

The Case of Chilean Health Insurers [ISAPRES]: Jurisprudential Considerations on a Potential International Arbitration linked to Human Rights

El caso de las aseguradoras de salud chilenas (ISAPRES): consideraciones jurisprudenciales sobre un posible arbitraje internacional vinculado a los derechos humanos

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Abstract

Based on international arbitration cases concerning investment protection, this article examines jurisprudential criteria that can be applied in disputes, for example, between states and foreign investors. The analysis highlights the incorporation of human rights criteria in arbitration situations regarding the case of Chilean health insurers [ISAPRES]. A Chilean Supreme Court's ruling, concerning an across-the-board decision on arbitrary discrimination by insurers that would have affected users, could eventually be discussed in international forums. If the owners of health insurers consider that they have not been treated fairly, the decision adopted by the court could be expropriatory. This study addresses the compatibility of human rights criteria in arbitration proceedings within foreign investment frameworks. Finally, the main aspects under examination will consider jurisprudential criteria and the Court's ruling regarding health insurers.

Keywords: insurance companies, health economics, investment, arbitration, human rights, investment arbitration, right to health, isapres, investment protection.

Resumen

A partir de casos de arbitraje internacional que conciernen la protección de inversiones, se examinan criterios jurisprudenciales que pueden aplicarse en contiendas, por ejemplo, a litigios entre estados e inversionistas extranjeros. El análisis subraya la incorporación de criterios de derechos humanos, en situaciones de arbitraje, al caso de las aseguradoras de salud chilenas [ISAPRES]. Un fallo de la Corte Suprema de Chile, a propósito de una decisión aplicada masivamente en materia de discriminación arbitraria de los aseguradores que habría afectado a los usuarios, podría, eventualmente, ser discutida a nivel internacional. En el evento que los propietarios de los aseguradores de salud estimaren que no han tenido un tratamiento justo, la decisión adoptada por el tribunal pudiere ser expropiatoria. Se discutirá la compatibilidad de los criterios de derechos humanos a propósito de procedimientos arbitrales en marcos de inversión extranjera. Finalmente, se expresarán los principales aspectos a considerar en base a análisis de la jurisprudencia y del fallo de la Corte Suprema chilena sobre los aseguradores de salud.

Palabras clave: compañías aseguradoras, economía de la salud, inversión, arbitraje, derechos humanos, arbitraje de inversiones, derecho a la salud; isapres; protección de inversiones.

Introducción

Business activity in the world has traditionally been confronted with the problem of expropriations and political risks, which has led to the emergence of bilateral investment protection treaties and, therefore, the emergence of conflict resolution systems regarding disputes between the host state of the investment and the foreign investor. However, a growing trend in Latin America and throughout the world is a potential contradiction between the practical application of fundamental rights (economic, social or cultural), versus an increasingly relevant influence of foreign investment, that is not limited to industrial or manufacturing sectors but has grown in the extractive sector and, recently, the service provision sector.

In addition, it should be taken into consideration that in the case of Latin America, there is a growing judicialization before the national courts by means of constitutional actions. Hence the provision of some specific fundamental rights is claimed before court in each country, such as the right to life, access to education, health, non-arbitrary discrimination. This occurs both in the national legal system and the set of treaties on applicable fundamental rights. It should also be considered that in the case of legal systems of Latin American countries, the role of the Inter-American Court of Human Rights, through the so-called control of conventionality has been gaining an increasing influence. It should be mentioned, however, that Latin American systems are not a strong legal link as is the case of provisions of the European Court of Human Rights with respect to the members of the Council of Europe. Especially in the case of the European Union the decisions of the European Court of Justice are binding.

There are issues associated with foreign investment which overlap with the demand or provision of some fundamental rights, for example, right to health, either through medical benefits or through the provision of medicines. In addition, there are areas such as ownership of natural resources or the use of certain geographical spaces, where tensions emerge between the rights of foreign investor versus the claims of local communities (usually native Peoples) claiming ancestral rights. It is in this scenario that the regulation established for foreign investment would be at odds with the regulation applied in terms of fundamental rights standards. This could be an antinomy not only of rules but of entire branches of the legal system not only at the national but also at the international level. This generates harmful effects on the legal system such as discredit or lack of legitimacy regarding decisions adopted by some international courts, or an oscillating jurisprudence where is practically impossible to ensure predictability of decisions. This situation generates a scenario that results in a drop in foreign investments and undermines business, affecting economic growth. On the other hand, employing judicialization as a mechanism of litigation as a means of regulation, especially in the case of litigation of a structural, strategic or public interest nature that may have a strong social justice root.

