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## CHAPTER 10

### INVESTMENT

#### Article 126: Definitions

For purposes of this Chapter:

**investment** means every kind of asset invested by investors of one Party in accordance with the laws and regulations of the other Party in the territory of the latter, and in particular, though not exclusively, includes:

- (a) movable, immovable property and other property rights such as mortgages and pledges, and similar rights;
- (b) shares, debentures, stock and any other kind of participation in companies;
- (c) claims to money or to any other performance having an economic value associated with an investment<sup>11</sup>;
- (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, know-how and technological process, as well as good-will;
- (e) concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

**investors** means:

- (a) for Peru:
  - (i) natural persons who, according to the law of the Republic of Peru, have its nationality; or
  - (ii) all juridical persons established in accordance with the laws of the Republic of Peru, including civil and commercial companies and other associations with or without a legally acknowledged existence that perform an economic activity included within the sphere of this Chapter and which are directly or indirectly controlled by nationals of the Republic of Peru,

that have made an investment in the territory of the other Party; and

- (b) for China:

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<sup>11</sup> For greater certainty, investment does not include loans issued by one Party to the other Party.

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- (i) natural persons who have nationality of the People’s Republic of China in accordance with its law;
  - (ii) economic entities established in accordance with the laws of the People’s Republic of China and domiciled in the territory of the People’s Republic of China; or
  - (iii) legal entities not established under the law of the People’s Republic of China but effectively controlled, by natural persons, as defined in subparagraph (a)(i) or by economic entities as defined in subparagraph (a)(ii),

that have made an investment in the territory of the other Party; and

**returns** means the amounts yielded by investments, such as profits, dividends, interests, capital gains, royalties, fees or other legitimate income.

#### **Article 127: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of the other Party; and
- (b) investments of investors of the other Party.

2. This Chapter shall not apply to measures adopted or maintained by a Party affecting trade in services.

3. Notwithstanding paragraph 2, for the purpose of protection of investment with respect to the commercial presence mode of service supply, Article 132 (Fair and Equitable Treatment and Full Protection and Security), Article 133 (Expropriation), 134 (Compensation for Losses), Article 135 (Transfers), Article 136 (Subrogation) and Article 137 (Denial of Benefits) shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party. Article 139 (Investor-State Dispute Settlement) shall apply to Article 132 (Fair and Equitable Treatment and Full Protection and Security), Article 133 (Expropriation), Article 134 (Compensation for Losses), Article 135 (Transfers), and Article 136 (Subrogation) with respect to the supply of a service through commercial presence.

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4. For greater certainty, the provisions of this Chapter do not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

5. This Chapter shall not apply to laws, regulations, policies or procedures of general application governing the procurement by government agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale.

6. Notwithstanding paragraph 5, Article 132 (Fair and Equitable Treatment and Full Protection and Security), Article 133 (Expropriation), Article 134 (Compensation for Losses), Article 135 (Transfers), Article 136 (Subrogation), Article 137 (Denial of Benefits) and Article 139 (Investor-State Dispute Settlement) shall apply to the laws, regulations, policies or procedures mentioned hereinbefore.

7. This Chapter shall apply to all investments made by investors of a Party in the territory of the other Party, whether made before or after the entry into force of this Agreement, but Article 139 (Investor-State Dispute Settlement) shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before the entry into force of this Agreement.

#### **Article 128: Promotion and Protection of Investment**

1. Each Party shall encourage investors of the other Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

2. Subject to its laws and regulations, each Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Party engaging in activities associated with investments made in the territory of that Party.

#### **Article 129: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.

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3. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to socially or economically disadvantaged minorities and ethnic groups.<sup>12</sup>

### **Article 130: Non-Conforming Measures**

1. Article 129 (National Treatment) does not apply to:
  - (a) any existing non-conforming measures maintained within its territory;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
2. The Parties will endeavour to progressively remove the non-conforming measures.

### **Article 131: Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any third State with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any third State with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments<sup>13</sup>.
3. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment:
  - (a) to socially or economically disadvantaged minorities and ethnic groups<sup>14</sup>; or

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<sup>12</sup> For purposes of this Chapter, minorities include peasant communities; ethnic groups means indigenous and native communities.

<sup>13</sup> For greater certainty, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 of Article 131 (Most-Favoured-Nation Treatment) does not encompass dispute settlement mechanisms, such as those in Article 138 (Settlement of Disputes Between Parties) and Article 139 (Investor-State Dispute Settlement), that are provided for in international investment treaties or trade agreements.

<sup>14</sup> For purposes of this Chapter, minorities include peasant communities; ethnic groups means indigenous and native communities.

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- (b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.

4. The treatment and protection as mentioned in paragraphs 1 to 2 of this Article shall not include any preferential treatment accorded by the other Party to investments of investors of any third State based on free trade agreement, free trade zone, custom union, economic union, or agreement relating to avoidance of double taxation or for facilitating frontier trade.

### **Article 132: Fair and Equitable Treatment and Full Protection and Security**

1. Each Party shall accord fair and equitable treatment and full protection and security in accordance with customary international law in its territory to investment of investors of the other Party.

