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**BACKGROUND DOCUMENT FOR BREAKOUT SESSION:**

**DRAFTING PROVISIONS ON THE DEFINITION OF EXPROPRIATION,  
PERFORMANCE REQUIREMENTS, AND THE FREE MOVEMENT OF CAPITAL**

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**PERFORMANCE REQUIREMENTS: AN OVERVIEW OF APPROACHES**

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## 1. INTRODUCTION

A performance requirement is a condition that investors must meet in order to establish or operate a business, or to obtain some advantage that is offered by the host state. It might include obligations that are linked to the approval of the investment and sometimes might differ from comparable requirements imposed on domestic investors.

Through the imposition of certain responsibilities on investors, performance requirements are a way to ensure that an investment contributes to the development of the host country.

Examples of performance requirement obligations are:

- Requirements to export a certain percentage of total sales, or total production;
- Requirements to enter into joint venture arrangements with domestic partners;
- Requirements to transfer or share technology;
- Requirements that a certain amount of inputs be locally sourced;
- Requirements to expend a certain amount on research and development; and
- Requirements to hire a certain number or percentage of local employees.

Performance requirements are of particular interest to developing countries, since they can be used as a tool to ensure that the incoming foreign investments are guided towards local and national priorities to further environmentally and socially sustainable development.

The rationale for imposing performance requirements includes:

- Strengthening the industrial base and increasing domestic value added;
- Generation of employment opportunities;
- Linkage promotion;
- Export generation and performance;
- Trade balancing;
- Regional development promotion;
- Technology transfer;
- Avoidance of restrictive business practices;
- Generation and distribution of rents;
- Various non-economic objectives, such as political independence and distribution of political power.

Nevertheless, arguing that performance requirements are economically inefficient, industrialized countries are increasingly taking steps to limit the use of performance requirements through trade and investment agreements. To date, there has been little discussion on the effect of bans on performance requirements on social policy objectives that could be achieved through their use. Indeed, prohibitions on performance requirements in trade and investment treaties have the potential to hinder governmental efforts to pursue certain types of social policies.

## 2. RESTRICTIONS ON PERFORMANCE REQUIREMENTS IN THE WTO AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

States are increasingly committing in international treaties not to impose certain performance requirements. One main body of international law restricting states' freedoms to impose performance requirements is the WTO Agreement on Trade-Related Investment Measures (hereinafter "TRIMs Agreement").

The TRIMs Agreement builds on the notion that certain investment measures can have trade-restricting or distorting effects. Thus, it provides that no Member shall apply a trade-related investment measure inconsistent with Article III (national treatment) or Article XI (quantitative restrictions) of the General Agreement on Tariffs and Trade (GATT). The Annex to the TRIMs Agreement contains an Illustrative List with examples of inconsistent measures, which include "local content requirements" and "trade balancing requirements".

The TRIMs Agreement prohibits certain categories of *trade-related* performance requirements such as requirements for domestic sourcing of inputs, and restrictions on imports and exports related to local production. The TRIMs Agreement covers only a sub-set of all performance requirements. But the TRIMs Agreement's commitments are significant nonetheless, since as WTO law they have been subscribed to by almost all of the world's trading nations.

### WTO Agreement on Trade-Related Investment Measures

#### ANNEX

##### *Illustrative List*

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
  - (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
  - (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.
2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
  - (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
  - (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
  - (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

## 3. APPROACHES TAKEN IN INVESTMENT TREATIES AND CHAPTERS RELATING TO PERFORMANCE REQUIREMENTS

In addition to the WTO TRIMs Agreement, a number of regional and bilateral trade and investment agreements have begun banning or restricting performance requirements. Some

limit the restrictions to those contained in the TRIMs Agreement, while others go beyond. The restrictions on performance requirements can either be subject to investor-State dispute settlement, or excluded from its scope.

i. ***Approach 1 (most frequent): No provisions limiting the use of performance requirements in investment treaties and chapters***

The great majority of the 3000 investment treaties and chapters does not include any provisions banning or limiting the use of performance requirements. Significantly, investment agreements of the European Union member states, as well as the recent regional investment agreements of COMESA and SADC also do not mention performance requirements.

