



Rapport de stage effectué dans le cadre du programme d'échanges de magistrats de l'AIHJA :

**Participant :**

Nom : Eggermont  
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 Nationalité : Belge  
 Juridiction d'origine : Conseil d'Etat  
 Fonction : Auditeur au Conseil d'Etat  
 Ancienneté : Neuf ans

**Stage :**

Juridiction d'accueil : Corte Suprema  
 Pays : Chile  
 Ville : Santiago de Chile  
 Dates du stage : 12.08.2019-16.08.2019

**I. Introduction – Présentation de la juridiction et du déroulement du stage :**

*a. Programme de l'échange :*

<b>Monday August 12: Supreme Court and Constitutional Court</b>	
<ul style="list-style-type: none"> <li>- Visit to the third Chamber of the Supreme Court</li> <li>- Meeting with the President of the Supreme Court</li> <li>- Visit to the Palace of Justice and meeting with the <i>Dirección de Asuntos Internacionales y Derechos Humanos de la Corte Suprema</i></li> <li>- Meeting with the President of the Constitutional Court</li> </ul>	
<b>Tuesday August 13: Court of Appeals of Santiago, Environmental Court and Law Faculty <i>Universidad Alberto Hurtado</i></b>	
<ul style="list-style-type: none"> <li>- Meeting with the President of the Court of Appeals of Santiago</li> <li>- Visit to the first chamber of the Court of Appeals of Santiago</li> <li>- Meeting with the President of the Environmental Court</li> <li>- Meeting with the Director of the Department of Public Law and Professors of administrative law of the Law Faculty of the <i>Universidad Alberto Hurtado</i></li> <li>- Lunch with a Justice of the Supreme Court</li> </ul>	
<b>Wednesday August 14: Council of State Defence, <i>Controlaría General de la República</i>, Public Procurement Court and Law Faculty <i>Pontificia Universidad Católica de Chile</i></b>	
<ul style="list-style-type: none"> <li>- Meeting with Counsellors of the Council of State Defence</li> <li>- Meeting with the Directorate of Studies of the <i>Controlaría General de la República</i></li> <li>- Meeting with the magistrates of the Public Procurement Court</li> <li>- Meeting with the Director of the Department of Public Law and Professors of administrative law of the Law Faculty of the <i>Pontificia Universidad Católica de Chile</i></li> </ul>	
<b>Friday August 16: Tax and Customs Court and Presidential Palace</b>	
<ul style="list-style-type: none"> <li>- Meeting with the President of the Tax and Customs Court</li> <li>- Guided visit to the Presidential Palace</li> </ul>	

b. *Présentation de la juridiction d'accueil :*

The Supreme Court of Chile (*Corte Suprema de Chile*), consisting of twenty-one ministers (of which 16 are career magistrates and five are external lawyers) appointed by the President of the Republic, holds the directive, correctional and economic supervision of all courts of the Chilean nation, although the Constitutional Court (*Tribunal Constitucional*), the Electoral Court (*Tribunal Calificador de Elecciones*) and regional electoral courts are excepted from this rule.

The third Chamber of the Supreme Court (*Sala de Asuntos Constitucionales y de lo Contencioso Administrativo*) has competence over matters of administrative law and rules on cassation appeal (among other things *casación en fondo*, see *infra*).

**II. Différences et similitudes entre les systèmes juridiques du pays d'origine et du pays d'accueil :**

a. *En ce qui concerne l'organisation du système juridique :*

Chile has a “quasi-monistic” judicial organization. “Monistic” because judicial courts, and in the end the Supreme Court, have competence over civil, penal, constitutional, administrative and labour matters. However, this “monistic” system is breached,<sup>1</sup> with respect to administrative law cases, by the presence of several specific administrative courts such as the Environmental Court (*Tribunal Ambiental*) and the Public Procurement Tribunal (*Tribunal de la Contratación Pública*). Because of the fact that cassation appeal is possible at the Supreme Court against the decisions of these administrative courts, with in certain cases first an appeal at the Court of Appellation, the jurisprudence in matters of administrative law can once again be aligned. The matter of the unconstitutionality of a law (provision) may be raised by either party or by the judge hearing the case and the Constitutional Court must resolve, by the majority of its active members, the inapplicability of a legal rule, in the case that the application of the rule in any procedure to be followed before a regular or special court is contrary to the Constitution. The ruling of the Constitutional Court is *inter partes*.<sup>2</sup>