In light of this phenomenon, this article examines the situation of the ISAPRES in Chile as a potential case of judicialization before arbitral tribunals under international investment protection regimes. It seeks to identify the potential legal and financial risks that the Chilean State may face in such proceedings, as well as the human rights considerations that arbitral tribunals might take into account in their deliberations. To provide adequate context, the analysis will also consider the impact of domestic litigation brought by local communities against large-scale investment projects. A comparative methodology will be applied, drawing on case law from regional human rights courts in Latin America, alongside relevant arbitral jurisprudence in the field of foreign investment, which may offer instructive insights for addressing the issues raised in this study.

General setting applicable to the problem

Overview

This article exposes something similar to a collision course, because it is precisely what researchers seem to face in Latin America. The conflict lies in the contradiction that would arise between the protection of fundamental rights and the development of productive activities. This would have to do with an economic structure, but countries with a strong extractive matrix do not seem to have this contradiction. Now, where could the problem of this possible collision course lie? The problem could be determined by the balance between economic activity and universal legal principles (González Butrón, 2012). Comparative methodology

or comparative analysis comes into play. On this point, it is vital to refer to the cryptotype¹, or the ethos that a certain legal branch supposes. (Caterina, 2017) Thus, the perspective of fundamental rights or human rights is a perspective that, obviously, takes sides on the basis of ideal conditions: ideals that must be achieved towards a condition of dignity or well-being. (Nogueira Alcalá 2005: 2012). In short, it is an idea that to be achieved, that is definitely looked-for because encompasses an ethical mission.

Current globalized society interacts within a capitalist system to meet economic needs (García Garnica y Taboada Ibarra 2012). Thus, we have a counterpoint between these two worlds, one that is an essentially empirical world. A world, let's say, based on what would be British pragmatism and empiricism in the Anglo-Saxon tradition and in short, it seems that this two "ethos" are opposing each other. It is worth asking the question if this two "ethos" can be compatible. (Tobar Torres 2021). One possible answer, in the case of Latin America in general—and Chile in particular—, is if they can be unified. This would be possible using methodologies compared to institutions of foreign legislation. (Míguez Nuñez 2011). This also has to do with a factor of great importance with respect to two cases or matters that seem interesting, specifically, on jurisprudence that has been pronounced on the protection of fundamental rights and business activity.

Methodology and sample selection

This article analyzes a set of five cases involving arbitration or litigation with transnational implications. Four of these pertain to international arbitration proceedings arising from disputes between foreign investors and host States under investment protection agreements. The remaining case involves domestic litigation in Chile concerning price variations in Health Managed Organization (ISAPRE) policies. The selection criteria focused on whether the disputes were eligible for arbitration and had proceeded to a final decision, thereby allowing for substantive legal analysis. If the issue arises from a clear violation of fundamental rights, it cannot be limited to an economic matter, nor can it be understood solely as related to international investments or commercial interests. Therefore, it is reasonable to infer that the arbitral tribunal can consider the issue as one of transgression of fundamental rights, including health, access to water, and environmental protection.

Hypothesis

The central question of this article is the correlation between judicial rulings and fundamental rights in relation to an activity carried out by a private party within a state. This research aims to determine why in a context of the private provision of a social service—traditionally a public good until the application of the theory of subsidiarity—what prevails are the economic considerations not the general provision of the service. Fundamental rights should reign over economic efficiency or the prerogatives that a private party has obtained through concession to provide a certain public service. This research follows the hypothesis: "There are divergences in the treatment that arise in controversies related to public goods or services that are categorizable as social rights". This hypothesis will be contrasted with the choice of a limited group of cases, which meet certain specific requirements to be considered as paradigmatic cases

