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Section IV. A: The Protection of Foreign Investment

PERU NATIONAL REPORT

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1. Framework and hierarchy of foreign investment law and treaties

The general legal framework governing foreign investment in Peru

Domestic laws and regulations

As for domestic Peruvian law related to foreign investment we will focus on the main current principles that apply to foreign investment which are contained in the Peruvian Constitution of 1993 and in the two main regulations, i.e., Legislative Decree No 662 – Approving the Juridical Stability System for Foreign Investment (Legislative Decree No 662) and Decree No 757 – Approving the Framework Law for Private Investment Growth (Legislative Decree No 757) both of them issued just before the Constitution of 1993¹.

Constitutional Principles applicable to Foreign Investment

Constitution is the regulation of the highest hierarchy in Peru. Laws coming from Congress and regulations issued by the Executive must comply with the principles stated in such text like the ones related to the private sector investment and foreign investment. As summarized by Proinversion² such principles are as follows:

Free private initiative exercised in a market-based social economy. Indeed article 58 of the Peruvian Constitution states that ‘Private enterprise is free and is practiced within a social, market economy. Under this system, the government guides the country’s development and is mainly active in the areas of the promotion of employment, health, education, security, public services, and infrastructure’. In this respect, note that the

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¹ Main Peruvian laws related to foreign investment can be found at

<http://www.proinversion.gob.pe/0/0/modulos/JER/PlantillaSectorHijo.aspx?ARE=1&PFL=0&JER=837>

² PROINVERSIÓN, the Peruvian Investment Promotion Agency, is a public administration that was created in 2002 in order to promote investments in Peru.



concept of free private initiative is defined at article 3 of Legislative Decree No 757 as ‘... the right that any individual or company has to engage in the economic activity they prefer, which comprises the production or marketing of goods or rendering of services in agreement with the Constitution, international treaties executed by Peru ...’.

Freedom of work and to engage in business, trade and industry. Such freedom is recognized by article 59 of the Peruvian Constitution: ‘The government promotes the creation of wealth and guarantees the freedom to work and the freedom of private enterprise, commerce and industry In addition, article 6 of Legislative Decree No 662 states that ‘Foreign investors are entitled to the rights to trade and to engage in economic activities, as well as to the right to export and import’. Note that in practice there are some obstacles to hire foreign workers in Peru. The workforce of a Peruvian company must not be composed of more than 20% of foreigner and salaries paid to foreigner must not be of more than 30% of the total wages. However there are many exceptions to such restrictions³.

Subsidiary role of the State in economic activity. There is no doubt that Peruvian Constitution operates a rupture with the past as for the role devoted to the State in the economic activity. Indeed article 60 states that: ‘(...) Authorized solely by an express law, the State may in a subsidiary way engage in business activities directly or indirectly, for reasons of overriding public interest or manifest national benefit (...)’. In this respect, article 7 of the Legislative Decree No 757 provides that: ‘When one same economic activity is carried out by the State and private companies, the same conditions should be applicable to both. In no case State-owned companies will be granted *imperium* attributions or powers inherent to the Public Administration with the exception of the powers delegated by the State for the coercive collection of taxes’.

Free competition and prohibition of restrictive practices and the abuse of dominant or monopolistic positions. Article 61 of the Peruvian Constitution provides that ‘The State promotes and oversees free competition. It fights any practice that would limit it and the abuse of dominant or monopolistic positions. No law or arrangement may authorize or establish monopolies’. The National Institute of Protection of Intellectual Property – INDECOPI, is the agency in charge of copyright, trademarks and patents issues and consumer protection. It seeks out anticompetitive conduct in the marketplace and controls and punishes application of dumping and subsidies practices. It also can challenge bureaucratic obstacles impeding or hindering, unlawfully or irrationally, the access or permanence of economic market agents.

Freedom to conclude contracts. According to Peruvian law, new regulation cannot alter the consequences of existing contracts. In effect, under the first paragraph of article 62 of the Peruvian Constitution: ‘The freedom to make contracts guarantees that the parties may make valid agreements in accordance with standards in force at the time of the contract. Contractual terms **may not be modified** by law or any other kind of provision’. (emphasis added)

³Ricardo Guevara Bringas, ‘Being Hired as a foreign Worker by a Peruvian Employer’, <http://www.expatperu.com/working-in-peru.php>



Powers of the State to establish guarantees and grant securities by means of contract law. We will analyze later on that Peruvian State may enter into agreements with private investors in order to ensure that regulation under which the investment is made shall not vary for a certain period of time. Indeed article 62 of the Peruvian Constitution states that ‘By means of law-contracts the State may provide guarantees and grant security. The latter may not be modified legislatively (...)’.

National treatment. By a straightforward provision article 63 of the Peruvian Constitution states that “National and foreign investments are subject to the same terms. (...). In addition, article 2 of the Legislative Decree provides that ‘Foreign investors and the companies in which these participate have the same rights and obligations as the local investors and companies. Such rights and obligations are only limited by the exceptions established in the Political Constitution of Peru and the provisions hereof. In no case the domestic juridical regulations will discriminate among investors or the companies based on the local or foreign share in the investments.’ In this regard, it must be pointed out that paragraph 2 of article 71 of Peruvian Constitution states ‘within a distance of 50 kilometers from the border, foreigners may not acquire or own for any reason mines, land, forests, water, fuel or energy sources, either directly or indirectly, individually or in partnership, under penalty of surrendering that acquired right to the government. The sole exception is the case of public need expressly declared by a supreme decree approved by the Cabinet in accordance with the law’. Besides, as we will see there are still some fields in which nationality of the investor can be a prerequisite such in aviation and maritime merchant sectors.

Right to submit controversies arising from contractual relationship with the State to national and international arbitration⁴. As we will see arbitration has become a very common practice in Peru. Public bodies as well as the State submit their controversies to arbitration. For instance in case of controversies related to public procurement arbitration is compulsory under Peruvian regulation. In addition Peru belongs to most of the international arbitration mechanisms (ICSID, MIGA, OPIC). Indeed, last paragraph of article 63 of the Peruvian Constitution states that ‘The State and other public law persons may submit disputes deriving from contractual relationships to courts set up by virtue of existing treaties. They may also submit them for national or international arbitration in the manner provided by law’.

Freedom to hold and dispose of foreign currency. This freedom is guaranteed by article 64 of the Peruvian Constitution. There is no control exchange.

