

APPENDIX 6

NEW CHAPTER 10 (INVESTMENT)

CHAPTER 10

INVESTMENT

Section A

Article 10.1: Definitions

Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

Claimant means an investor of a Party that is a party to an investment dispute with the other Party;

Covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter;

Disputing parties means the claimant and the respondent;

Disputing party means either the claimant or the respondent;

Enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise;

Enterprise of a Party means an enterprise constituted or organised under the law of a Party, or a branch of an enterprise of a Party located in the territory of a Party and carrying out business activities there;¹⁴

Freely usable currency means “freely usable currency” as determined by the International Monetary Fund under its Articles of Agreement;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

ICSID Convention means the *Convention on the Settlement of Investment Disputes*

¹⁴ For greater certainty, the inclusion of a “branch” in the definitions of “enterprise” and “enterprise of a Party” is without prejudice to a Party’s ability to treat a branch under its laws as an entity that has no independent legal existence and is not separately organised.

between States and Nationals of Other States, done at Washington on 18 March, 1965;

Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) movable, immovable property and other property rights such as mortgages and pledges, and similar rights;
- (c) shares, bonds¹⁵, debentures, stock and any other kind of participation in companies;
- (d) claims to money or to any other performance having an economic value associated with an investment;
- (e) intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, know-how and technological process, as well as good-will; or
- (f) concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

Investor means:

- (a) for China:
 - (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
- (b) for Peru:

¹⁵ Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

- (i) natural persons who, according to the law of the Republic of Peru, have its nationality;
- (ii) juridical persons established in accordance with the laws of the Republic of Peru, including civil and commercial companies; or
- (iii) associations with legal personality that perform an economic activity included within the sphere of this Chapter and which are directly or indirectly controlled by natural persons, as defined in subparagraph (b)(i), or by juridical persons as defined in subparagraph (b)(ii) that have made an investment in the territory of the other Party;

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

Investor of a non-Party means, with respect to a Party, an investor that attempts to make¹⁶, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

Investor of a Party means a Party, a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party;

Measure includes any law, regulation, procedure, requirement or practice;

New York Convention means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on June 10, 1958;

Non-disputing Party means the Party that is not a party to an investment dispute;

Person means a natural person or an enterprise;

Protected information means confidential business information or information that is privileged or otherwise protected from disclosure under the laws of a Party, including classified government information;

Respondent means the Party that is a party to an investment dispute;

Secretary-General means the Secretary-General of ICSID;

TRIPS Agreement means the Agreement on Trade-Related Aspects of Intellectual

¹⁶ For greater certainty, the Parties understand that, for the purpose of definitions “investor of a non-Party” and “investor of a Party”, an investor “attempts to make” an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for a license.

Property Rights, set out in the WTO Agreement¹⁷; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

Article 10.2: 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, Articles 10.7, 10.8, 10.9, 10.10, 10.11 and 10.12 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. Section B shall apply to Articles 10.7, 10.8, 10.9, 10.10, and 10.11 with respect to the supply of a service through commercial presence.
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, Articles 10.7, 10.8, 10.9, 10.10, 10.11, 10.12 and Section B 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 Section B 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.

¹⁷ For greater certainty, TRIPS Agreement includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

Article 10.3: 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 10.4: National Treatment¹⁸

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.
3. Notwithstanding paragraph 1 and paragraph 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.

Article 10.5: Non-Conforming Measures

1. Article 10.4 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.

¹⁸For greater certainty, whether treatment is accorded in “like circumstances” under Article 10.4 and Article 10.6 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 10.6: 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 investments¹⁹.
3. Notwithstanding paragraph 1 and paragraph 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 groups²⁰; or
 - (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 paragraph 1 and paragraph 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.
5. For greater certainty, the substantive obligations in other international investment treaties and other free trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted by a Party.

Article 10.7: 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.

¹⁹For 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 10.6 does not encompass dispute settlement mechanisms, such as those in Article 10.14 and Section B, that are provided for in international investment treaties or trade agreements.

²⁰For purposes of this Chapter, minorities include peasant communities; ethnic groups means indigenous and native communities.