While in Belgium, every court – judicial and administrative – may only<sup>3</sup> apply, according to article 159 of the Constitution, general, provincial or local decisions and regulations provided that they are in accordance with the law, only the Administrative Litigation Section of the Council of State (*Conseil d'Etat*) may annul<sup>4</sup> an administrative regulation (of general application) or decision (limited to an individual situation). Established lower administrative courts may also, if given that competence, annul a decision. If no exception is made by law, the

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<sup>1</sup> This is why I use the word “quasi-monistic”.

<sup>2</sup> Art. 93 of the Chilean Constitution foresees a declaration of unconstitutionality once a law (provision) has been declared inapplicable due to unconstitutionality, but in such a case a - difficult to achieve - majority of four-fifths of the active members of the Constitutional Court has to be obtained.

<sup>3</sup> There are, nonetheless, some exceptions, developed in the jurisprudence of the Supreme Court and the Council of State. Such an interpretation of the Constitution would almost be impossible in Chile, according to the lawyers I talked to during my stay.

<sup>4</sup> In certain, very limited cases the Council of State may also take a decision on the outcome of the administrative procedure (for example, decide on the amount of administrative penalty instead of sending the matter back to the administration for a decision on the amount).

Administrative Litigation Section is competent for the annulment without possibility for appeal.<sup>5</sup> On the other hand, if the competence to rule on the ground of the case has been given to a lower administrative court such as the federal Court of Alien Law Litigation (*Conseil du Contentieux des Etrangers*) or the Flemish regional<sup>6</sup> Enforcement Court (to a certain extent to be compared with the Chilean Environmental Court), its decision may be appealed at the Administrative Litigation Section of the (federal) Council of State, although the appeal is limited to cassation (violation of the law or imperative procedural rules). The matter of the unconstitutionality of a law (provision) may be raised by either party or by the judge hearing the case and the Constitutional Court must resolve the inapplicability of a legal rule. The ruling of the Constitutional Court is *inter partes*. However, every citizen who can prove an interest may also ask the annulment of a legal provision within six months of its publication; if annulled – which does not often happen –, the decision of the Constitution Court applies *erga omnes*.

b. *En ce qui concerne la compétence de la juridiction administrative :*

Both the Chilean (administrative) courts as the Belgian Council of State may revise the legality of administrative decision when asked. In Chile, in determined matters specialised administrative courts are competent (for example, in environmental matters and public procurement<sup>7</sup>); in other cases, normal courts are competent. At the top of the pyramidal structure stands the Supreme Court, also in matters of administrative law. Due to the fact that Belgium is, according to article 1 of its Constitution, a federal country,<sup>8</sup> in certain regionalised matters first a regional administrative court has to decide; that decision can be appealed (cassation) at the federal Council of State. The same goes for the judgments of the federal Court of Alien Law Litigation, which may be appealed (cassation) at the Council of State.

While the Belgian Council of State only has the limited competence to annul a administrative decision which is considered contrary to the law,<sup>9</sup> after which the administration is entitled to take a new decision, respecting the authority of *res judicata* of the court's decision, the Chilean courts have a more amplified authority which allows the courts to perform final dispute settlement notwithstanding the possibility to appeal. Even when the Chilean Supreme Court has to rule on a *casación en fondo*, it takes a final decision without returning the matter to the lower court or to the administration (therefore, *en fondo*). In Belgium, when the Council of State has to rule on a cassation appeal against the decision of a lower administrative court, the Council of State may only annul the appealed the decision when contrary to the law or contrary to fundamental procedural rules.

