 448 and 452-459.

IV. AN ANSWER TO THIS ISSUE

4.1 Sources of International Investment Arbitration

If investment arbitration originates from international treaties, a relevant issue is identifying how to apply and understand these legal instruments in light of the national legal order. A treaty's entry into force – on an international plane – is granted by the legal act by which the State expresses its willingness to be bound by the treaty, known as ratification.[53] It is worth underlining that this function falls on the President of the Republic (article 32 N°15, CPR). Although the latter does not bring up much discussion, the question of how it enters into force in domestic law is still pending.[54]

The Constitution does not regulate the hierarchical position of international treaties or their regulatory rank within the national legal system. Although they have only been considered somewhat like the law, the similarities do not extend to the legal effects of the treaties.[55] Various authors have discussed whether there is a level of hierarchy within the international treaties signed and ratified by Chile. Hence, it is not unreasonable to consider a certain supremacy of treaties that deal with human rights, which is not exempt of discussion.[56] All in all, international investment is not deemed a human right, so the APPIs and FTAs are excluded from this discussion.[57]

In view of this, some doctrine has acknowledged that the only source that allows to recognize the normative function of the treaties' text within the national law is a Presidential decree authorizing it, as well as the mandate contained therein, as it orders to execute the treaty.[58] This, logically, must be followed by the publication of the decree in the Official Gazette of the Republic of Chile.

It is important to note the distinction embraced by both doctrine and constitutional case law, which differentiates between self-executing international treaties and non-self-executing international treaties. The criteria to distinguish one from the other stems from whether the provisions contained in the treaty can be applied by the jurisdictional body without a previous legal act that gives content to the obligations set in the agreement. This distinction, however, does not mean that non-self-executing treaties lose their regulatory force; they are still very much binding.[59]

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[53] DIEZ DE VELASCO (2017), p. 164. See PASTOR (2013), pp. 109-111.

[54] Traditionally, considering the issue of including international law into the internal legal order, the authors have been divided between those who uphold the dualist theory and those who opt for the monistic conception. The former people argue that international law and domestic law are independent and separate legal systems, which have different sources and cannot be confused; therefore, conflict cannot exist between them. On the other hand, the monistic current claims the essential unity of all legal systems, which depend on a rigorous hierarchical order in which the rules or internal law are subordinated to the rules of international law. However, it is important to bear in mind that, although none of these theories have been wholly accepted, both the practice of the States and doctrinal developments have shown an inclination for the monistic view. To check this discussion, see VARGAS (2017), pp. 183-189; PASTOR (2013), pp. 168-169; DIEZ DE VELASCO (2017), pp. 242-243 and BROWNLIE (2008), pp. 31-33.

[55] ALDUNATE (2010), pp. 192-197.

[56] MÜLLER (2015), pp. 506-511.

[57] MONTT (2005), p. 41.

[58] ALDUNATE (2010), p. 198. In a similar vein, see VARGAS (2017), pp. 202-203.

[59] ALDUNATE (2010), pp. 201-202.

Considering this distinction, some authors have noted that, in Chilean law, Bilateral International Treaties are self-executing,[60] an acknowledgement that can also be extended to provisions pertaining to foreign investments in TFA that have been ratified by Chile.

However, it is key to specify that the self-executing nature of an APPI is affirmed about each provision itself and not from the text of the international treaty as a whole. Therefore, it has been said that clauses pertaining to non-discriminatory national treatment and the protection from direct or indirect seizures are fully enforceable in domestic law. The same goes for umbrella clauses.[61]

Finally, it is necessary to consider that the interpretation of an international treaty differs greatly from the interpretation of a legal[62] or constitutional[63] text. Interpretation requires specifying the meaning and scope of a legal text. With this in mind, the Vienna Convention, which Chile entered in 1969 and has been in force since 1981, has created certain rules in its articles 31 and 32, which have been observed by States and have set judicial precedents.[64]

In light of the provisions set in the Convention, authors have noted, *roughly,* that the essential elements of this task are: the ordinary meaning of the terms, the context, the object and goal of the treaty, the agreement between the parties, their conduct, and the rules of international law.[65] These elements must be analyzed contemplating each specific international treaty; for example, given APPIs and FTAs, it seems reasonable to conclude that their object and goal is the promotion and protection of investments.

[60] MONTT (2005), pp. 28-36 and 41-47.

[61] MONTT (2005), pp. 43-45.

[62] Broadly speaking, in domestic law we refer to the Civil Code for legal interpretation. The rules for interpretation are set down in its articles 19, 20, 21, 22, 23 and 24. For a dogmatic review of these rules, see GUZMÁN (1992), pp. 67-81.