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) “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;
 - (c) 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;
 - (d) the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result;
 - (e) the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result;
 - (f) the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article; and
 - (g) a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 10.8: 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:

- (a) for the public interest²¹;

²¹For China, domestic law may express this concept using different terms, such as “public necessity” and “public purpose”; for Peru, this concept may be expressed in different terms according to its Constitution.

- (b) under domestic legal procedure;
- (c) without discrimination; and
- (d) against compensation.

2. The compensation mentioned in paragraph 1(d) 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.

3. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.

4. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant,

- (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or
- (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant,

standing alone, does not constitute an expropriation.

Article 10.9: 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 10.10: 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 10.1;
- (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
- (h) the free transfer of compensation and other payments under Articles 10.8 and 10.9.

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 paragraph 1 and paragraph 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 10.11: Subrogation

1. 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.

2. The investor shall be precluded from pursuing the abovementioned rights to the extent of the subrogation.

Article 10.12: Denial of Benefits

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

- (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 10.13: Measures against Corruption

1. In accordance with its legal system and internationally agreed standards and commitments that it has adhered to, each Party shall ensure that measures are taken to prevent and fight corruption and other crimes with respect to matters falling within the scope of this Chapter.

2. Each Party recognizes the importance of principles such as accountability, transparency and integrity with regard to the development of its anti-corruption policies, and of taking measures affecting investment in a transparent manner and avoiding conflicts of interest and corrupt practices.

Article 10.14: 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 six months, it shall, upon the request of either Party, be submitted to an ad hoc arbitrary tribunal.

3. Such tribunal comprises of three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Party shall appoint one arbitrator. Those two arbitrators shall, within further two 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 four 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 Chapter and the principles of international law recognized by the Parties.

6. The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon the 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.

Article 10.15: Future Work Program

1. Unless the Parties otherwise agree, the Parties shall conduct negotiations on National Treatment for pre-establishment and lists of non-conforming measures, no later than two years after the entry into force of this Optimization Protocol.

2. Unless the Parties otherwise agree, the Parties shall conduct negotiations on Transparency of investor-State Arbitral Proceedings, no later than two years after the entry into force of this Optimization Protocol.

3. No later than two years after the entry into force of this Optimization Protocol, the Parties shall initiate consultations regarding the scope of application of this Chapter in relation to public debt. The outcome of the consultations is subject to agreement by the Parties.

Section B

Article 10.16: General Rule

The Parties reaffirm that the recourse to the proceedings under Section B shall be

on the basis of international law principles, including good faith and due process of law.

Article 10.17: Consultations

1. In the event of an investment dispute, the disputing Parties should initially seek to resolve the dispute amicably through consultations. If the claimant intends to submit the dispute to arbitration, it shall deliver a written request for consultations to the respondent²² at least 180 days prior to submission of the dispute to arbitration. The request shall:

- (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;
- (b) list evidences that the claimant is an investor under this Chapter;
- (c) for each claim, identify the provision of Section A of this Chapter alleged to have been breached and any other relevant provisions of this Chapter;
- (d) for each claim, identify the measures or events giving rise to the claim;
- (e) for each claim, provide a brief summary of the legal and factual basis; and
- (f) specify the relief sought and the approximate amount of damages claimed.

2. After a request for consultations is made pursuant to this Chapter, the claimant and the respondent shall enter into consultations²³ with a view to reaching a mutually satisfactory solution.

3. For greater certainty, the initiation of consultations shall not be construed as recognition of the jurisdiction of the tribunal under this Section.

Article 10.18: Submission of a Claim to Arbitration

1. If an investment dispute has not been settled within 180 days of the receipt by the respondent of a written request for consultations pursuant to Article 10.17:

²² For greater certainty, the request for consultations shall be sent to the central government body as listed out in Annex 10-A.

²³ Unless otherwise agreed by the Parties to the dispute, the place for consultation should be the capital of the respondent.