Inviolability of property and establishment of conditions for exceptional causes that empower expropriation, specifically in advance cash payment of a fair-value. Peruvian law has a special law for expropriation and in many Bilateral Investment Treaties guarantees to foreign investors are granted in this respect⁵. Article 70 of the Peruvian Constitution states that ‘The right to own property is inviolable and guaranteed by the government. It is exercised in keeping with the common good and within the confines of the law. No one may

⁴ For arbitration and investment issues the outstanding book in Peru is Fernando Cantuarias Salaverry, *Arbitraje Comercial y de las Inversiones* (UPC, Lima 2007)



be deprived of his property except for reasons of national security or public need, declared by law and following cash payment of the appraised value, which must include compensation for potential damages. Proceedings have been instituted before the judicial branch to challenge the value of property which the government has established in the expropriation procedure⁷.

Finally, Peruvian Constitution provides for equal treatment on taxation matters and that the tax cannot have confiscating effects. In this respect, it is very common that foreign investors enter into agreements in order to freeze tax regulation under which they made their investments. The two most significant domestic regulations of foreign investment in Peru, Legislative Decree No 662 and Legislative Decree No 757, notably deal with these stability agreements.

Legislative Decree No 662 and Legislative Decree No 757

Framework legislation

Context

Said Legislative Decrees provides for the general framework of foreign investment in Peru. They are complemented by further specific regulation specially related to hydrocarbons, telecommunications and energy and utilities. In effect, investor's rights stated in both Legislative Decrees allow them to access the benefits granted by other legal provisions.

Legislative Decree No 662 was issued after the Congress of Peru had ratified the Constitutive Agreement for the Multilateral Investment Guarantee Agency (MIGA). Its purpose was the creation of a favorable environment for foreign investment. Through this regulation Peruvian State aimed at guaranteeing equal rights and obligations to foreign and local investors and also providing for a juridical stability system to foreign investors.

Besides, Legislative Decree No 757 stated provisions required for the growth of private investment and implemented relevant measures to eliminate legal and administrative obstacles to private investors in Peru⁶.

Foreign investment definition

In order to qualify as foreign investments the latter must come from abroad. Said regulations provide for the following forms of investments⁷:

- Property contributions from individuals or companies channeled through the National Financial System to the capital of a new or existing company in any of the corporate forms indicated by the General Business Corporations Act, in freely convertible currency or in physical or tangible goods, such as industrial plants, new and reconditioned machinery, new and reconditioned equipment, spare parts, parts and pieces, raw materials and intermediate products.

⁶ Felipe Ortiz de Zevallos, *Reformas para un futuro mejor* (Beatriz Boza Editora, Lima 1998) 29

⁷ Article 1 of Legislative Decree No 662 and article 1 of Supreme Decree No 162-92-EF.



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- Investments in local currency derived from resources with the right to be remitted abroad.
 - Conversion into stock of private obligations with foreign countries.
 - Reinvestments made pursuant to the legislation in force.
 - Investments in assets located physically in Peru.
 - Intangible technological contributions such as trademarks, industrial models, technical support and patented or non-patented expertise, which may appear under the form of physical goods, technical documents and instructions.
 - Investments aimed at the acquisition of titles, documents and financial papers listed at stock.
 - Exchanges or bank certificates of deposit in local or foreign currency.
 - Resources aimed at unincorporated association contracts or the like, granting the foreign investor a form of share in the production capacity of the company without implying capital contribution. This share is referred to commercial transactions of contractual nature, whereby the foreign investor provides goods or services to the receiver company in exchange for a share in the physical production volume, the sales lump-sum and net profit of the referred receiver.
 - The investments comprised in this section should be subject to tax legislation on the matter.
 - Any other form of foreign investment contributing to the country's development.

Guarantees granted to foreign investors

Most significant guarantees granted to foreign investors by these regulations are as follows:

- Equality of rights between foreign and local investors (national treatment).
- Automatic authorization for foreign investments after a registration procedure.
- Acknowledgement of foreign investor's property right.
- Right to trade and to engage in economic activities.
- Right to decide upon the organization of the business related to the foreign investment. Thus, any legal provision setting forms of production or productivity except for the ones referred to hygiene and industrial security, environmental conservation and health, are prohibited.
- Right to freely decide upon distribution of total profits or dividends and right to receive all profits and dividends they are entitled to without prejudice of the obligations concerning the workers' shareholding, the legal reserve and the relevant tax obligations.
- Right to transfer its share capital, dividends, and any kind of royalties abroad in freely convertible foreign currency without previous authorization prior payment of legal taxes.
- Right to acquire shares, interest shares or property rights from local or sub-regional investors.
- Right to use the most favorable purchase exchange rate.
- Right to conclude juridical stability agreements with the Peruvian State prior to the investment and its registration as long as legal requirement of the investment are met.



- Right to register its investment before PROINVERSION.

Main international treaties signed by Peru in connection with foreign investment

Peru is signatory of several international treaties and member of many international organizations:

- World Trade Organization (WTO).
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention)
- Multilateral Investment Guarantee Agency (MIGA).
- Overseas Investment Corporation (OPIC).
- New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards.

Additionally Peru has entered into the following Bilateral Investment Treaties⁸ as indicated in the list below provided by PROINVERSION⁹:

COUNTRY	STATUS	DATE OF ENTRY INTO FORCE
GERMANY	IN FORCE	05.01.1997
ARGENTINA	IN FORCE	10.24.1996
AUSTRALIA	IN FORCE	02.02.1997
BOLIVIA	IN FORCE	03.19.1995
CANADA	IN FORCE	08.01.2009
CHILE	IN FORCE	03.01.2009
COLOMBIA	IN FORCE	03.21.2004
CUBA	IN FORCE	11.25.2001
DENMARK	IN FORCE	02.17.1995
ECUADOR	IN FORCE	12.09.1999
THE SALVADOR	IN FORCE	12.15.1996
SPAIN	IN FORCE	02.17.1996
THE UNITED STATES	IN FORCE	02.01.2009
FINLAND	IN FORCE	06.14.1996
FRANCE	IN FORCE	05.30.1996
ITALY	IN FORCE	10.18.1995
JAPAN	IN FORCE	12.10.2009
MALAYSIA	IN FORCE	12.25.1995
NORWAY	IN FORCE	05.05.1995
NETHERLANDS	IN FORCE	02.01.1996