Discussion

This paper focuses on the tension that occurs in accessing public goods. From a perspective of human rights, recognised at the international level, goods are considered social or economic rights; while, from an economic point of view, they are considered an investment. The right to health is a social right and must be understood from a perspective that goes beyond access to medical infrastructure and medical professionals who provide medical care. This implies that we must go beyond promotion, protection, recovery and rehabilitation actions, with regard to medical ailments. Accessing health services implies actions and infrastructures, which encompass environmental, social and attitudinal aspects that allow, in one way or another, to achieve the maximum biopsychosocial well-being of people. Therefore, the right to health should not only be understood as the benefit itself offered to people who need to prevent a disease or recover from one. Human beings are imbedded in social and physical situations or conditions that intervene throughout

¹ We refer to Rodolfo Sacco's terminology about the influence of a general idea that illustrates or guides the judicial system.

their lives that could affect their health, well-being and quality of life. The level of income, schooling, housing and employment situation, sanitary infrastructure related to drinking water, sewage and wastewater treatment services affect these circumstances too.

Affordability affects access to medical benefits as well. Social security systems are partly responsible for allowing access to medical benefits, for example with regard to the link with occupational accidents or work-related diseases. However, a comprehensive system of medical benefits must also consider situations if people out of work (either because they have retired or because they have not yet formally entered the labour market) can access medical services, through a medical benefits financing system. This service can be provided both by a public system (responsible for the financial coverage of health benefits), as well private companies, usually insurance companies that provide coverage to clients who require medical care, through the subscription of an of insurance.

Conceptual framework

Judicialization

Judicialization of disputes means the escalation a disagreement once other, non-judicial, instances have been exhausted. The Spanish legal system considers judicialization the “access to effective judicial protection”; nevertheless, this procedure reflects a tendency to appeal to courts when disputes that arise in social life have not been settled. Judicialization also implies submitting a dispute, for example differences that exist between states and foreign investors, to an adjudicative entity. It is important to keep in mind that an arbitral tribunal does not recourse to national public justice, but to an international decision-making body.

Subsidiarity

The principle of subsidiarity is one of the foundational elements of the 1980 Chilean Constitution, inspired by the ideas of German *Ordoliberalismus* (ordoliberalism). Under this doctrine, the State should limit its intervention in economic and social affairs to those activities that private actors cannot perform independently. In essence, the State recognizes and affirms the primacy of private initiative in providing goods and services (even those traditionally classified as public goods). This principle influences Chile’s constitutional framework. By enshrining subsidiarity, the legal system enables public and private actors to provide public services. This dual provision model has become particularly relevant in healthcare, education, and utilities, where the line between public service and commercial enterprise has been increasingly blurred.

Economic services of general interest

The concept of *economic services of general interest* (ESGI) originates in European Union law. It refers to activities deemed essential for the public and whose provision must be ensured for all citizens. These services (public transportation, access to drinking water and sanitation services) are of collective rather than individual interest. Initially, the European Court of Justice adopted a broad interpretation, holding that any activity involving the provision of goods or services in a given market qualifies as an economic activity. As such, the scope of ESGI has remained flexible and somewhat indeterminate.

Nevertheless, economic services of general interest consider openness to competition and their potential for market-based provision. These services are delivered to everyone uninterruptedly, under conditions that ensure quality, accessibility, and affordability. Conversely, social services of general interest are not considered economic activities per se. They are usually excluded from market-based competition and are governed by distinct legal and policy considerations, often rooted in social welfare obligations.

Foreign direct investment

FDI refers to the transfer of capital —whether in monetary form or capital goods— into a host country, to establish a productive enterprise or a commercial project. While historically associated with manufacturing and industrial facilities, the scope of FDI has expanded to include the services sector, encompassing financial institutions, healthcare providers, and essential utilities such as water supply and telecommunications. FDI is not limited to traditional production but is increasingly present in sectors with direct implications for public

interest and human rights. This evolving dynamic raises complex legal questions, particularly when private investors engage in sectors traditionally reserved for State provision.

Investment protection treaties

Investment protection treaties are instruments of public international law designed to foster and safeguard cross-border investments. These bilateral or multilateral treaties establish a legal framework that ensures reciprocal protection for investors from each contracting State. Federal Republic of Germany and Pakistan signed the first modern investment protection treaty in 1959. Core principles include fair and equitable treatment, national treatment, and most-favoured-nation treatment, all intended to prevent arbitrary or discriminatory measures against foreign investors.