Nevertheless, it is likely that pressures to include provisions restricting the use of performance requirements will increase, including by the European Union which since December 2009 has the competence to negotiate investment protection treaties. It is therefore important for negotiators to understand the impacts and the different drafting approaches that have been taken with respect to this issue. Approaches to include such provisions are described under Approaches 2 and 3 below.

ii. ***Approach 2: Integrating TRIMS requirements into investment treaties and chapters***

Some investment treaties contain a provision on performance requirements by simply referencing and incorporating the TRIMs Agreement, without expanding the scope of restrictions beyond what is provided for in the TRIMs Agreement. The TRIMs Agreement prohibits certain categories of trade-related performance requirements such as requirements for domestic sourcing of inputs, and restrictions on imports and exports related to local production. Though the TRIMs Agreement covers only a sub-set of all performance requirements, it is a significant restriction on states' freedoms to impose performance requirements.

When a WTO member includes TRIMs obligations in an investment treaty or chapter, the member might not be merely reaffirming its WTO commitments but may be allowing investors to bring claims against it in this respect – something not possible under the WTO. This could be avoided by explicitly excluding the provisions on performance requirements from the dispute settlement provisions.

An example of an investment treaty that integrates restrictions on performance requirements by incorporating the TRIMs Agreement is the 2009 ASEAN Comprehensive Investment Agreement.

**ASEAN Comprehensive Investment Agreement**

Article 7

Prohibition on Performance requirements

1. The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A of the WTO Agreement (TRIMs), which are not specifically mentioned in or modified by this Agreement shall apply, *mutatis mutandis*, to this Agreement.
2. Member States shall undertake joint assessment on performance requirements no later than 2 years from the date of entry into force of this Agreement. The aim of

such assessment shall include reviewing existing performance requirements and considering the need for additional commitments under this Article.

3. Non-WTO Members of ASEAN shall abide by the WTO provisions in accordance with their accession commitments to the WTO.

iii. *Approach 3: Integrating TRIMs-Plus obligations*

Some treaties integrate performance requirements and restrictions that combine TRIMs-type obligations with obligations that go beyond those under the TRIMs Agreement (TRIMs-plus provisions). This approach is typically taken in treaties that include pre-establishment rights through the national treatment and the MFN clauses. The prohibition on performance requirements therefore limits the options for host states to make certain demands upon entry of an investment. Typically, some limits are already imposed through the national treatment clause, but the performance requirement restrictions limit host state options even further.

TRIMs-plus provisions can include, among others, prohibitions on the requirement:

- to transfer technology, a production process or other proprietary knowledge;
- to act as the exclusive supplier of the goods it produces or services it provides;
- to locate the headquarters of that investor for a specific region;
- to hire a given number or percentage of its nationals; or
- to achieve a given level or value of research and development.

For example, Article 1106 of the North American Free Trade Agreement (hereinafter 'NAFTA') contains a mix of TRIMs-type provisions as well as TRIMs-plus provisions prohibiting a party from imposing or enforcing mandatory performance requirements relating to export of a given level or percentage of goods or services; achieve a given level or percentage of domestic content, technology transfer, production process or other proprietary knowledge to a person in its territory

The United States and Canadian Model Bilateral Investment Treaties (hereinafter 'BITs') also contain a specific provision prohibiting performance requirements, similar to the NAFTA provision. In line with their models, Canada and the United States have been able to negotiate such restrictions in their treaties negotiated with several partner countries. Among the various Canadian BITs since 2004, the Canada-Peru BIT (2006) and Canada-Jordan BIT (2009) contain the exact provision prohibiting performance requirements as the Canadian Model BIT. While, the Canada-Romania BIT (2009) and the Canada-Latvia BIT (2009) also contain a prohibition on performance requirements, they have minor differences from the Canadian Model BIT and probably without legal implications. Interestingly, both the Canada-Czech Republic BIT (2009) and Canada-Slovakia BIT (2010) do not contain a specific prohibition on performance requirements.