⁸ Fernando Cantuarias Salaverry, *Los tratados bilaterales de promoción y protección recíproca de inversiones y el acceso al arbitraje*, en Revista de Economía y Derecho (UPC, Lima 2004) 29-50

⁹ <http://www.proinversion.gob.pe/0/0/modulos/JER/PlantillaSectorHijo.aspx?ARE=1&PFL=0&JER=3861>



PARAGUAY	IN FORCE	12.18.1994
PORTUGAL	IN FORCE	10.18.1995
UNITED KINGDOM	IN FORCE	04.21.1994
THE CZECH REPUBLIC	IN FORCE	03.06.1995
THE REPUBLIC OF KOREA	IN FORCE	04.20.1994
PEOPLE'S REPUBLIC OF CHINA	IN FORCE	02.01.1995
RUMANIA	IN FORCE	01.01.1995
SINGAPORE	IN FORCE	08.01.2009
SWEDEN	IN FORCE	08.01.1994
SWITZERLAND	IN FORCE	11.23.1993
THAILAND	IN FORCE	11.15.1993
BELGIUM-LUXEMBOURG ECONOMIC UNION	IN FORCE	09.11.2008
VENEZUELA	IN FORCE	09.18.1997

In the same way, Peru has signed the following Free Trade Agreements that include investments chapters:

- Free Trade Agreement with Chile.
- Free Trade Agreement with the United States of America.
- Free Trade Agreement with Singapore.

Peru has also concluded 29 Agreements on Reciprocal Promotion and Protection of Investments.

As for double taxation treaties, Peru has only concluded treaties with Sweden, Chile, Canada and countries of the Andean Community¹⁰.

The Relationship between International Treaties and Domestic Laws

According to article 55 of the Peruvian Constitution, international concluded by the Peruvian State are part of national law. Consequently there is no need of special regulation to implement them into the Peruvian law. Peruvian president is empowered to conclude treaties without the intervention of the Congress. However certain treaties for instance those related to human rights or financial obligations of the State requires previous approval from the Congress.

As a consequence, hierarchy of international treaties will depend on the legal instrument that approves them. For instance, if the treaty is approved by the Congress such treaty will have the same value than an internal law. If the treaty is only signed by the President such treaty will have the same value than a Supreme Decree which is of less hierarchy than a law.

Thus, in case of contradiction between a law and a treaty, it will be necessary to asses the value of the treaty according to the procedure that such treaty is concluded¹¹.

¹⁰ http://www.mef.gob.pe/ESPEC/Convenios_DT2.php

¹¹ Enrique Bernal Ballesteros, *La Constitución de 1993 Análisis Comparado* (RAO S.R.L., 1999)



Insofar as international treaties are considered as a national law and provided of the object of the treaty, individuals can directly invoke them.

Transparency

According to article 149 of the Peruvian Constitution ‘a law takes effect on the day after its publication unless the law itself postpones its enforcement entirely or in part’.

According to article 1 of Supreme Decree No 018-97-PCM all regulations, such as laws, decrees, judicial decisions that constitute a precedent, and administrative general decisions related to must be released through the official gazette.

In addition administrative proceedings or requirements may only be established by Supreme Decree, Regional Executive Decree or Municipal Ordinance given by the Central, Regional, and Local Governments.

As stated by the law N° 27444 Ministries, public institutions and organizations, as well as other Public Administration entities of any nature, whether they are dependent upon the Central Government, Regional Governments or Local Governments, are obliged to disclose their legal requisites through written regulation called Single Text of Administrative Proceedings (TUPA).

The TUPA will be approved by Supreme Decree given by the appropriate sector in the case of entities depending on the Central Government: If the entities depend on Regional Governments, such TUPA will be approved by Regional Executive Decree, and if they depend on Local Governments by Municipal Ordinance.

As for the transparency in the processing of administrative procedures, according to Law No 27806 documents, records, studies, opinions, statistical data and any other information in the possession of the public sector entities, should be supplied to the individuals who require so. Documentation and information likely to affect national security and foreign affairs, as well as those limited exclusively to Public Administration internal circulation and use may not be disclosed.

General standards of treatment of foreign investment/investors

Standards of treatment under international treatments

Bilateral investment treaties (BITs) concluded by Peru are intended to create a level playing field for foreign investors.

Most-favored nation (MFN) and national treatment

BITs provide for both most-favored nation (MFN) and national treatment within the territory of the contracting parties. For instance BIT concluded with the UK states that:



‘Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of national or companies of any third State’.

These standards apply primarily to the post-establishment phase of an investment but could apply to the market access. For instance BIT concluded between Peru and Japan refers to “investment activities” as ‘**establishment**, acquisition, expansion, operation, management, maintenance ... or other disposal of investments’. (emphasis added)

However as it customary, BITs concluded by Peru provide for certain exceptions to the application of MFN. For instance privileges or preferences given to States with which Contracting Parties have concluded customs unions, free trade arrangements and international agreements related to taxation do not fall under the scope of MFN.

In addition of MFN treatment and national treatment standards, BIT’s concluded by Peru include prohibition on discriminatory measures.

Minimum standards of protection, fair and equitable treatment and full protection and security

Minimum standards of protection shall be construed in accordance with customary international law.

BITs concluded by Peru provides for minimum standards of protection according to which ‘investment of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment in its territory of nationals or companies of the other Contracting Party (...)’.

In the same way, fair and equitable treatment must be understood as the protection of legitimate expectations, good faith, transparency, consistency and non discrimination¹².

It is interesting to note that the BIT concluded between Peru and Japan says that fair and equitable treatment includes the obligation of the Contracting Party not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law.

By granting full protection and security any state must guarantee ‘stability in a secure environment, physical, commercial and legal’¹³.

¹² Biwater Gauff (Tanzania) Ltd v Tanzania (Award of July 2008) ICSID Case No ARB/05/22 para 602.

¹³ Ibidem para 729.



3. Admission/entry requirements

No prior authorization is required to foreign investors to invest in Peru. Peruvian legislation only requires that the investment to be registered with PROINVERSION, the Peruvian public agency in charge of the promotion of private investments.

It must be said that almost all economic activities are open to foreign investors. There are only few restrictions in fields such as radio and television¹⁴, commercial airline transportation¹⁵ and marine merchant activities¹⁶.