A defining feature of these treaties is the inclusion of Investor-State Dispute Settlement (ISDS) mechanisms. These mechanisms allow investors to bring claims directly against host States before international arbitral tribunals, bypassing domestic courts. The panels are usually lawyers with experience in investment and public international law. Arbitral decisions can review and even overturn national authority rulings, including those by judicial bodies, raising important questions about the limits of State sovereignty and the interplay between economic and human rights obligations.

Arbitration and human rights

Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A. v. Argentine Republic ICSID No. ARB/03/19

This arbitration concerned a concession for bottled water services granted to French and Spanish investors in the Buenos Aires Province. The concession was operated by Aguas Argentinas S.A. (AASA). The claimants alleged that the Argentine State infringed its obligation to provide fair and equitable treatment, particularly concerning tariff-setting mechanisms that failed to account for increasing operational costs.

The investors argued that the regulatory authority's refusal to adjust pricing in light of economic conditions deprived the concessionaire of a reasonable return on investment and constituted indirect expropriation. Amidst economic instability and a sharp currency devaluation, the government ultimately re-nationalized water distribution, terminating the concession and resuming control over the service (Bayón, 2018). The tribunal admitted amicus curiae submissions from consumer protection and human rights organizations. This decision acknowledged the importance of incorporating affected users' perspectives while treating disputes that involve essential services such as water. While the tribunal emphasized transparency as the primary rationale for accepting these submissions, it also indirectly referenced the human right to water (ESCR-Net, 2006).

Company de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/97/3

This dispute involved claims for compensation filed by a French investor concerning rights obtained through the privatization under a 30-year concession of Aguas de la Conquista, a water utility in the Province of Tucumán. Following political opposition and public criticism—partly fueled by allegations of irregularities in the privatization process and incidents of water turbidity—local authorities attempted to terminate the concession and repeatedly sought to renegotiate tariff terms. These measures conflicted with the company's obligations to invest in and improve service delivery (Ripinsky & Williams, 2008).

In 1997, due to political and regulatory pressures, the company attempted to terminate the concession unilaterally. However, provincial authorities insisted on continuing operations until 1998. The first arbitration proceedings started in 1996, but the tribunal found that although it had jurisdiction, it could not fit to rule (Ferro, 2001). A subsequent claim, filed in 2003, asserted a violation (under the investment treaty) of fair and equitable treatment.

The tribunal considered arguments by the provincial government that emphasized the need to safeguard citizens' health and well-being. These included claims that service interruption would endanger public health and that water quality concerns—allegedly exaggerated by authorities—were used to justify renegotiation

efforts. The award noted the strategic invocation of health-related arguments, revealing the complex interplay between investment protection and human rights obligations (ITLaw, 2008).

Ely Lilly v. Novopharm

This case concerned the withdrawal of a pharmaceutical patent in Canada, originally granted to Eli Lilly, a U.S. pharmaceutical company. The dispute centred on Canada's application of the *promise of utility* doctrine, under which a patent must fulfil the functional promise stated in its claims. The revoked patent pertained to the drug Zyprexa (olanzapine), used in the treatment of schizophrenia and related mental health conditions (Barros Michell, 2017).

Eli Lilly alleged that the revocation, prompted by a challenge from Canadian generics manufacturer Novopharm, was arbitrary, discriminatory, and contrary to Canada's obligations under Chapter 11 of the North American Free Trade Agreement (NAFTA). Specifically, the claim was based on Articles 1116, 1117, 1118, and 1119, asserting that the Canadian judiciary and patent office had discriminated against U.S. pharmaceutical firms and undermined investor protections.

The tribunal ultimately dismissed Eli Lilly's claims, finding that the revocation of the patent was neither arbitrary nor discriminatory. It held that Canadian authorities acted within a reasonable and legally justified framework and that applying the "promise doctrine" did not breach Canada's international obligations. Thus, the claim for expropriation and denial of fair and equitable treatment was rejected (Jus Mundi, 2018).