Canada's Free Trade Agreements (hereinafter 'FTA') with Colombia (2011) and Peru (2008) also contain a prohibition on performance requirements similar to that in NAFTA. The Canada-Panama FTA (2010) also contains a provision on prohibition of performance requirements with minor differences as compared to the provision in NAFTA, which are probably without any legal implications.

The United States' BITs with Uruguay (2005) and Rwanda (2008) contain the exact provision prohibiting performance requirements as the one in the U.S. Model BIT.

Similarly, most United States' FTAs since 2004 also contain a prohibition on performance requirements in their chapter on 'Investment'. This provision in the Dominican Republic-Central America-United States Free Trade Agreement (2004), US-Chile FTA (2004), US-Morocco (2004), US-Peru Trade Promotion Agreement (2006) and US-Oman FTA (2009) is exactly the same as the one contained in the U.S. Model BIT.

Certain Japanese investment agreements also regulate performance requirements, including the Japan-Mexico Free Trade Agreement, Japan-Peru BIT and Japan-Uzbekistan BIT.

There are, however, some notable differences in the scope of the performance requirement provisions among the various agreements.

The NAFTA and Canadian Model BIT provisions provide that no party may impose or enforce any performance requirements, or enforce any commitment or undertaking, in connection with the 'establishment, acquisition, expansion, management, conduct or operation' of an investment. The scope of the Japan-Mexico FTA regarding performance requirements is similar to that provided in NAFTA and the Canadian Model BIT. However, the U.S. Model BIT differs slightly in that it further provides that no party may impose or enforce any performance requirement, or enforce any commitment or undertaking, in connection with the 'establishment, acquisition, expansion, management, conduct, operation *or sale or other disposition* [emphasis added]' of an investment.

The NAFTA and the U.S. Model BIT contain a prohibition on the performance requirement to export a given level or percentage of goods *and* services, while the Canadian Model BIT only prohibits the requirement to export a given level or percentage of goods.

Some Japanese investment treaties contain additional prohibitions, not included in the NAFTA or the U.S. and Canadian Model BITs, such as the prohibition on a requirement "*to locate the headquarters of that investor for a specific region or the world market in its Area*". The Japan-Uzbekistan BIT also contains a prohibition on a requirement to "*hire a given number or percentage of its nationals*" and "*achieve a given level or value of research and development in its Area*".

#### **4. EXCEPTIONS**

The scope of the prohibition on performance requirements can be limited through exceptions. One can see two kinds of exceptions clauses: (i) a general exceptions clause, applicable to all or a series of host state obligations; and (ii) an exceptions clause applicable to specific performance requirements restrictions and prohibitions.

The Canadian Model BIT, for instance, contains a general exceptions clause that allows a party to adopt or enforce measures necessary to protect human, animal or plant life or health; to ensure compliance with laws and regulations that are not inconsistent with the provisions of the agreement; or for the conservation of living or non-living exhaustible natural resources.

The NAFTA and the U.S. Model BIT, on the other hand, contain an exception that is specific to the prohibition on certain performance requirements. They provide that such prohibitions shall not be construed to prevent a party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with the treaties; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources, provided that they are not applied in an arbitrary or unjustifiable manner and do not constitute a disguised restriction on international trade and investment. Japan-Mexico FTA contains a similar exception.

The general and specific exceptions relating to the environmental and health exceptions could be relevant for justifying certain performance requirements, such as those relating to transfer of technology or research and development.

Both the NAFTA and the Canadian Model BIT also provide a carve-out with respect to technology requirements, stating that “*a measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements*” shall not be construed to be inconsistent with the prohibition on the requirement to transfer technology.

Finally, some exceptions also state that the restrictions on performance requirements do not prevent countries from providing incentives or advantages to an investor in exchange for the investor’s commitment to invest in research and development, train or employ workers, or provide other development-related services within the host country’s territory. The NAFTA, and U.S. and Canada Model BITs, for example, each contain language to this effect.