4. Investment contracts

Peruvian Constitution at paragraph 2 of article 62 provides for the so called “law contracts” by which the State may provide guarantees and grant securities that cannot even be modified by law. This means that by renouncing to any kind of privilege the State acts as it would be a private person and at the same time grants certain guarantees to investors.

Consequently “law contracts” can only be modify if the State and the other party agree to do so. At local level this approach has been confirmed by the Peruvian Constitutional Tribunal¹⁷. At international level we may find this view in *Duke Energy International Peru Investment No 1 Ltd vs. Republica del Peru (ARB/03/28)*¹⁸.

Stability agreements

“Law contracts” that freeze the legal, tax and labor regimes under which foreign investors made their investments can be based on general investment regulation, i.e., Legislative Decrees N0 662 and Decree Legislative No 757 as well as on specific regulation related to certain industries such as mining, hydrocarbons. We will focus on agreements based on both Legislative Decrees No 662 and No 557.

Stability agreements may grant the following guarantees to foreign investors:

- Stability of the non discrimination right.

¹⁴ According to the Law No 28278 companies that provide services of radio and television must have a share capital composed of at least 60% of Peruvian citizens. In addition individuals that apply for authorization to develop such activities can only be Peruvian citizens.

¹⁵ According to the Law No 27261 more than 50% of the directors and the managers of civil aviation companies must be of Peruvian nationality or domiciled in Peru and at least 51% of the company’s share capital must be composed of Peruvian citizens domiciled in Peru.

¹⁶ According to Law No 28583 at least 51% of the marine merchant company’s share capital must be at least owned by Peruvian citizens. President of the Board, the majority of the directors as well as the General Managers must be Peruvian citizens.

¹⁷ Decision of Peruvian Constitutional Tribunal of 3 October 2003, Exp. 005-2003-AI/TC.

¹⁸ It was stated that ‘31... pursuant to investment laws of Peru, the main features of LSA are that (i) the stabilized legal regime cannot be changed unilaterally by the State, and (ii) the agreements are subject to private or civil law and not administrative law ...’. Quoted by Fernando Cantuarias Salaverry,...op.cit.



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- Stability of the Income Tax System, applicable to investors, in force at the moment the agreement is executed.
 - Stability of the system of free availability of foreign currency and remittance of profits, dividends and royalties.

On the other hand, stability agreements may grant the following guarantees to the entity receiving the investment:

- Stability of the system of labor hiring in force at the time agreement is executed.
- Stability of the system of export promotion applicable at the time the agreement is concluded.
- Stability of the Income Tax System.

Investors and enterprises receiving the foreign investment are eligible to subscribe to these agreements. Foreign investors that comply with one of the following obligations may benefit from them:

- To make, within a two-year term, capital contributions for an amount not under US\$ 5 million in any economic activity, except mining and hydrocarbon sectors.
- To make, within a two-year term, capital contributions not under US\$ 10 million in mining and hydrocarbon sectors
- To acquire more than 50% of shares of an enterprise participating in the privatization process.
- To make capital contributions in a concession contract, fulfilling the investment requirements established in the pertaining contract.

As for entities that receive the foreign investment and wish to enter into a stability agreement, they must comply with one of the following requirements:

- One of its shareholders shall have concluded a stability agreement.
- In the event that tax stability is requested, contributions shall represent a 50% increase of the share capital and reserves, and shall be destined to the expansion of the production capacity or to the technological development of the company.
- In the event of a shares transfer agreement, the acquisition must be of more than 50% of the share capital of the entity under privatization.
- If the company receiving the investment has concluded a concession contract with the State.

The duration of stability agreements is 10 years. In case of concessions, the duration of the legal stability agreement shall extend until the termination of the concession.

Finally, controversy arising from these agreements shall be submitted to arbitral tribunals.



Concession agreements

Other kind of contracts that must be entered into between a foreign investor and the State. Indeed concession contracts can be concluded under the Supreme Decree N° 059-96-PCM that promotes private investment on public infrastructure works and utilities.

Concessions are awarded through national or international special public call for tenders or integral projects competitive bids and are formalized with the subscription an administrative agreement.

As a result, the concession agreement awards the concessionaire the execution and exploitation of certain public infrastructure works or the delivery of utility. The concession agreement shall establish mechanisms that will assure the concessionaire the granting of revenues.

Note that the concession term shall not exceed sixty (60) years.

Finally, the State and the investor may submit controversies derived from concessions to national or international arbitration, as provided in the Political Constitution of Peru.

Investments and activities carried out by the State

In the same way, Peruvian legislation has encouraged the promotion of private national and foreign investment in activities carried out by the State. Legislative Decree No 674 provides for the modalities through which private investment promotion is implemented such as:

- acquisition of shares and/or assets of stated owned companies,
- capital increases, and
- joint ventures.

In all cases PROINVERSION shall be the competent agency to promote private investment in State owned companies and assets through public and transparent procedures.

Foreign investors are also enabled to sign contracts with Regional Governments and Municipalities. Indeed, by virtue of the Law No 27783 and Law No 27972, Regional Governments and Municipalities are respectively entitled to grant concessions and enter into any kinds of agreements seeking to promote private investment on regional property.

According to PPOINVERSION the following minimum criteria shall be observed in the relationship between regional governments and the national government in connection with investment projects:

- Investment projects developed after initiative of two or more regional governments shall have the participation of PROINVERSIÓN.
- National projects developed in the regions shall foster participation of the regional government(s) of said jurisdictions.



- Projects developed with the participation of the national government shall benefit from the relevant national and regional regulations concerning investment existing at the time of execution at any government level.
- National projects shall foster the constitution of Interregional Coordination Councils, thus promoting development of the necessary capacities for the decentralized administration of assets, companies and projects.

5. Performance requirements

Peruvian law related to performance requirements is straightforward. Indeed, article 9 of Legislative Decree 757 repeals any legal provision setting forms of production or productivity indexes, which prohibit or compel to the utilization of inputs or technological processes and, in general, any legal provision intervening in the productive processes of companies based on the type of economic activity developed and the installed capacity there of, or any other similar economic factor, except for those legal provisions referred to hygiene and industrial security, environmental conservation and health¹⁹.