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. the Oriental Republic of Uruguay

This case involved a claim by the U.S. tobacco company Philip Morris against Uruguay, contesting the legality of tobacco control regulations that restricted branding and mandated large graphic health warnings—particularly the dangers of cancer associated with smoking—covering 80% of cigarette packaging. Philip Morris alleged that these measures violated its intellectual property rights, constituted indirect expropriation, and significantly impaired its commercial interests.

Uruguay defended the regulations as part of its sovereign prerogative to protect public health, considering the high incidence that smoking has in the diagnosis of several types of cancer. The measures were adopted pursuant to its obligations under the World Health Organization's Framework Convention on Tobacco Control, which Uruguay had ratified (Gianelli, 2016).

The arbitral tribunal, convened under ICSID, ruled in favour of Uruguay. It found that the State's regulatory measures were legitimate, proportionate, and non-discriminatory. The tribunal emphasized the State's right to regulate in the public interest, particularly in matters of public health, and held that the tobacco control policy was consistent with Uruguay's domestic legal framework and its international treaty commitments.

The case of the ISAPRES in Chile

General background

The case of the ISAPRES² does not evidence regulation by administrative means but regulation by way of litigation. The occurrence of legal intervention, as described in the literature, can be seen in cases such as use of asbestos case or class action, the diesel engine dispute in the United States. In dealing with certain types of litigation (class actions or collective litigation actions), courts become regulatory entities, in an almost analogous way to traditional regulatory bodies.

Within the Chilean constitutional system there are certain social rights that are offered by private providers. In the case of the ISAPRES or Social Security Health Institute, they are health insurance companies, which are equivalent to the North American HMOs³. In short, the scheme shows a commercial provider that offers to the public a service that from the point of view of fundamental rights is treated or called as a social

² It corresponds to the acronym of Social Security Health Institutions.

³ It stands for health management organizations.

right.

The essential issue or problem raised by the cryptotype or ethos that exists with respect to each area of law, because the judgment and this problem starts from the year 2010 regarding a challenge that is made with respect to the table of factors that is the mechanism through which the risk is calculated and the risk of insurers is measured with respect to those of, specifically, the insured, of the people who have ISAPRES plans, and that is eliminated or in the end it is declared unconstitutional and a process of massive litigation begins. Also, with regard to those of the litigation that is made collective regarding production resources, claiming from the increases the blood plans.

The core issue concerns the underlying *ethos* or cryptotype that informs distinct areas of law, particularly in how they respond to systemic challenges. In the case of the Chilean ISAPRES system, the turning point emerged in 2010, when the Constitutional Court declared unconstitutional the so-called “tabla de factores” (risk adjustment table), the mechanism used by private health insurers to calculate premiums based on individual risk assessments of policyholders. This ruling catalysed a wave of litigation, as thousands of policyholders challenged premium increases that had previously been justified through actuarial risk profiling.

The Supreme Court of Chile rules correctly, applying criteria of fundamental rights. It applies the right to non-discrimination, but there is a problem. In this case, it should be remembered that we are dealing with the situation of a series of companies that are insurers and that what they do is distribute risks, and the distribution of risk is a technically complex matter, which must be subject to certain specific rules, which is why there are tables of factors. It is important to make a clarification: that the position held in this text, in the sense that the ISAPRES is being defended or that it is good, this is not the case. The controversy surrounding ISAPRES regulation reveals that both the supervisory authorities and the insurers themselves failed to anticipate the erosion of public trust. This failure extended beyond technical regulation and into the realm of perceived legitimacy, particularly from the perspective of policyholders and the broader public.

In this judicial process, the Court establishes that the table prompts a situation of arbitrary discrimination. (Izquierdo Serrano 2023). However, the same ruling does not consider the risk distributions of each of the ISAPRES. And this brings us to the current problem for the ISAPRES, which specifically have to do with the return of money to their users, for the premiums that have been paid, more precisely, that have been paid in excess in favour of the insurers. (Vío, 2024).

About the table of factors (as well as the GES table⁴) it should be mentioned that they are, in essence, statistical mechanisms referring, in one case to general mortality and in the second, associated with catastrophic diseases, specifically established in the specific health guarantees. Furthermore, two of the ISAPRES are subsidiaries of international groups originating from Anglo-Saxon countries, specifically the United States and Great Britain, which are institutional investors that are also covered by investment protection treaties.