- (a) the claimant, on its own behalf, may submit to arbitration under this Chapter a claim:
 - (i) that the respondent has breached:
 - (A) an obligation under Articles 10.4 and 10.6;
 - (B) Articles 10.7, 10.8, 10.9 and 10.10; and
 - (ii) that the claimant has incurred losses or damages by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Chapter a claim:
 - (i) that the respondent has breached:
 - (A) an obligation under Articles 10.4 and 10.6;
 - (B) Articles 10.7, 10.8, 10.9 and 10.10; and
 - (ii) that the enterprise has incurred losses or damages by reason of, or arising out of, that breach²⁴.

2. At least 60 days before submitting any claim to arbitration under this Section, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (Notice of Intent). The Notice of Intent shall specify:

- (a) the name and address of the claimant and, if the claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address and place of incorporation of the enterprise;
- (b) list evidences that the claimant is an investor under this Chapter;
- (c) for each claim, the provisions of Section A of this Chapter alleged to have been breached and any other relevant provisions of this Chapter;
- (d) for each claim, identify the measures or events giving rise to the claim;
- (e) the factual and legal basis for each claim; and
- (f) the relief sought and the approximate amount of damages claimed.

²⁴For greater certainty, a minority non-controlling shareholder of an enterprise may not submit a claim on behalf of that enterprise.

For greater certainty, where a Notice of Intention is submitted by more than one claimant or on behalf of more than one enterprise, the information in paragraph 2 shall be submitted for each claimant or each enterprise, as the case may be.

3. An investor of a Party may not initiate or continue a claim under this Chapter if a claim involving the same measure or measures alleged to constitute a breach under this Article and arising from the same events or circumstances is initiated or continued pursuant to an agreement between the respondent and a non-party by:

- (a) an enterprise of a non-party that owns or controls, directly or indirectly, the investor of a Party, or
- (b) an enterprise of a non-party that is owned or controlled, directly or indirectly, by the investor of a Party.

Notwithstanding the previous paragraph, the claim may proceed if the respondent agrees that the claim may proceed, or if the investor of a Party and the enterprise of a non-Party agree to consolidate the claims under the respective agreements before a tribunal constituted under this Chapter.

4. A claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules²⁵; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

5. A claim shall be deemed submitted to arbitration under this Chapter when the claimant's notice of or request for arbitration (notice of arbitration):

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

²⁵ In the case of arbitration under this Chapter pursuant to the UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applicable unless the disputing parties otherwise agree.

- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Arbitration Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

6. In addition to any other information required by the applicable arbitral rules, the notice of arbitration shall also include information addressing each of the categories in Article 10.17.

7. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Chapter, shall govern the arbitration except to the extent modified by this Chapter.

8. A claim asserted by the claimant for the first time after such Notice of Arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitration rules.

Article 10.19: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Chapter.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
- (b) Article II of the New York Convention for an “agreement in writing.”

Article 10.20: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.18 and knowledge that the claimant (for claims brought under 10.18(1)(a)) or the enterprise (for claims brought under Article 10.18(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section by national who had the nationality of the Party to the dispute on the date on which the parties consented to submit such dispute to arbitration pursuant to Article 10.18.
3. No claim may be submitted to arbitration under this Section unless:
 - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Chapter;
 - (b) the claim arises from measures included in the request for consultations submitted by the claimant in accordance with Article 10.17; and
 - (c) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.18(1)(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 10.18(1)(b), by the claimant's and the enterprise's written waivers,of any right to initiate or continue before any administrative tribunal or court under the law of a Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.18.
4. Notwithstanding paragraph 3(c), the claimant (for claims brought under Article 10.18(1)(a)) and the claimant or the enterprise (for claims brought under Article 10.18(1)(b)) may initiate or continue an action that seeks interim injunctive relief under the law of the respondent and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 10.21: Constitution of the Tribunal

1. Unless the disputing parties otherwise agree, the tribunal shall be comprised of three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. In selecting arbitrators, disputing Parties shall take into account, amongst other things, whether potential candidates have experience in public international law or international economic law.
3. If a tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration under this Section, the appointing authority, on the request of a

disputing party, shall appoint, in his or her discretion and after consulting with the disputing parties, the arbitrator or arbitrators not yet appointed.

4. The appointing authority shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator, unless the disputing parties otherwise agree.