6. Tax Regime

Corporate taxation

¹⁹ We must point out at article 6 of the BIT concluded between Peru and Japan according to which: '1. Neither Contracting Party shall impose or enforce any of the following requirements as a condition for investment activities in its Area of investors of a Contracting Party or of a non-Contracting Party:

- (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use or accord a preference to goods produced or services provided in its Area, or to purchase goods or services from natural or legal persons or any other entity in its Area;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor;
 - (e) to restrict sales of goods or services in its Area that investments of that investor produce or provide by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
 - (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person or any other entity in its Area, except when the requirement (i) is imposed or enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or (ii) concerns the transfer of intellectual property rights which is undertaken in a manner not inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement (hereinafter referred to as "the TRIPS Agreement");
- Note: Nothing in subparagraph (f) shall be construed to prevent a Contracting Party, in connection with investment activities in its Area, from imposing or enforcing a requirement or enforcing a commitment to train workers in its Area, provided that such training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its Area.
- (g) to locate the headquarters of that investor for a specific region or the world market in its Area; or
 - (h) to supply one or more of the goods that the investor produces or the services that the investor provides to a specific region or the world market, exclusively from the Area of the former Contracting Party ...'.



Domiciled entities

Corporate tax levies the net income of the annual period (January 1st to December 31st.) with a 30% rate.

Companies incorporated in Peru are levied not only for their Peruvian incomes, they are also levied for the incomes that they can generate in another country. The income tax paid in another country is a credit against the Peruvian income tax they have to pay for the foreign income source.

Branches are only levied on their Peruvian income.

Note that taxpayers are obliged to make monthly payments, which constitute credit against the annual tax. These advance payments are calculated on the basis of the situation of the company in the previous annual period.

As in other tax systems, the expenses to be deducted from the gross revenue of the business entity are those incurred for the generation of levied income or the maintenance of the producing source of that income. It is important to indicate that some expenses are capped by law such representation expenses, personnel recreational expenses, interests paid to shareholders for financial operations, payments to the Board of Directors.

In addition to the monthly payments, taxpayers must perform the annual tax payment. They are also obliged to fulfill some formal obligations such as: (i) filing a monthly and an annual tax return, (II) holding accounting books, (III) keeping the documentation related to their activities, (IV) issuing invoices and (v) providing the information required by the Tax Authority.

Note that the disbursement of dividends to non-domiciled shareholders is levied with a tax rate of 4.1%. This tax is triggered when the Shareholders' Meeting decides to disburse the company's dividends.

The company, as a withholding agent, has to withhold this tax and pay it to the Tax Authority on behalf of the shareholders.

Non-domiciled entities

A Peruvian company or a branch of a foreign company registered in Peru that pay Peruvian source income to a non-domiciled person has to withhold the correspondent tax and must pay it to the Tax Administration Office. The income tax that the Peruvian company has to withhold to the non-domiciled person is calculated according to the following effective rates:

- Interests: 4.99% if the interests are paid to a not related party, or, 30% if they are paid to related party.
- Interests paid by banks abroad for the use of credit lines: 1%
- Royalties: 30%.
- Technical services: 15%.



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- Paid dividends: 4.1%
 - Income coming from the sale of stocks in Peru: 5%
 - Other revenues: 30%.

Transfer pricing

Peruvian legislation regulates the transfer pricing of goods and/or services between related parties, as well as operations made from, towards or through tax heavens²⁰.

Corporate entities that have operations with related parties or with persons domiciled in tax heavens, must establish the value agreed in these operations with a transfer pricing technical study.

Transfer Price Technical Study

Corporate entities that are obliged to have a transfer pricing technical study are the following:

Entities registered in Peru when the two following conditions occur:

- During a fiscal year their income is of an amount superior than 6' 000,000 PEN; and,
- The amount of all the operations conducted with related parties is greater than 1'000,000. PEN.

In addition, corporate entities registered in Peru, must prepare the transfer pricing technical study if they have performed at least one transaction from, towards or through countries or territories considered tax heavens.

The transfer pricing technical study has to include all the transactions made with related parties as well as all the transactions made from, towards or through tax heavens.

Related Parties

According to the Peruvian legislation, two or more persons, companies or organizations are notably considered as related parties provided that they are in one of the following situations:

- A natural or legal person that directly or indirectly owns more than 30% of the share capital of another legal person.
- More than 30% of the capital of two or more legal persons is directly or indirectly owned by the same physical or legal person.
- The capital of two or more legal person is owned in more than the 30% by common partners.

²⁰ Our Income Tax legislation considers tax heavens the following places: Alderney, Andorra, Anguilla, Antigua, and Barbuda, Antillas Neerlandesas, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, Cyprus, Dominica, Guernsey, Gibraltar, Granada, Hong Kong, Man Island, Caiman Island, Cook Islands, Marshall Islands, Turk and Caicos Islands, the Caïques and Turkish Islands, US Virgin Islands, Jersey, Labuan, Liberia, Liechtenstein, Luxemburg, Madeira, Maldivas, Monaco, Monserrat, Nauru, Niue, Panama, Samoa Occidental, Saint Cristobal and Nevis, San Vincent and the Granadinas, Saint Lucia, Seychelles, Tonga, Vanuatu.



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- The legal persons or organizations have one or more common directors, managers, administrators or other personnel that is able to take decisions in the financial, operative and/or commercial agreements.
 - A non-domiciled company has one or more permanent establishments in the country such a branch, in which case entailment between the non-domiciled company and each one of its permanent establishments and between all of them will exist.
 - A person, company or organization domiciled in the country make, in the previous annual period, 80% of its sales, services or another type of operations, with a person, company or organization domiciled in the country or with people, companies or organizations tie to each other, domiciled in the country, whenever such operations, as well, at least represent 30% of the purchases or acquisitions of the other part in the same period.

The operations between related parties must be done at the same value than transactions which are performed with persons with no economic entailment, whenever the same conditions occur. Each transaction with related parties will have to have the information and detailed documentation, when it corresponds, that endorses the calculation of the transfer pricing; and, when it corresponds, to have the transfer pricing technical study.

Income Tax for Non-Domiciled Self-Employed Workers

Note that non domiciled natural persons are levied with Peruvian income tax for the income they receive, when it comes from a Peruvian source. The income obtained from personal services rendered in Peruvian territory it is considered as Peruvian income.

The Peruvian company or the branch registered in Peru that pay to non domiciled persons for services rendered in our country must act as the withholding agents, and must withhold the tax and pay it to the Tax Administration Office on behalf of the non-domiciled person. The Income Tax that the non-domiciled person have to pay for the income gained for services rendered in our country is calculated applying an effective rate of 24%.