[63] In constitutional investigation some authors claim that it is necessary to set an admissible standard for constitutional interpretation, which is given by its plausibility. This is bearing in mind that the Constitution is not an ordinary legal text, it is also historical and political. For an in-depth review of the rules for constitutional interpretation, see ALDUNATE (2002), pp. 261-262.

[64] VARGAS (2017), pp. 142-146. See SHAW (2008), pp. 932-938 and BROWNLIE (2008), pp. 631-632.

[65] PASTOR (2013), p. 114. See DIEZ DE VELASCO (2017), pp. 205-209.

4.2 Regulatory Conflicts

Bearing in mind that investment treaties are a source of law in a country's internal order, and its provisions are self-executing, it is worth asking about the potential regulatory conflicts that may arise involving other legal texts.

For illustrative purposes, let us say that Chile enters an APPI that has terms that clash with the provisions contained in Law N° 28.848 regarding the definition of investor. In this scenario, it is necessary to determine if the classic criteria used for normative conflict resolutions provides an answer; the classic criteria include the hierarchy, temporality, and specialty principles.

a) The hierarchy principle does not seem like an adequate criterion to solve the conflict, as it lacks a legal foundation. On the other hand, the hierarchy principle is mainly linked to the supremacy of the Constitution over other sources of law.[66] This is because the Constitution is in charge of defining the hierarchy of the sources of law and regulating the ways in which legal rules are created.[67]

Notwithstanding, it is worth bearing in mind the different positions held in doctrine regarding the normative rank of certain international treaties. It is possible to determine two interpretations. On one hand, certain doctrine holds that human rights treaties have constitutional hierarchy, given the terms of Article 5 i. II of the Constitution.[68] Alternatively, there are those who suggest that certain instruments have legal rank and a clearly inferior normative hierarchy than the Constitution; this is basically due to the fact that they submit to the procedures applicable to laws (articles 54 N°1, i. I and 66 CPR) and can also be subjected to constitutional control.[69]

Given the latter, the potential use of the hierarchy principle as a solution to normative conflicts regarding international treaties will ultimately depend on which of these two interpretations is chosen.

b) The temporality principle also falls short when solving this conflict, given that a treaty can repeal legal provisions, but not the other way around. The Constitution states that: "the provisions of a treaty can only be repealed, modified or suspended in the way that is determined in the treaty or according to the general rules of international law" (Article 54, N°1, i. V, CPR).[70]

c) Finally, the specialty principle also lacks the necessary elements to settle the matter for the following reason: classical principles revolve around the regulatory conflicts that arise between law sources of the same rank, which is not what happens with laws and international treaties.

It is improper to use classical principles to attempt solving regulatory conflicts between international treaties and national legal sources. Since these provisions do not share the same normative rank, given that treaties are their own autonomous source of law.[71]

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[66] ALDUNATE (2010), pp. 205-208.

[67] HENRÍQUEZ (2008), pp. 75-76.

[68] MÜLLER (2015), pp. 506-508. Similarly, see CUMPLIDO (1996), pp. 255-258.

[69] MÜLLER (2015), pp. 508-509. Similarly, see RIBERA (2007), pp. 97-115.

[70] See VARGAS (2017), pp. 203-204.

[71] CORDERO (2009), p. 46.

To solve this conflict, the only criteria that provides an answer is the competence principle.[72] According to this principle, the matters that need to be regulated by law are distributed to different formal sources throughout the legal system. Thus, the path to solve the conflict between different provisions within the national legal system is not limited by the classic criteria, but also includes this principle.[73]

Considering the application of the competence principle, a new string of questions come to mind. Is it possible for an international treaty to repeal, for example, a part of the COT? In light of the former, it is: an international agreement can repeal a law, regardless of whether it is an ordinary law or an organic constitutional law. However, it is important to bear in mind that this does not have generalized effects, operating only in certain cases and situations determined by the treaty itself. Finally, the requirement for this hypothesis presumes conformity to the Constitution and that the treaty is passed with the quorum needed according to article 66 (article 54, N°1, i. I, CPR).

By way of example, it is worth considering a few practical cases regarding the approval of international treaties. For this, we shall look at the procedures of the FTA signed between the United States of America and the APPI signed with Iceland.

