

Law & Business Journal

LEGAL & BUSINESS
ADVISORS

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- Mining in Chile - Tax laws & what Foreign companies need to know 1
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INVESTMENT LAW & REPATRIATION OF FUNDS ESSENTIAL TO KNOW

DECREE LAW 600

Decree Law 600 (“DL 600”) regulates the entry of foreign capital as investment into Chile. It provides investors with guaranteed certainties, rights and certain tax advantages. Individuals, legal entities or Chileans residing abroad may bring funds into Chile under this regulation. The minimum investment required is USD\$5,000,000 for investments in currency, and USD\$2,500,000 for other forms of investment (in other words, tangible assets, technology and capitalisation of profits or credits).

Investors using the DL 600 effectively enter into a “contract” with the Chilean Government. This “contract” cannot be amended unilaterally by the Government or by subsequent changes in legislation. Investors may, however, request changes to the contract to increase the amounts invested, change their purpose or bequeath its rights to another foreign investor.

CHAPTER XIV

Chapter XIV (of the Central Bank of Chile and its Compendium of Foreign Exchange Regulations) (“Chapter XIV”) is a capital placement mechanism where the Chilean Foreign Investment Statute does not apply. Credit transactions, deposits, investments and capital contributions from abroad, which are regulated under Chapter XIV, are only affected by the restrictions of the international exchange market through which they are made. It sets out the rules governing foreign exchange transactions related to loans, deposits, investments and capital contributions originating abroad, for amounts more than USD\$10,000 or its equivalent in foreign currency. Chapter XIV however does not apply to operations made by banks.

Amongst other things, Chapter XIV provides that in the case of foreign exchange income, whether liquidated or not, or in the case of using it abroad, the relevant rules can be either those (historical) rules applicable and current at the date that the exchange was made, or the rules applicable at the present date. Therefore, if at the time of the repatriation of capital the rules which govern Chapter XIV are more restrictive than those rules applicable at the time of the initial transaction, the investor may choose to use the previous rules and derive the benefits therein.

It is absolutely imperative that if you do business in Chile that you understand this regime, laws and the instruments available. We have seen in too many cases when it comes to repatriated funds/profits to Australia and/or offshore that these laws have not been considered, causing concern for, *inter alia*, possible unexpected “triggers” of tax and ancillary implications.

MINING IN CHILE - TAX LAWS & WHAT FOREIGN COMPANIES NEED TO KNOW

In addition to being subject to normal taxes, Mining Activities are also subject to a specific tax known as the Mining Activity Tax or Mining Royalty. Following the earthquake that devastated Chile in February 2010, the National Congress approved Law N°. 20,469 which modified the Mining Royalty by introducing the concept of “mining operational income” as a basis for the application of the Mining Royalty. The effect of this legislation was to increase the Specific Mining Tax rates and its basis for calculation, including various incentives to motivate companies to elect this tax regime. The tax is applicable to the miner whose annual sales exceed 12,000 metric tons of fine copper or its equivalent. The “taxable operational income” attributable to mining activity establishes the tax base. In addition a progressive tax rate was established based on volume of sales. If annual sales are lower than 12,000 metric tons of fine copper, the miner does not have to pay this tax. Those with sales in excess of 12,000 metric tons, but less than 50,000 metric tons of fine copper, are subject to an ascending progressive tax rate that ranges between 0.5% and 4.5% of the taxable operational income. Finally, a 5% tax rate applied to those miners with annual sales in excess of 50,000 metric tons. The amendment to Law No. 20,469 introduced the concept of “operational mining margin” which is the percentage based on miner’s operating profitability. The goal of this amendment is to tax profits in a progressive manner. Additionally, the law progressively increased the tax from 5% to 14% depending on the operational mining margin for those with annual sales in excess of 50,000 metric tons of fine copper. The new provisions are applicable to mining activities that commenced after January 1, 2011.

Finally, Law No. 20,460 created the Regional Investment and Restructuring Fund, which uses a portion of the additional resources raised by the tax increase, which is intended to finance development projects throughout Chile.