If the person that renders the services is domiciled in our country, the Peruvian company will only have to withhold the 10% of the amount that has to pay him. Any difference will be paid directly by the natural person in his annual tax return.

Peruvian legislation establishes that the foreign natural person who remains in the country for more than 183 calendar days during a period of 12 months, will be considered domiciled in Peru for income tax purposes, from the 1st of January of the following year.

Income Tax Paid by Workers (Fifth Category Income Tax)

A natural person that renders services as an employee in Peruvian territory is levied with Peruvian Income Tax with a 30% effective rate.



The employer must withhold the 30% tax. If the employer is not domiciled in our country, the employee will have to pay its tax directly to the Peruvian Tax Administration Office.

Once the natural person qualifies as domiciled in our country, he or she is able to deduct 7 UIT²¹ (Tax Units) to determine their net fifth category income and to apply the following rate to calculate their Income Tax:

Net Global Income	Rate
Up to 27 UIT	15%
For the excess of 27 UIT and up to 54 UIT	21%
For the excess of 54 UIT	30%

Said rates are also applied to domicile in Peru self-employed natural persons. In addition they have an allowance of 20% on their gross income.

Please note that managers of any company must have an employment contract and they pay the above mentioned income tax.

In addition foreign persons need to obtain a work permit to be hired in Peruvian territory.

Sales Tax or Value Added Tax (IGV)

IGV is a monthly regularity tax that levies with the rate of 19% the following operations:

- Sale of goods located in the country.
- Commercial services rendered in the country.
- Utilization of commercial services rendered by a non-domiciled person;
- Construction contracts.
- First sale of buildings by their constructors.
- Import of goods.

Although export operations are not taxed with the sales tax, the companies that export goods and/or services are able to recover the sales tax paid in their acquisitions through two different procedures: compensation with other obligations or tax devolution.

Tax Credit

As it is a value added tax, the sales tax paid in the acquisition of goods and services constitutes a credit against the sales tax that the company has to pay to the Tax Administration Office for its own operations.

To use the sales tax paid in the acquisitions as a fiscal credit, the acquisitions require fulfilling two conditions: (i) to be destined to operations taxed with the sales tax; and, (ii) to be considered as a cost or expense according to the Income Tax legislation.

The companies that are levied with this tax are obliged to fulfill substantial obligations: a monthly payment of the resulting tax of the period; and, formal obligations: (i)

²¹ Each UIT amounts to 3,600.00 PEN.



present/display monthly tax returns; (II) to have a registry of purchases and sales; (III) to file the documentation related to their activities; (IV) to provide the information required by the Tax Administration Office.

Custom Duties

The custom duties levy the import of goods. The tax base is the goods custom CIF value, according with the World Trade Organization Value Agreement. The custom duties rates are 0%, 9%, 17% or 20%.

The custom duties that levy the import are part of the sales tax basis.

Net Assets Temporary Tax (ITAN)

ITAN is a patrimonial tax of annual regularity that levies the net assets of the companies, since the following annual period that they start activities.

The tax base is the net asset value that the company had at the end of the previous year.

Rate	Net Assets
0%	Until S/. 1' 000.000
0.5%	For the excess of S/. 1'000,000.

The ITAN paid in the corresponding annual period, can be used as a fiscal credit against the Income Tax. The part of the ITAN paid that cannot be applied against the Income Tax can be paid back, after presenting/displaying the income tax annual tax return of the referred annual period.

Financial Transactions Tax (ITF)

In Peru all operations conducted through the Financial System are taxed with the ITF, tax that has to be withheld by the financial company (banks, among others).

Note that all the financial operations are levied with the ITF, the most important financial operations that are not levied are, among others, the followings: the transferences of money between accounts of the same company in the same bank, the movements in the accounts used only for tax purposes.

The Tax levies all the entrances and exits of money in the accounts opened in the national Financial System, among others, with the following rate:

From January 1st 2009 until December 31st 2009	0,06%
From January 1st 2010	0,05%

Note that the amount that will be sent for the share capital of the Peruvian Entity will have to pay the ITF tax.

Payroll Taxes



The taxes that levy the payroll, in addition to the income tax, are the following:

- EsSalud (Social Security): 9% of the employee and workers salary. This tax has to be paid by the employer.
- National or Private Pension Fund System: approximately 12% of the employee or workers salary. The employer has to withhold the tax and pay it to the Tax Administration Office (National Pension Fund) or to the Pension Funds Administrators (Private Pension Fund) on behalf of the employees and workers.

Other Payroll Burdens

We considered important to mention that according to our labor legislation the employees/workers have the right to receive, in addition to their monthly salary:

Two additional monthly salaries (one in July and other one in December) as a *gratificación*, as long as they have worked during the six previous months. If they work for a smaller period of time, the *gratificación* must be paid proportionally (1/6 of the salary for every complete month).

- One month of vacations paid for every complete worked year.
- A time services compensation (CTS) that is equivalent to a monthly salary by every complete worked year.
- To participate in the company's gains. The companies that have more than 20 workers in their payroll are obligated to pay them the gain participation. In the case of companies that render services, as would be the case of the company to be incorporated in our country, the workers participation is equivalent to 5% of the net gains that the company obtains for income tax purposes in each year (before income tax and after carry-over previous losses).

Real State Tax

It is an annual municipal tax of patrimonial nature that levies the real state property in each district. The determination of the tax is made on the basis of an accumulative progressive scale according to the value given to the real state property by the:

Up to 15 UIT	0,2%
More than 15 UIT and up to 60 UIT	0,6%
More than 60 UIT	1,0%

Real State Transfer Tax (Alcabala)

It is a municipal tax that levies the transference of real state property and the person obligated to pay it is the purchaser. The tax is equivalent to the 3% of the transference value or 3% of the municipal valuation of the real state, the one that is greater. The tax base has a deduction of 10 UIT.

Tax Incentives

Tax incentives to investors can be divided into two major forms. There are incentives related to the refund of VAT for transactions made at a pre-operation stage of the



investment. Such regimes require the conclusion of an Investment Contract with the Peruvian States and are granted for investments of at least USD 5'000.000²².

Moreover, there are advantageous tax and labour regimes applicable to investments made in certain areas such as agriculture and aquaculture. For instance companies that make investments in such sectors and subject to certain conditions, will pay a 15% corporate tax instead of 30%²³. Note that benefits granted to the aquaculture sector end up in December 31, 2010, whereas those granted to the agriculture sector remain until December 31, 2021.