## **5. CONCLUDING REMARKS**

A number of investment treaties or chapters now contain provisions on performance requirements. However, a majority of bilateral or regional investment treaties still do not mention performance requirements. It should be noted that even under these treaties, states may be restricted from applying certain performance requirements through the national treatment or the MFN clause. This can be avoided through careful drafting.

When states consider whether or not to integrate prohibitions or limitations on performance requirements, they should keep in mind that:

- they can always limit the use of performance requirements unilaterally, without locking themselves in for years to come;
- if they agree to refer to pre-existing obligations such as those assumed under the TRIMs Agreement, they should be aware that – if not explicitly excluded - these TRIMs obligations may now be enforced by a private party (the investor); and that
- they can limit the scope of the provisions through careful drafting and exceptions.

## ANNEX

### North American Free Trade Agreement

#### **Article 1106: Performance Requirements**

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (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 territory, or to purchase goods or services from persons in its territory;
- (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 such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides 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 person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (c) 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 such investment;
- or
- (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources.

## **United States Model Bilateral Investment Treaty 2004**

### **Article 8: Performance Requirements**

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:<sup>1</sup>

- (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 in its territory, or to purchase goods from persons in its territory;
- (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 such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) 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 such investment;
- or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

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<sup>1</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory

(b) Paragraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.<sup>2</sup>

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

## **Canadian Model Bilateral Investment Treaty 2004**

### **Article 7**

#### **Performance Requirements**

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:

(a) to export a given level or percentage of goods;

(b) to achieve a given level or percentage of domestic content;

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<sup>2</sup> The Parties recognize that a patent does not necessarily confer market power

- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
  - (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 such investment;
  - (e) to restrict sales of goods or services in its territory that such investment produces or provides 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 person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
  - (g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market.
2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 3 and 4 apply to the measure.
3. Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
- (a) to achieve a given level or percentage of domestic content;
  - (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
  - (c) 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 such investment;
- or
- (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
5. Paragraphs 1 and 3 shall not apply to any requirement other than the requirements set out in those paragraphs.
6. The provisions of:
- (a) Paragraphs (1) (a), (b) and (c), and (3) (a) and (b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
  - (b) Paragraphs (1) (b), (c), (f) and (g), and (3) (a) and (b) shall not apply to procurement by a Party or a state enterprise; and
  - (c) Paragraphs (3) (a) and (b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

## Article 10

## **General Exceptions**

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.

## **Agreement Between Japan and The United Mexican States for the Strengthening of the Economic Partnership**

### **Article 65**

#### **Performance Requirements**

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its Area:

- (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 persons 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 such investment;
- (e) to restrict sales of goods or services in its Area that such investment produces or provides 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 person in its Area, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with multilateral agreements in respect of protection of intellectual property rights. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with this paragraph. For greater certainty, Articles 58 and 59 shall apply to the measure; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its Area of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;

- (b) to purchase, use or accord a preference to goods produced in its Area, or to purchase goods from producers in its Area;
  - (c) 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 such investment;
  - or (d) to restrict sales of goods or services in its Area that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. Nothing in paragraph 2 above shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its Area of an investor of a Party or of a non-Party, on compliance with a requirement to:
- (a) locate production;
  - (b) provide a service;
  - (c) train or employ workers;
  - (d) construct or expand particular facilities; or
  - (e) carry out research and development in its Area.
4. Paragraphs 1 and 2 above shall not apply to any requirement other than the requirements set out in those paragraphs.
5. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment activities, nothing in subparagraph 1(b) or (c) or 2(a) or (b) above shall be construed to prevent any Party from adopting or maintaining measures:
- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
  - (b) necessary to protect human, animal or plant life or health; or
  - (c) necessary for the conservation of living or nonliving exhaustible natural resources.

## **Japan-Peru Bilateral Investment Treaty**

### **Article 6**

#### **Prohibition of Performance Requirements**

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.

2. Neither Contracting Party may condition the receipt or continued receipt of an advantage, in connection with investment activities of an investor of a Contracting Party or of a non-Contracting Party in its Area, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) 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;

(c) 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; or

(d) 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.

3. Nothing in paragraph 2 shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with investments in its Area, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its Area.

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