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INDIGENOUS LAND RIGHTS ON THE ENERGY SECTOR (GEOTHERMAL CONCESSIONS) WHICH ALSO AFFECTS THE MINING INDUSTRY

The challenge of creating enough energy supplies to fuel Chile's economic growth is a major consideration. Today the Chilean Government is pressing forward with plans to make the most of the country's abundant natural resources and to incorporate alternative and renewable power into its grid.

Some of these resources, however, are located in areas that affect indigenous land interests. Although the Chilean government controls subsurface rights for minerals and geothermal energy, it provides investors no guarantees against opposition from ethnic groups, which have objected to developments for economic or environmental reasons. It is up to the investor to negotiate with these groups. If issues are unresolved they can be referred to the court system, where the Government's legal policies on such conflicts are still under development.

The Law on Geothermal Energy Concessions (Law No. 19.657, "the Law") gives the holder of a concession a property right *in rem*, which is independent from the property of the surface holdings. The right granted under this Law may conflict with holders of other rights in the same territorial areas covered by the geothermal energy concession.

Policy towards conflicting interests

Case outcomes on the question of indigenous rights have varied. The government has tended to favour investment in the energy sector over and above indigenous land rights, putting in question its human rights policies.

In September 2008, Chile ratified the International Labour Organisation (ILO) Convention 169 concerning Indigenous and Tribal Peoples ("Convention"), but thus far it has not done much to adjust its conflicting legislation to the Convention, one of the most notable cases being the Law.

The Government's bidding process for the concession itself breaches Article 6 of the Convention in that the Government did not previously consult indigenous groups whose rights may be affected by these concessions.

Contrary to the Convention, the Law has no provision for indigenous consultation. It gives rights *in rem* to tender winners, ignoring other pieces of legislation that ought to be considered when creating such rights.

A number of indigenous appeals launched against geothermal concessions, which raised indigenous rights pursuant to the Convention, have been rejected. In spite of these cases, the first judicial application of the Convention occurred in December 2009. This has not been the last application of the Convention in Chilean courts.

As Chile pushes to become a 'developed' country, the Convention will most likely become further applied in the Chilean system. How the Government will try to compromise between indigenous rights and its commitment to become energetically independent is uncertain. We are closely monitoring any developments.

IP CHILE - RECENT CHANGES FROM A COMMON LAW PERSPECTIVE

In May 2011, Law No. 20,435 amended Law No 17,336 on Intellectual property law in Chile. The main purpose of this law was to meet the requirements set forth in the Free Trade Agreement (FTA) between Chile and the United States (and Australia) which primarily dealt with Internet service provider (ISP) liability. The goal of this law was to meet the requirement of stricter prosecution for copyright piracy in Chile.

ISP liability stems from the fact that an internet service provider is in the unique position to host or transmit infringing content of third parties over the internet. Pursuant to the law, ISPs are exempt from liability if they remove infringing content as soon as they know about it. The law contemplates that an ISP is deemed to know of infringing content once in receipt of a judicial notice to that effect. Even though Chile is the first Latin American country to enact legislation regarding the liability of ISPs many were disappointed that the notice requirement was ineffective absent a judicial notice. One of the changes promulgated by this legislation is the increase of fines for violations of copyright; this law increased those fines by 20-fold. The law also includes jail terms of up to 10 years for those violators who import, manufacture or acquire for distribution works violating copyright law. In addition to strict

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penalties for groups of infringers, counterfeit products are to be destroyed, or in some circumstances, donated to charities if the rights holder chooses. Compensation for infringement is deemed to be the legitimate retail value of the infringing works and civilly a court may order the infringer to compensate for any profits made from the infringing copies or a fixed sum of up to US\$100,000.

The legislation also establishes a mechanism that sets copyright fees for groups of users, via a mediation process, which if ineffective, ends in arbitration.

Finally, in the work-for-hire in software scenario, the law provides that a person who orders the development of a computer program for a third party is the copyright holder, whether that software is marketed or not.

OSMOFLO BRINGS NEW EXCITING TECHNOLOGY TO THE MINING SPACE



Harris Gómez Group Ltd. welcomes Osmoflo, Australia's largest desalination and water recycling company as our client here in Chile. Osmoflo brings exciting technology to LATAM. We wish Osmoflo all the success.