In the first case, the international instrument needed the organic constitutional quorum in order to be passed in the parliament, as it includes provisions that clashed with some of the powers granted to Chile's Central Bank [*Banco Central de Chile*], stated in Law N° 18.849. Given this, the application of article 10.8 of the FTA, pertaining to money transfers, affects the powers of the issuing entity to define the limits of international operations done in foreign currencies.[74]

On the other hand, regarding the procedure to pass the investment treaty signed with Iceland, this international instrument was adopted without a special quorum for parliamentary approval. This was done even though the treaty enshrines the figure of investment arbitration for conflict resolution between foreign investors and the State that received the investment.[75]

Given this, it is plausible to assert two ideas. First, an international treaty can modify the provisions in an organic constitutional law as long as it abides with the rules set in the Constitution and is passed with the required quorum according to Article 66 of the CPR. Second, no special quorum is needed to authorize a treaty that involves an international obligation declaring that Chile is to submit investment legal disputes to an arbitral panel; in other words, it must only abide by the procedures set for an ordinary law.

Finally, it is worth bearing in mind that investment arbitration is not the only instance where an international body oversees the performance of a jurisdictional role, and it is not a rare case where there is dialogue between national and international jurisdiction.[76] A specific case was when the Constitutional Court had to determine the constitutionality of the powers granted to

[72] BASCUÑÁN (1998), pp. 33-36.

[73] CORDERO (2009), pp. 35-36.

[74] BIBLIOTECA DEL CONGRESO NACIONAL (2003), pp. 48, 190, 324, 332 and 372-373.

[75] BIBLIOTECA DEL CONGRESO NACIONAL (2006), pp. 7, 9 and 17.

[76] It is worth highlighting other cases where there has been dialogue and intermingling of national and international jurisdiction, such as – for example – the cases where the Supreme Court has had to rule over the reach of the effects of a sentence pronounced by the Inter-American Court of Human Rights (IACHR) within the conventionality control. For a revision of the conventionality control and case law dialogue, see NASH (2013), pp. 491-499 and 502-506; CAMARILLO & ROSAS (2016), pp. 134-140, 142-144 and 153-158 and OLANO (2016), pp. 63-83. Similarly, a commentary on this dialogue, based on the "Atala Riffo and children v. Chile" case, is analyzed in ZÚÑIGA (2012), pp. 430-467.

the International Criminal Court, by the Rome Statute. Some claimed that the Statute infringed national sovereignty, as it made it possible to abandon the power to administer justice that belongs to every independent State.[77]

Given this, the Constitutional Court[78] determined that, in order to recognize the jurisdiction of a supranational court, it needs to be embraced as part of the national system, and thus requires the previous modification of the constitutional text. This materialized in Law N° 20.352 and the inclusion of the twenty-fourth transit clause in the Constitution.

Finally, it is worth asking why this situation has not been repeated in the case of other APPIs and FTAs. As previously mentioned, arbitral courts exercise a jurisdictional role, but the ratification of these treaties has not required constant constitutional reforms. Based on an analysis of the ruling in question, it seems the answer is given by the fiftieth whereas clause, given that the Constitutional Court states that "every conflict whose solution entails a public interest is necessarily subject to the knowledge and decision of the courts established in the (formal) Chilean law"; on the other hand, those referring to disposable rights can be extended to national and international courts. Thus, considering how APPIs are processed, it is perfectly clear that, to the Constitutional Court, foreign investment conflicts relate to disposable rights.

V. CONCLUSIONS

We can claim that international investment arbitration involves a jurisdictional activity as it exhausts the legal element of a special conflict (investments), between special subjects (sovereign States and private investors). This exhaustion is understood from the perspective of *res judicata* and from the option of applying coercion to materialize the decision of the arbitral court.

Within the Chilean jurisdictional framework, the Constitution does not choose the nature of the organs called to fulfill this function, it simply indicated that it must be carried out by the courts determined by law.

International investment arbitration is not determined by law, but by the international treaties signed and ratified by Chile. Although it is possible to assert that, according to Chilean law, they are not courts, the truth is that investments arbitration fulfills a jurisdictional function: international arbitration panels hear conflicts, follow a specific procedure, and make decisions. Similarly, their decisions have specific compulsory effects for the parties involved.

The issue of including investment arbitration, by way of investment international treaties, must be analyzed in light of the normative conflicts that occur within the legal system. Based on this analysis, we can conclude that the answer is given by applying the competence principle whenever antinomies arise.

We cannot claim that international investment arbitration is a novelty, the history of law proves otherwise. During European medieval times there was already a type of special courts, backed by political power, that aimed to fulfill the jurisdictional role in the special matter that was commerce. We can therefore claim that this vision has been revitalized, and that this mechanism for conflict resolution has been the institutional answer for special conflicts that take

[77] VARGAS (2017), pp. 626-628.

[78] *Motion for unconstitutionality filed by a group of Deputies regarding the Rome Statute of the International Criminal Court* (2002).

place in the current international arena, given the influence of globalization and increase of commercial and economic links between States and different individuals.

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