5. In the event that the appointing authority appoints a presiding arbitrator in accordance with relevant arbitration rules, the presiding arbitrator being appointed should be a recognized expert in public international law, and should be experienced in investor-state dispute settlement.

6. In addition to any applicable arbitral rules regarding independence and impartiality of arbitrators, arbitrators shall comply with a code of conduct for arbitrators that the Parties may agree in the future pursuant to Article 170 (Free Trade Commission) of Chapter 14 (Administration of the Agreement) of the Free Trade Agreement.

Article 10.22: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.18. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consulting the disputing parties, the tribunal may allow a person or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. Such a submission shall provide the identity of such person or entity (including any controlling entity and any source of substantial financial assistance in either of the two years preceding the submission, e.g. funding around 20% of an entity's overall operations annually), disclose any connection, direct or indirect, with any disputing party, and identify any person, government or other entity that has provided or will provide any financial or other assistance in preparing the submission. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;

- (b) the *amicus curiae* submission would address a matter within the scope of the dispute; and
- (c) the *amicus curiae* has a significant interest in the proceeding.

4. The tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

5. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal.

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that the dispute is not within the competence of the tribunal, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under this Section.

- (a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after it has been constituted, and under in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial, or in the case of an amendment to the Notice of Arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds thereof.
- (c) In deciding an objection under paragraph 6, the tribunal shall assume to be true claimant's factual allegations. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 7.

7. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 6 or any other objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30

days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

8. When the tribunal decides a respondent's objection under paragraphs 6 or 7, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

For greater certainty, consistent with general principles of law applicable to international arbitration, when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim.

9. Subject to Article 10.11 a respondent shall not assert as a defence, counterclaim, right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages, pursuant to an insurance or guarantee contract.

10. A tribunal may order an interim measure of protection²⁶ to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.18. For the purposes of this paragraph, an order includes a recommendation.

11. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

12. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 10.25 should be subject to that appellate mechanism.

²⁶For greater certainty, a domestic court's consideration of an order for interim measures issued pursuant to this Article is subject to domestic law.

13. Subject to paragraph 2, when a claim is submitted under Article 10.18(1)(a)(i)(A), (1)(a)(i)(B), (1)(b)(i)(A) or (1)(b)(i)(B), the tribunal shall decide the issues in dispute in accordance with this Chapter and applicable rules of international law.²⁷

14. A decision of the Free Trade Commission on the interpretation of a provision of this Chapter shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by a tribunal must be consistent with that decision.

Article 10.23: Discontinuance

If, following the submission of a claim under this Section, the claimant fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. In case that a Tribunal has been established according to this Section, it shall, at the request of the respondent, and after notice to the disputing parties, take note of the discontinuance in an order and issue an award on costs. After such an order has been rendered, the authority of the Tribunal shall lapse. The claimant may not subsequently submit a claim arising from the same measure or measures. This Article is without prejudice to the Tribunal's authority to discontinue the proceedings in accordance with the applicable arbitration rules.

Article 10.24: Consolidation

1. If two or more claims have been submitted separately to arbitration under Article 10.18.1, and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order, in accordance with the agreement of all the disputing parties sought to be covered by the consolidation order or the terms of paragraph 2, paragraph 3, paragraph 4, paragraph 5, paragraph 6, paragraph 7, paragraph 8, paragraph 9 and paragraph 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver a written request to the Administrating authority and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the consolidation order;
- (b) the nature of the consolidation order sought; and
- (c) the grounds on which the order is sought.

²⁷For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent where it is relevant to the claim as a matter of fact.

3. Unless the Administrating authority finds, within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the consolidation order agree otherwise, the tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Appointing authority provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant.

5. If, within a period of 60 days after the Administrating authority receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Appointing authority, on request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed.

6. If a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.18.1 have a question of law or fact in common and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others, or
- (c) instruct a tribunal established under Article 10.18 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
 - (i) that tribunal, on request of any claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to subparagraph 4 (a) and paragraph 5, and
 - (ii) that tribunal shall decide whether any prior hearing should be repeated.