PANORAMIC RESOURCES HAS A PRESENCE



Harris Gómez Group Ltd. welcomes Panoramic Resources, which is a mid to large Australian miner in their recent "cornerstone position" in Hot Chili Ltd.'s mine in the North of Chile, as our client. We wish Panoramic Resources continued success in the Region.

ABOUT OUR LAW FIRM

Harris Gómez Group Ltd., is a legal and business advisory firm located in Santiago, Chile, South America's most stable, open and competitive

economy. Our firm specialises in Australian (and other Common Law countries) and Latin American cross-border issues, in areas such as Corporate, Mergers and Acquisitions, Tax, IP, Mining and Energy, and Business Enterprises. Our firm has over 18 years experience in the respective legal and business cultures of Australia and Latin America and we have created a seamless bridge between the two as an essential partner in any multinational enterprise. One of our unique qualities is our ability to take your perspective when coming into the region:

- We help remove the uncertainties of doing business in a foreign market,
- We create effective business and taxation structures to comply with both jurisdictions,
- We help you manage the risk of undertaking business overseas to the parent company, its subsidiary and its Directors,
- And we manage expectations by understanding how your business works and the dynamics of industry in the jurisdiction you are entering.

By understanding the latest developments in both regions we are able to assist existing businesses in their future courses of action for sustained growth. Our clients view us as a strategic partner for the long run.

Whether you are an Australian business going into Latin America or a Latin American business going into Australia and Asia we believe that your business needs to be strategic and take a regional approach; we assess where you are currently doing business, what new markets you intend to enter and help you plan for the future.

For example, depending on your markets, you may want to consider bringing your products through Chile's Trade Free Zone in Iquique. Chile, in comparison to Australia, enjoys stronger and more competitive trading treaties with many Latin American countries, including Brazil, Colombia and Mexico. Alternatively, Tax Free Zones in Brazil may serve you better.

What distinguishes us from other law firms is our ability to give comprehensive legal and business advice in both English and Spanish, which gives our common law clients a heightened sense of confidence in doing business in Latin America. In addition, we provide personalised services, by

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a partner or senior associate, in a cost effective manner. We understand the business and legal ethos in both regions and are committed to delivering clear & practical advice to our clients, which saves them both time and money. We adopt the high legal standards of the Australian legal system giving our clients the confidence that we are able to understand their business culture. Some of our clients' come from the following industries:

- Large Mining Company
- Junior to Medium Mining Companies
- Water Treatment / Reverse Osmosis Company
- Large Australian Bank
- Renewable Energy

- Geothermal & Drilling Equipment
- Publicly Listed Companies
- Large Construction and Infrastructure
- Large Universities & Research Centres
- Governments
- Mining Technology Services
- Agribusiness
- Investment & Capital Raising
- Medical
- Food and Wine
- Insurance
- Private Companies and Wealthy Individuals
- Sports
- Transport & Logistics

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South American Diggers '11
CONFERENCE
17 & 18 November | Sydney Convention & Exhibition Centre
'The official conference and tradeshow for Australian resource companies doing business in South America'

HGG is proud to announce its participation in the South American Diggers Conference '11 where it will present *Cross border mineral exploration and development in Chile – what to look out for from an Australian perspective (the regulatory environment and approval process)*

InvestChile CORFO

October 17 - 20, 2011, Santiago, Chile

5th International Forum

Chile: Investment Opportunities for Mining Suppliers

InvestChile, Corfo's Foreign Investment Attraction Division is hosting the 5th International Forum "Chile: Investment Opportunities for Mining Suppliers" on 17th to the 20th of October 2011. This is an excellent opportunity to explore markets such as North America, Oceania, Africa, Latin America and Europe, for direct or joint investment opportunities in the following sectors:

- Investment Opportunities
- Mining equipment for and open pit mining
 - Mining Supplies

- Automation and Control
- Applied Robotics
- Engineering Services
- Telecommunications for and open pit mining
- Logistic Services
- Export Services

For more information, visit:
http://www.investchile.com/mining_suppliers_forum/mining_industry_suppliers_forum