If the ISAPRES system were to collapse economically as a result of having to comply with the Chilean Supreme Court’s ruling—which possesses expansive effects not only in its immediate outcome but also in its interpretive reach—this would raise several complex legal and institutional challenges, and would compromise the health system altogether. The controversial nature of the decision lies not only in its content but in its consequences, particularly the systemic financial impact it may impose on private health insurers. Additionally, the Supreme Court is the last legal resort within Chile’s legal framework. Consequently, there is limited—if any—scope for further domestic review or correction of the resulting dilemma.

Given the above, a problem arises, which is the possibility of modifying or filing an appeal against the decision of a supreme court. It is then that international investment protection mechanisms and dispute resolution mechanisms come into play, with the purpose of eventually raising the possibility of suing the state in the future before international [arbitral] tribunals.

Practical problems of the application of the Supreme Court Ruling on ISAPRES

⁴ These are the Explicit Health Guarantees, which consist of the guarantee of access to the benefit, that it is provided in a timely manner and financial coverage by the tax authorities.

The challenging task is finding a mechanism that allows compliance with the judgment and, at the same time, prevents the private health system from collapsing to protect users. (Benavides *et al*, 2023)

As a result of economic integration, at the national and international levels, the institution that comes to mind is specifically the use of mechanisms such as those proposed in the Mendoza case, consisting of incorporating a compliance mechanism within the judgment itself, but it should, as far as possible, be an organic compliance mechanism.

A potential solution could consider a *special master*, a procedural mechanism commonly used in the U.S. legal system, typically appointed by a court to oversee the implementation of complex judgments, serving as an intermediary, monitor, or facilitator of compliance.

Mechanisms for managing complex litigations would be advisable for the ISAPRES system. Compensation to users should reflect the individual economic, financial, and risk profiles of each insurer. A uniform compensation scheme, as proposed in the ruling, fails to account for the distinct characteristics of each ISAPRE. The debtor insurers are not homogeneous; each serves a different segment of the health insurance market, and even within the same company, customer profiles vary significantly (Cid Pedraza 2011).

An alternative mechanism should ensure the feasibility of compliance with the ruling and allow managing large-scale and diverse claims efficiently and deliver payments. For the Deepwater Horizon (catastrophic oil spill) and the Samarco (mining accident in Brazil) cases, a centralized system of payments and compensation funds was implemented to address claims from affected parties. Specialized mechanisms can support the effective enforcement of judicial decisions while taking into account the complexity and diversity of the affected populations.

The use of Special Masters or trust funds for the payment of compensation (Galisteo 2019) could be useful to avoid delays that compromises effective judicial protection to achieve judicial decisions efficiently. There is a risk, as Chile's Supreme Court is the highest judicial authority and operates without oversight within the domestic legal system. Nonetheless, foreign investors are unlikely to remain passive, particularly when the potential financial impact exceeds two billion dollars and entails a significant loss of market share in an established sector.

Crucially, the Court's ruling appears not to address—or at least not to explicitly acknowledge—the relevance of actuarial analysis, a fundamental element in the pricing and risk assessment of insurance products. In insurance markets, decisions must rely on rigorous and technically grounded actuarial studies. The absence of such analysis may become central if the dispute is brought before an international arbitral tribunal.

In such a scenario, it is highly probable that the insurers—as claimants—would engage prominent arbitrators and leading actuarial experts to demonstrate that the Chilean Supreme Court failed to consider critical technical evidence. This could substantiate claims of judicial bias or, at a minimum, a serious procedural omission. Such arguments present a credible risk and must be carefully weighed in assessing both the legal exposure and broader financial consequences this case may entail under the framework of international investment law.