In order to improve life conditions and development of certain Peruvian regions, the Peruvian State also provides for tax incentives to investment in areas such as the Amazonian region²⁴ and certain high Andean territories²⁵.

Finally, investors may benefit from tax-free areas (zona francas) located in the south of Peru²⁶.

As it was already mentioned Peru has only signed few agreements as to avoid double taxation. Such agreements were signed with Sweden, Chile, Canada and countries of the Andean Community. However as a general rule, Peruvian law allows companies registered in Peru to deduct from their gross revenue income tax paid abroad to a certain extent.

7. Property right, expropriation and compensation

Property right

Peruvian Constitution guarantees property rights to foreign and Peruvian investors²⁷.

²² For further details about the requisites see

<http://www.proinversion.gob.pe/0/0/modulos/JER/PlantillaSectorHijo.aspx?ARE=1&PFL=0&JER=2768>

²³ For further details about these regimes see

<http://www.proinversion.gob.pe/0/0/modulos/JER/PlantillaSectorHijo.aspx?ARE=1&PFL=0&JER=2768>

²⁴ Ibidem.

²⁵ The Law No 29482 of December 2009 grants tax reliefs for 5 years to individuals and companies that invest in the Peruvian Andean zone located at 2,500 meters and at 3,200 meters. Activities that must be performed are those related to fish farming, forest plantations, raising of camelids.

²⁶ See at

<http://www.proinversion.gob.pe/0/0/modulos/JER/PlantillaSectorHijo.aspx?ARE=1&PFL=0&JER=2768>

²⁷ Article 71 states 'Concerning property, foreigners, whether individuals or corporations, enjoy the same rights as Peruvians except that they may in no instance invoke special situations or diplomatic protection. However, within a distance of 50 kilometers from the border, foreigners may not acquire or own for any reason mines, land, forests, water, fuel or energy sources, either directly or indirectly, individually or in partnership, under penalty of surrendering that acquired right to the government. The sole exception is the case of public need expressly declared by a supreme decree approved by the Cabinet in accordance with the law'.



Local regulation as well as international treaties protects intellectual property regardless of the nationality of the beneficiary²⁸. Additionally Peru has concluded several agreements to ensure protection of intellectual property as is showed below:

- Convention World Intellectual Property Organization (WOPI).
- Trade-related aspects of intellectual property rights (TRIP'S).
- Paris Convention for the Protection of Industrial Property.
- General inter-american convention for trade mark and commercial protection.
- International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement.
- Andean Group Common Provisions on the Treatment of Foreign Capital, Licensing and Royalties, Decision N° 291 of the Commission of the Cartagena Agreement.
- Decision N° 486 Common Intellectual Property Regime.
- Berne Convention for the Protection of Literary and Artistic Works.
- Universal Copyright Convention.
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.
- Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms.
- Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.
- Decision N° 351 of the Cartagena Agreement, October 1993, which establishes a common regime on copyright and related rights for the Member Countries of the Andean Group.
- Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, with model bilateral agreement and additional Protocol.
- Treaty on the International Registration of Audiovisual.
- WIPO Performances and Phonograms Treaty.

It must be mentioned that Peru has not signed the Madrid Agreement Concerning the International Registration of Marks.

Expropriation

As for expropriation issues, article 70 of Peruvian Constitution grants the necessary guarantees required in case of expropriation. Indeed only national security or public need, declared by law and following cash payment of the appraised value can legitimate expropriation.

According to Peruvian law No 27117 that regulates expropriation the person which property has been expropriated by the State will have the right to judicial review at Peruvian level or before arbitral tribunals.

²⁸ Legislative Decree No 1075



BITs concluded by Peru stipulate as a general rule that expropriation shall not occur except for limited reasons of public interest recognized by a special law and upon payment of prompt adequate and effective compensation.

Additionally most of BITs and Free Trade Agreements concluded by Peru state that compensation shall be equivalent to the fair market value of the expropriated investment at the time when the when the expropriation was publicly announced or when the expropriation occurred, whichever is earlier.

As for the moment to pay compensation, it is commonly said that compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time until the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.

In any case, investors affected by expropriation shall have a right of access to the courts of justice or administrative tribunals or agencies making the expropriation to seek a prompt review of the investors' case and the amount of compensation.

8. Money transfer

Peruvian law grants the right to investors to transfer the total amount of their capital, dividends and royalties in freely convertible foreign currency without previous authorization.

According to Decree Laws 662 and 757 enacted before the current Peruvian Constitution of 1993 the lack of registration of the foreign investment before PROINVERSION would deprive foreign investors from the right to freely transfer abroad foreign currency without previous authorization and from the right to get the best exchange rate for foreign currency.

We believe that since Peruvian Constitution of 1993 establishes the equality between Peruvian and foreign investors this formal requisite of investment registration cannot be a condition precedent to foreign investors to be entitled to said rights. However, as a precaution measure, we advise to register the investment with PROINVERSION.

9. Dispute Settlement

Peruvian regulation is significantly open to arbitration. Indeed, last paragraph of art 63 of Peruvian Constitution states that 'The State and other public law persons may submit disputes deriving from contractual relationships to courts set up by virtue of existing treaties. They may also submit them for national or international arbitration in the manner provided by law'.



Peruvian arbitration law is governed by a very recent law, the Legislative Decree No 1071. This regulation has thrived to unify national and international arbitration. However, there are still some specific regulations that apply to international arbitration, which means arbitration in which one of the parties is not domiciled in Peru. Those rules aim to reinforce the efficacy of arbitration. For instance parties are free to choose the substantive rules of law applicable to arbitration. It is also stated that there is no need to be a lawyer for arbitration in law.

As for judicial review of arbitration decisions, Peruvian law has limited the ways to challenge said decisions. The only recourse is the annulment of the arbitration decision. Grounds of annulment are rather restrictive and are only related to procedural questions. Judges cannot decide on questions of law. The objective of new regulation is to ensure certainty of arbitration.

As for treaties concluded by Peru in arbitration issues, we must mention the New York Convention, the Panama Convention, and the Washington Convention. Peru has issued no reservation to the ICSID Convention.

10. FDI stastics, policies and authorities

There is little doubt that Peru since 1990 has started a new era for foreign investments and liberalization of the economy.