7. If a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 10.18.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6. The request shall specify:

- (a) the name and address of the claimant;
- (b) the nature of the order sought, and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Administrating authority.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the applicable arbitration rules, except as modified by this Section.

9. A tribunal established under Article 10.21 shall not have jurisdiction to decide a claim, or part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On the application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 10.21 be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 10.25: Awards

1. 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.

2. For greater certainty, if an investor of a Party submits a claim to arbitration under Article 10.18.1(a), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.

3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules. For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an

award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award the respondent reasonable costs and fees incurred during the arbitration.

4. Subject to paragraph 1, where a claim is submitted to arbitration under Article 10.18(1)(b):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic laws with respect to the relief provided in the award.

5. A tribunal may not award punitive damages.

6. Subject to paragraph 8 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without undue delay.

7. The decision or award shall be made available to the public promptly.²⁸

8. A disputing party shall not seek enforcement of a final award until:

- (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
 - (ii) revision or annulment proceedings have been completed; and
- (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 10.18:
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or

²⁸For greater certainty, nothing in this Chapter requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 10.29.

- (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

9. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

10. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, Panel shall be established under Article 10.21. The requesting Party may seek in those proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Chapter, and
- (b) a recommendation that the respondent abide by or comply with the final award.

11. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 10.

Article 10.26: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Section C

Article 10.27: Service of Documents

Delivery of notice and other documents to a Party shall be made to the place designated in Annex 10-A. A Party shall promptly notify the other Parties of any change to the place referred to in that Annex.

Article 10.28: 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 10.29: 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 necessary for the fulfilment of its obligations under the *United Nations Charter*, done at San Francisco on June 26, 1945 (UN Charter), for the maintenance or restoration of international peace or security, or measures that it considers necessary for the protection of its own essential security interests²⁹.

Article 10.30: Taxation Measures

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

2. Nothing in this Chapter shall affect the rights and obligations of the Parties under any tax convention. In the event of any inconsistency between the provision of this Chapter 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) of the Free Trade Agreement and such other provisions of

²⁹For greater certainty, if a Party invokes Article 10.29 in an arbitral proceeding initiated under this Chapter, the corresponding tribunal hearing the matter shall find whether the exception applies.

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 8.3 (National Treatment) of Chapter 8 (Trade in Services) of the Optimization Protocol, 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 10.8 and Annex 10-B of this Chapter shall apply to taxation measures alleged to be expropriatory.

5. The provisions of Section B apply with respect to paragraph 4 of this Article.

6. If an investor invokes Article 10.8 and Annex 10-B of this Chapter as the basis of a claim to arbitration according to Section B, 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 Section B, 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 Section B.

7. For purposes of this Article:

- (a) taxation measures do not include:

- (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 China, the State Taxation Administration; and

- (ii) for Peru, the Ministry of Economy and Finance (Ministerio de Economía y Finanzas - MEF), or its successor.

Article 10.31: 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 Chapter, such position shall not be affected by this Chapter.

ANNEX 10-A

Service of Documents on a Party

China

Notices and other documents shall be served on the People's Republic of China by delivery to:

Department of Treaty and Law
Ministry of Commerce of the People's Republic of China
2 Dong Chang'an Avenue
Beijing, 100731
People's Republic of China

Peru

Notices and other documents shall be served on the Government of the Republic of Peru by delivery to:

Dirección General de Asuntos de Economía Internacional, Competencia y Productividad
Ministerio de Economía y Finanzas
Jirón Lampa 277, piso 5
Lima, Peru

ANNEX 10-B

Expropriation

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Expropriation may be either direct or indirect:
 - (a) direct expropriation occurs when a state takes an investor's property outright, including by nationalisation, compulsion of law or seizure; and
 - (b) indirect expropriation occurs when a state takes an action or series of action that have an effect equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.
3. In order to constitute indirect expropriation, the action or series of actions must be:
 - (a) either severe or for an indefinite period; and
 - (b) disproportionate to the public interest.
4. In addition to paragraph 3, the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.
5. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:
 - (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or
 - (b) in breach of the state's prior binding written commitment to the investor, whether by contract, license, or other legal document.
6. Except in rare circumstances to which paragraph 5 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.