2. For greater certainty,

- (a) the concepts of “fair and equitable treatment” and “full protection and security” do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law;
- (b) a determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the minimum standard of treatment of aliens has been breached;
- (c) “fair and equitable treatment” includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the general accepted principles of customary international law; and
- (d) the “full protection and security” standard does not imply, in any case, a better treatment to that accorded to nationals of the Party where the investment has been made.

### **Article 133: Expropriation**

1. Neither Party shall expropriate or nationalize, either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as “expropriation”) against investments of investors of the other Party in its territory, unless the following conditions are met:

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- (a) for the public interest<sup>15</sup>;
  - (b) under domestic legal procedure;
  - (c) without discrimination; and
  - (d) against compensation.

2. The compensation mentioned in subparagraph 1(d) of this Article shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation took place (“the date of expropriation”), convertible and freely transferable. The compensation shall be paid without unreasonable delay.

#### **Article 134: Compensation for Losses**

Investors of one Party who suffer losses in respect of their investments in the territory of the other Party owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Party, as regards restitution, indemnification, compensation and other settlements, treatment no less favourable than that accorded to the investors of its own or any third State, whichever is more favourable to the investor concerned.

#### **Article 135: Transfers**

1. Each Party shall guarantee investors of the other Party the transfer of their investments and returns held in the territory of the former Party, including:

- (a) profits, dividends, interests and other legitimate income;
- (b) amounts from total or partial liquidation of investments;
- (c) payments made pursuant to a loan agreement in connection with investment;
- (d) royalties referred to in the “returns” definition of Article 126 (Definitions);
- (e) payments of technical assistance or technical service fee, management fee;
- (f) payments in connection with projects on contract associated with investment;
- (g) earnings of nationals of a Party who work in connection with an investment in the territory of the other Party; and

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<sup>15</sup> Domestic law may express this concept using different terms, such as “public necessity” and “public purpose”.

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(h) the free transfer of compensation and other payments under Article 133 (Expropriation) and Article 134 (Compensation for Losses).

2. The transfers mentioned above shall be made in a freely usable currency at the prevailing market rate of exchange of the Party accepting the investments on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offenses; or
- (d) ensuring compliance with orders or judgments in judicial or administrative proceedings.

#### **Article 136: Subrogation**

If one Party or its designated agency makes a payment to its investors under a guarantee or a contract of insurance against non-commercial risks it has accorded in respect of an investment made in the territory of the other Party, the latter Party shall recognize:

- (a) the assignment, whether under the law or pursuant to a legal transaction in the former Party, of any rights or claims by the investors to the former Party or to its designated agency;
- (b) that the former Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and assume the obligations related to the investment to the same extent as the investor.

#### **Article 137: Denial of Benefits**

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to:

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- (a) investors of the other Party where the investment is being made by a enterprise that is owned or controlled by persons of a third State and the enterprise has no substantive business activities in the territory of the other Party; or
  - (b) investors of the other Party where the investment is being made by a enterprise that is owned or controlled by persons of the denying Party.

### **Article 138: Settlement of Disputes between the Parties**

1. Any dispute between the Parties concerning the interpretation or application of this Chapter shall, as far as possible, be settled with consultation through diplomatic channel.
2. If a dispute cannot thus be settled within 6 months, it shall, upon the request of either Party, be submitted to an ad hoc arbitral tribunal.
3. Such tribunal comprises of 3 arbitrators. Within 2 months of the receipt of the written notice requesting arbitration, each Party shall appoint one arbitrator. Those 2 arbitrators shall, within further 2 months, together select a national of a third State having diplomatic relations with both Parties who, upon approval by the Parties, shall be appointed as Chairman of the arbitral tribunal.
4. If the arbitral tribunal has not been constituted within 4 months from the receipt of the written notice requesting arbitration, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments.
5. The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Parties.
6. The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Parties. The arbitral tribunal shall, upon the request of either Party, explain the reasons of its award.
7. Each Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Parties.



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## Article 139: Investor-State Dispute Settlement

1. Any dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled through negotiations within 6 months from the date on which the disputing investor requested for the consultation or negotiation in writing, and if the disputing investor has not submitted the dispute for resolution to the competent court<sup>16</sup> or any other binding dispute settlement mechanism<sup>17</sup> of the Party receiving the investment, it may be submitted to one of the following international conciliation or arbitration fora by the choice of the investor<sup>18</sup>:

- (a) conciliation or arbitration in accordance with the International Center for Settlement of Investment Disputes (ICSID), under the *Convention on the Settlement of Disputes between States and Nationals of Other States*, done at Washington on March 18<sup>th</sup>, 1965;
- (b) conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes so long as the ICSID Convention is not in force between the Parties;
- (c) arbitration under the arbitration Rules of the United Nations Commission on International Trade Law; and
- (d) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules.

For more clarity, the election of one dispute settlement fora shall be definitive and exclusive.

3. An arbitral tribunal established under paragraph 2 shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

4. The disputing investor who intends to submit the dispute to conciliation or arbitration pursuant to paragraph 2 shall give to the disputing Party written notice of its intent to do so at least 90 days before the claim is submitted. The notice of intent shall specify:

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<sup>16</sup> For Peru, the courts of justice or administrative tribunals. For China, the People's Courts.