The *Controlaría General de la República* – in Belgium to a certain extent to be compared with the *Cour des Comptes* (Court of Auditors) and the Legislation Section of the Council of State – has been granted by article 99 of the Chilean Constitution, a function of control of legality (*el*

<sup>5</sup> However, the Supreme Court (*Cour de Cassation*) makes decisions in conflicts of powers in the manner provided for by the law, which means that if the Administrative Litigation Section ruled on a case that belongs to the exclusive competence of the judicial courts, the Supreme Court may be requested by a party involved in the case before the Administrative Litigation Section, to annul (*cassation*) the decision of that Section.

<sup>6</sup> The Kingdom of Belgium is a federal state, according to article 1 of the Constitution,

<sup>7</sup> The Public Procurement Tribunal may suspend the attribution in the pre-contractual stage, declare the attribution void or recognize the right of the applicant to a compensation (in several cases it is not considered suitable for the attribution to be suspended to avoid major problems, therefore a compensation suffices). It is not necessary to have participated in the tendering in order to have the required interest to start a case against a specific attribution. The Public Procurement Court also facilitates conciliation

<sup>8</sup> This is however far from accurate: Belgium has a composite institutional structure and therefore elements from a unitary state, a confederation, a federation, a decentralised state and a deconcentrated state.

<sup>9</sup> Once again, one has to keep in mind that this is not always the case: for example, in specified cases the Court of Alien Law Litigation may grant the requested protection to a refugee.

*trámite de la toma de razón*). The *Controlar General* may object to the illegality of a decree or resolution.<sup>10</sup> Nonetheless, he will have to process the decree of resolution when, despite his objection,<sup>11</sup> the President of the Republic insists with the signature of all of his Ministers, in which case he shall send a copy of the respective decrees to the Chamber of Deputies. It also corresponds to the *Controlar General* to object to the decrees with force of law when they exceed or contravene the delegatory law or are contrary to the Constitution. If the objection has place with respect to a decree with force of law, a decree that promulgates a law or a constitutional reform for departing from the approved text, or a decree or resolution for being contrary to the Constitution, the President of the Republic will not have the power to insist, and in the case that he is not satisfied with the objection of the *Controlar General*, he will have to forward the records to the Constitutional Court within ten days, so that this Court resolves the dispute.

The *Controlaría General de la República* furthermore has been granted the authority (*Ley N° 10.336, de Organización y Atribuciones de la Contraloría General de la República*) to interpret legal norms in administrative matters (*función de dictaminar*). For example, if an administrative decision states that it is forbidden to sell alcohol within 7 kilometres from a school, the *Controlar General* may rule by *dictamen* that this means 7 kilometres as the crow flies. This interpretation (*dictamen*), which may be requested by every citizen, is binding for the administration, although it may be appealed in the courts of law.<sup>12</sup>

c. *En ce qui concerne le fonctionnement de la juridiction administrative :*

In Chile, cases presented before the Court of Appeals or the Supreme Court are prepared by the *relator* who is a magistrate subordinate to the court for which he prepares the case. This preparation is limited to giving an overview of the facts of the case, the decisions of the lower courts which have decided upon the case and of the law applicable to the case. After hearing the *relator* and the applicant and defendant, the Supreme Court immediately deliberates on the case, in presence of the *relator*. With a majority vote the case is decided (the individual opinions of the justices are notified in the judgement)<sup>13</sup> after which the *relator* drafts the decision which then has to be approved by the court.

In Belgium, the Council of State is composed of two types of magistrates: auditors (*auditeurs*) and state counsellors (*conseillers d'états*). In every annulment procedure<sup>14</sup> the auditor examines the case, "hears" the parties (therefore, "auditor") and drafts a report presenting his independent conclusion on the case. The parties may then present their comments or decide not to oppose the conclusion of the auditor.<sup>15</sup> After having presented their comments, the competent chamber of the Council of State, in general composed of three state counsellors, has to take a final decision (judgment). Before doing so, the chamber has to ask the opinion of the auditor on what he

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<sup>10</sup> The *Controlaría General de la República* revises all public procurement tenders, for example to avoid that in a tender the technical specifications favour only one company.