The above does not constitute a value judgment, it consists of a prevention about a potential scenario that may eventually involve a payment of more than 2,000 million dollars, a cost that would ultimately have to be paid by the State of Chile, which ultimately is all Chilean taxpayers. For the same reason, in a scenario of economic problems and uncertainty for a developing country like Chile, assuming the payment of compensation for an arbitration claim is indeed harmful. Given the above, the possibility of incorporating an intermediate solution arises as a preventive or remedial measure, depending on the course of action followed by the possible claims that are formulated, which can be understood as a third way of economic regulation—characteristic of North American legislation—which is regulation by means of negotiation. It constitutes an instance in which regulation, although issued by a regulatory authority, involves active participation by the regulated entities. The objective is to reach consensus through transparent and participatory dialogue, resulting in a regulatory framework that is not sectarian, but rather acknowledges the complexity of each industry. This approach aims to enhance both the efficiency and enforceability of the regulation.

ISAPRES is strongly established institution, not only from a legal point of view but also economically

and socially incorporated into the daily life of the population of Chile, it is therefore difficult to challenge the regulatory design (Alvear Téllez, 2015). In this sense, and which in some way can illustrate us as an equivalent means of regulation, it is to refer to the services of general and economic interest that exist in Europe, which are of a commercial nature, they are commercial services, but which there is a common interest then.

The court's ruling would have been less complicated if an economic safeguard had been contemplated. The protection of the rights of consumers should have been incorporated within its assumptions, allowing its filing before higher courts such as the Courts of Appeals. This seems to be a much more effective mechanism to ensure collective interest, because it would have allowed the protection of the interests of the insured, as guarded costumers, but also of the insurers, as economic agents that provide a relevant economic service.

However, class actions offer a more practical solution to the challenge of addressing mass infractions, allowing for differentiated treatment by class or group and adjusting compensation according to the needs of the group and the capacity of the entity ordered to pay. In this way, when a company is sanctioned or needs to pay compensation, such measures must be proportional and based on objective and impartial standards. In cases of non-compliance, the issue may be brought before international investment arbitration tribunals, whose rulings are comparable to a constitutional analysis of non-discrimination. This function can also be carried out domestically by lower and higher courts of justice. Thus, in conclusion, through different procedural channels, adjudicative bodies ultimately engage in the same intellectual exercise: the application of legal reasoning by actors charged with the task of delivering judgments.

Conclusions

Based on the analysed jurisprudence, it has been possible to determine that the parameters used by arbitral tribunals, in certain cases, do not take into account human rights factors as a determining element regarding the grounds that states have had to adopt decisions that foreign investors consider to be discriminatory. However, it must be taken into consideration that in certain cases, the process by which a decision is adopted by a state has a rational justification that foreign investors must ultimately understand as a power that states must necessarily fulfil.

The difficult occurs between the criteria of fundamental rights that must be followed with regard to certain public policies and the commitments assumed at the international level by investment protection treaties. However, a determining factor is to establish how states, before escalating a decision against foreign investors, can demonstrate that they are inserted within international commitments in the field of human rights, that the best interest of people should be protected, and that these are not whimsical decisions.

On the other hand, it should also be taken into consideration that the negotiation carried out between states and foreign investors or with other states to establish investment protection treaties, should consider some form of prior submission to domestic jurisdiction. Although not a common procedure is not illegal but there are a significant number of countries that distrust the objectivity of national justice, especially when they have to decide on the matter of government public policies or defend companies or entities in the same country.

It should also be taken into consideration that the decisions that are submitted to foreign arbitral tribunals must be able to explain contextually the commitments that states assume at the international level, and that they are part of the obligations that states must comply with regard to multilateral public policies. For example, the provision of drinking water, conceived as a fundamental human right, has a clear basis, which is to be a social conditioning factor of the right to health, which ultimately improves the quality of life of citizens and ultimately results in a substantial decrease in absenteeism from work, which is a consideration that is taken into account by foreign investors. when capital enters a certain country.

Likewise, policies aimed at giving greater access to financial coverage of medical benefits have an impact beyond human rights. It must also be considered the social factor consisting in a workforce that has better quality of life, which accounts for a much more convenient environment to make investments in a given country, since would allow a workforce focused on developing professional tasks that does not need to mortgage all their assets in case of being affected by a medical problem.

Consequently, all indications suggest that states, in the context of negotiating or amending bilateral

or multilateral investment protection treaties, should consider including clauses that safeguard their ability to adopt measures aligned with international human rights obligations —such as disease prevention or the reduction or temporary suspension of certain patent protections— in situations of major public health emergencies, as exemplified by the COVID-19 pandemic.

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