<sup>17</sup> Any other binding dispute settlement mechanism refers to those binding local dispute settlement mechanisms that are voluntarily chosen by the Parties to solve the dispute.

<sup>18</sup> China requires the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of China before the submission to the international fora.

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- (a) the name and address of the disputing investor;
  - (b) the specific measures of the disputing Party at issue and a brief summary of the factual and legal basis of the investment dispute sufficient to present the problem clearly, including the obligations under this Chapter alleged to have been breached;
  - (c) the waiver of the disputing investor from the right to initiate any proceedings before any of the other dispute settlement for referred to in paragraph 2 in relation to the matter under dispute;
  - (d) conciliation or arbitration set forth in paragraph 2 which the disputing investor will choose; and
  - (e) the relief sought and the approximate amount of expropriation claimed.

5. Notwithstanding paragraph 4, no claim may be submitted to conciliation or arbitration set forth in paragraph 2, if more than 3 years have elapsed since the date on which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the disputing investor or its investment referred to in paragraph 1.

6. The arbitration award shall be final and binding upon both parties to the dispute. Both Parties shall commit themselves to the enforcement of the award.

7. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with the applicable arbitration rules.

8. Any disputing investor shall serve notices and other documents on disputes under this Article:

- (a) for Peru, to the:  
Division of International Economy, Competition and Private Investment  
Affairs  
Ministry of Economy and Finance

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Jirón Lampa 277, floor 5th Lima, Peru.

- (b) for China, to the:  
Ministry of Commerce  
2, East Chang An Avenue  
100731, Beijing, People's Republic of China.

#### **Article 140: Meetings**

1. The representatives of the Parties shall hold meetings from time to time for the purpose of:
  - (a) reviewing the implementation of this Chapter;
  - (b) exchanging legal information and investment opportunities;
  - (c) forwarding proposals on promotion of investment; and
  - (d) studying other issues in connection with investments.
2. Where either Party requests consultation on any matters referred to in paragraph 1 of this Article, the other Party shall give prompt response and the consultation shall be held alternately in Beijing and Lima.

#### **Article 141: Essential Security**

Nothing in this Chapter shall be construed to:

- (a) require a Party to furnish or allow access to any information, the disclosure of which determines to be contrary to its essential security interests; or
- (b) preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under United Nation Charter for the maintenance or restoration of international peace or security, or the protection of its own essential security interests<sup>19</sup>.

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<sup>19</sup> For greater certainty, if a Party invokes Article 141 (Essential Security) in an arbitral proceeding initiated under this Chapter, the corresponding tribunal hearing the matter shall find whether the exception applies.

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## Article 142: Taxation Measures

1. Except as provided in this Article nothing in this Agreement shall apply to taxation measures.

2. Nothing in this Agreement shall affect the rights and obligations of the Parties under any tax convention. In the event of any inconsistency between the provision of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency.

3. Without prejudice to the application of paragraph 2, the disciplines referred to hereinafter shall apply to taxation measures:

(a) Article 7 (National Treatment) of Chapter 2 (National Treatment and Market Access for Goods) and such other provisions of this Agreement as are necessary to give effect to that Article to the same extent as does Article III of the GATT 1994; and

(b) Article 106 (National Treatment) of Chapter 8 (Trade in Services), subject to the exceptions provided for in Article XIV letters (d) and (e) of the GATS, which are hereby incorporated.

4. The provisions of Article 133 (Expropriation) and Annex 9 (Expropriation) of this Chapter shall apply to taxation measures alleged to be expropriatory.

5. The provisions of Article 139 (Investor-State Dispute Settlement) apply with respect to paragraph 4 of this Article.

6. If an investor invokes Article 133 (Expropriation) and Annex 9 (Expropriation) of this Chapter as the basis of a claim to arbitration according to Article 139 (Investor-State Dispute Settlement), the following procedure shall apply:

The investor must first refer to the competent tax authorities described in subparagraph 7(c), at the time that it gives written notice of intent under Article 139 (Investor-State Dispute Settlement), the issue of whether the tax measure concerned involves an expropriation. In case of such referral, the competent tax authorities shall consult. Only if, within 6 months of the referral, they do not reach an agreement that the measure does not involve an expropriation, or in case the competent tax authorities of the Parties fail to consult with each other, the investor may submit its claim to arbitration under Article 139 (Investor-State Dispute Settlement).

7. For purposes of this Article:

(a) taxation measures do not include:

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- (i) a customs duty; or
  - (ii) the measures listed in exceptions (b) and (c) of the definition of customs duty;
- (b) tax convention means a convention, or other international arrangement on taxation, to avoid double taxation; and
- (c) competent tax authorities means:
- (i) for Peru, the Ministry of Economy and Finance, or its successor.; and
  - (ii) for China, the State Administration of Taxation.

**Article 143: Other Obligations**

If the legislation of either Party or international obligations existing at present or established hereafter between the Parties result in a position entitling investments by investors of the other Party to a treatment more favourable than is provided for by this Agreement, such position shall not be affected by this Agreement.