According to the information declared to PROINVERSIÓN, as of June 30th, 2008, the stock of foreign direct investment totals US\$ 16,867 billion. Between 1996 and 2008 foreign investments have been multiplied by three-times.

During 2008, the GDP increased by 9.8%, a rate among the highest in the world.

Documentation below that comes from PRONINVERSION. It will give a better idea of this spectacular growth.

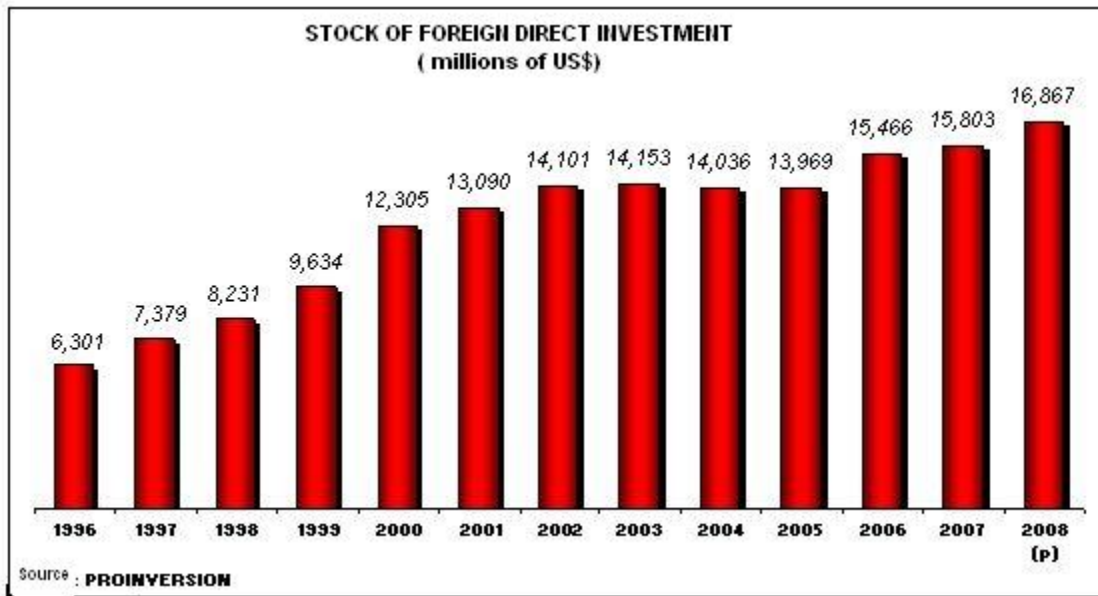


TABLE 1
FDI STOCK BY MAIN COUNTRIES
(US\$MILLION)

COUNTRY	2008 (p)	%
SPAIN	3,729.9	22.11%
UNITED KINGDOM	3,419.6	20.27%
USA	2,762.6	16.38%
HOLLAND	1,404.4	8.33%
CHILE	990.8	5.87%
PANAMA	869.2	5.15%
COLOMBIA	725.9	4.30%
MEXICO	439.2	2.60%
BRAZIL	341.9	2.03%
SWITZERLAND	275.0	1.63%
CANADA	274.6	1.63%
ITALY	195.4	1.16%
BAHAMAS	187.6	1.11%
URUGUAY	177.6	1.05%
GERMANY	159.4	0.94%
JAPAN	158.4	0.94%
SINGAPOUR	123.5	0.73%



OTHERS	631.9	3.75%
TOTAL	16,867.0	100%

(p) FDI stock as of June 2008

Source: ProInversion

TABLE 2
FDI STOCK BY DESTINATION SECTORS
(US\$ MILLIONS)

COUNTRY /2	2008 (p)	%
SPAIN	4,343.4	25.75%
USA	2,674.9	15.86%
SOUTH AFRICA	1,804.8	10.70%
CHILE	1,450.6	8.60%
SWITZERLAND	925.3	5.49%
MEXICO	852.6	5.05%
CANADA	715.5	4.24%
UNITED KINDOM	613.2	3.64%
JAPAN	413.9	2.45%
BRAZIL	363.9	2.16%
CHINA	261.7	1.55%
ITALY	258.8	1.53%
COLOMBIA	256.4	1.52%
HOLLAND	241.6	1.43%
ARGENTINA	233.6	1.38%
PANAMA	210.9	1.25%
AUSTRALIA	204.9	1.21%
OTHERS	1,040.9	6.17%
TOTAL	16,867.0	100%

Source. ProInversion

(p) FDI stocks as of June, 2008

2/ origin of investment by head office.

FDI BY SECTOR



TABLE 3
FDI STOCK BY MAIN COUNTRIES
 (Millions US\$)

SECTOR	2008(P)	%
AGRICULTURE	44.4	0.26%
COMMERCE	713.9	4.23%
COMMUNICATIONS	3,756.4	22.27%
CONSTRUCTION	159.7	0.95%
ENERGY	1,674.5	9.93%
FINANCE	2,598.6	15.41%
INDUSTRY	2,736.9	16.23%
MINING	3,510.4	20.81%
FISHING	163.0	0.97%
OIL	207.9	1.23%
SERVICES	425.3	2.52%
SILVICULTURE	1.2	0.01%
TRANSPORT	285.5	1.69%
TOURISM	63.5	0.38%
HOUSING	525.8	3.12%
TOTAL	16.867.0	100%

MAIN INVESTORS

The main investors that carry out any capital movements whether they are through contributions or shares acquisitions in the period 2007 – 2008 are the following

INVESTORS	COUNTRY
CENCOSUD INTERNATIONAL LIMITED	CHILE
GOLD FIELDS CORONA BVL LIMITED	UNITED KINDOM
NEXTEL INTERNATIONAL (PERU) LLC.	UNITED KINDOM
PAN PACIFIC COPPER CORP.LTD.	JAPAN
DEUTSCHE BANK AG	GERMANY
RIO BLANCO COPPER	UNITED



LIMITED	KINDOM
CARMELA S.A.R.L	LUXEMBURGO
BANCO SANTANDER CENTRAL HISPANO S.A.	SPAIN
SOCIEDAD DE INVERSIONES INTERNACIONALES PARQUE ARAUCO S.A.	CHILE
GLOBAL CROSSING INTERNACIONAL NETWORKS LTD	UNITED KINDOM