<sup>11</sup> In general, the *Controlar General* will first try to establish a dialogue to see if an understanding with the administration cannot be reached.

<sup>12</sup> The numbers that were given to me indicate that in 0.3% of the cases the *dictamen* is contested in court. In 98% of the cases, the courts agreed with the interpretation of the *Controlar General*.

<sup>13</sup> The possibility to determine the different points of view of the justices is considered important.

<sup>14</sup> In other procedures, when the suspension of an administrative decision is asked, the rules are somewhat different because the procedure has to proceed faster, but in any case both the auditor and the state counselor have to examine the case.

<sup>15</sup> If the opinion of the auditor is not opposed, the competent chamber of the Council of State may reject the case (if the auditor rejected the petition) or annul the administrative decision (if the auditor concluded that the decision was contrary to the law) in a simplified procedure.

considers that should be the outcome of the case.<sup>16</sup> However, the competent chamber may also oppose the conclusion of the auditor and decide otherwise.

The opinion of the auditor is known to the parties. However, the chamber of the Council takes a decision by consensus or majority, without making known the individual points of view of the state counsellors.

The procedure before the Chilean Supreme Court is oral, while the procedure before the Belgian Council of State is mainly written. Both courts use the electronic procedure: in Chile this is compulsory, while in Belgium this is optional (filling a petition is paper and sending it may mail is therefore still allowed). The Chilean Supreme Court as well as the Constitutional Court is partially composed of barristers-at-law (*avogados integrates*) which is not the case in the Belgian Council of State.<sup>17</sup>

*d. En ce qui concerne les procédures et règles de droit applicables :*

The system of *recurso de amparo* which provides protection of constitutional individual rights and is immediately dealt with at the level of an appeals court, may be intermingled with a matter of administrative law. Therefore matters of administrative law may be dealt with by a penal chamber. This system is not known in Belgian law.

*e. Autres :*

The Chilean State is defended by a Council for State Defence (*Consejo de Defensa del Estado*) composed of twelve counsellors appointed for life. In Belgium, state defence lawyers are chosen by the administration.

**III. Aspects sur lesquels le système juridique du pays d'accueil peut constituer une source d'inspiration pour le pays d'origine (« bonnes pratiques ») :**

Primarily, one could notice that the Chilean Supreme Court and lower administrative tribunals have a staff of qualified personnel preparing the cases and providing logistic support, which is currently lacking – due to budgetary reasons – at the Belgian Council of State. While the idea of making a preliminary examination to eliminate certain procedural issues before sending the case to the chamber for an examination on the ground, is to be appraised, this is at the moment – due to the aforementioned reason – not feasible at the Council of State. It would nonetheless be beneficial in order to resolve cases even faster and more efficient, that the Council of State would also be supported by more lawyers and especially paralegals. Furthermore, the preliminary control with respect to admissibility to name one, is interesting and could smoothen the path towards faster and more efficient judicial review. Quite revealing is that the procedure before the Public Procurement Court allows that the finding of illegality is not followed by an annulment but by a established ground for a petition for indemnisation. This method can form an element for political discussion on how to improve public and private investment security in Belgium.

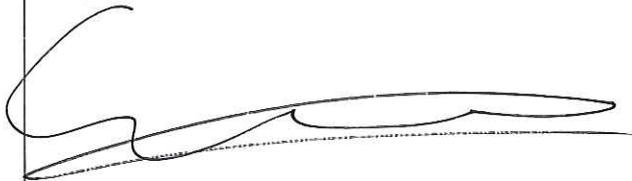
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<sup>16</sup> This means that the auditor has to examine the comments made by the parties with respect to his report and see if there are reasons to change his opinion. In each judgment of the Council of State it has to be stated if the opinion of the auditor was followed or not.

<sup>17</sup> Also interesting is that a chamber of the Chilean Environmental Court is composed of three members of which two are lawyers and one is a specialist in the field (e.g. an engineer).

**Signature :**

*Magistrat stagiaire :*



*Président de la juridiction d'origine / Juge en  
Chef :*



*R. Stevens*