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PERU'S NEW INVESTMENT LAWS: PRIVATIZATION AND FOREIGN INVESTMENT STATUTES

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I. THE NEW PRIVATIZATION STATUTE

After two decades of extensive state intervention, which led to economic stagnation and social impoverishment, the administration of President Alberto Fujimori is engaged in a substantial effort to comply with the constitutional mandate of establishing a free market system in the country. Under a delegation of authority made by Congress, important legislation has been enacted, especially in the last few weeks, liberalizing foreign and domestic trade, guaranteeing private investment, abrogating state monopolies, simplifying tax rules, and deregulating the labor market.

Most recently, on September 25, 1991, a long-awaited Law to Promote Private Investment in State Enterprises (hereinafter the "Privatization Statute") was approved by Legislative Decree No. 674, which ranks as a law of Congress. The Privatization Statute declares of national interest the promotion of private investment in the approximately 100 state-owned companies. These companies include the largest mining conglomerate, the largest telecommunications company, the largest fishing conglomerate, three of the largest cement companies and three of the largest banking institutions.

The Privatization Statute lists the following three vehicles for achieving the aim of attracting private investments:

- (i) transfer of shares or assets to private entities;
- (ii) increase of capital stock by allowing new subscriptions of shares by private entities; and
- (iii) entering into joint venture agreements, management contracts or similar arrangement with private entities.

The Privatization Statute creates a Commission on the Promotion of Private Investment (its Spanish acronym is "COPRI"), charged with approving a Privatization Plan for each state-owned company. COPRI shall make a case-by-case determination of the Privatization vehicle to be utilized for each state enterprise. It shall also designate a "Special Committee" which will elaborate the Privatization Plan and handle the Privatization process for one specific

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company. All relevant decisions of COPRI are subject to ratification by the Executive.

The sale of voting shares shall be made through the Stock Exchange or by public auction. Payment shall be in cash, unless COPRI determines otherwise. The Statute sets forth a special procedure for the sale of stock by public auction. COPRI may resort to other means of sale - including direct negotiation - after two unsuccessful auctions. In all cases, COPRI must approve the reference value of the shares prior to its sale. The same rules apply *mutatis mutandis* to transfers of assets and increases of capital.

COPRI will conduct all negotiations for joint venture agreements, management contracts, leasing agreements, service agreements and similar arrangements involving state-owned enterprises.

Other relevant features of the Privatization Statute include a provision that during the privatization procedure the company will not be subject to the administrative restrictions that apply to government entities. Other provisions allow COPRI to restructure any state enterprise through mergers or divisions, as well as to propose to the Executive the liquidation of any state-owned company.

II. THE NEW FOREIGN INVESTMENT STATUTE

For the past two decades, Peru has been a highly regulated economy with extensive state intervention in private business. As a result, the GDP declined an average 5% annually in the last few years while the state's 91 nonfinancial companies accumulated losses of US\$ 2.4 billion. Faced with such situation, since his inaugural speech on July 28, 1990, President Alberto Fujimori announced an aggressive plan to liberalize and deregulate the economy. Most statutory privileges, subsidies and state monopolies have been eliminated since then, and the business community has witnessed a major effort to instaurate an authentic free market system.

Government regulations opening to foreign investment economic activities traditionally reserved to the state or to nationals - i.e. agribusiness, banking, public utilities, oil production and refining, telecommunications and transportation - have been followed by the enactment of a New Foreign Investment Statute (the "Statute"), aimed at establishing a liberal and stable legal framework for transnational investments. The Statute, approved by Legislative Decree No. 622, which ranks as a law of Congress, authorizes foreign investment in all economic sectors. Its main provisions are summarized below.

The Statute adopts a broad definition of foreign investment which encompasses any investment in activities that generate income, such as capital

investments in business corporations, debt-equity conversions and joint ventures, as well as purchases of real state, securities and bank deposit certificates. State case-by-case approval is no longer required. Only post-investment registration before the National Foreign Investment Commission (known by its Spanish acronym "CONITE") is needed to ensure repatriation of capital, profit remittances, and royalty payments.

The new Statute grants equal rights and obligations to foreign and domestic investors with no further exception than a pre-existing constitutional prohibition for foreign ownership of land, water or energy resources located within 50 km of the border. Besides such specific limitation, foreign investors have the same rights as national to property, free enterprise and access to financing. Foreign investors' rights to freely repatriate dividends, invested capital and royalty payments are expressly guaranteed by the Statute.

Among its important novelties, the Statute introduces the concept of "legal stability agreements," which CONITE may enter into with foreign investors to guarantee stability of the legal framework existing at the time the investment is made. Such agreements may cover relevant areas of the law, such as taxation and customs labor contracts, and special export regimes, such as temporary imports, free trade zones, export processing zones, and convertibility of foreign currency for transfers abroad.

Capital investments in a company or joint venture which are in excess of US\$ 0.5 million are eligible for entering into legal stability agreements if, either, (i) the investment will result in the employment of a work force of at least 20, or (ii) the investment will result in the generation of annual exports exceeding US\$ 2 million. None of these requisites apply if the investment is in excess of US\$ 2 million.

Legal stability agreements will be in force for ten-year terms beginning on the date when the investment is completed. Disputes arisen from the agreements may be submitted to treaty-based arbitration, a timely provision if considered together with Perú's recent subscription of the convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), currently pending ratification in Congress. Perú is also a member of the convention establishing the Multilateral Investment Guaranty Agency (MIGA).

Finally, the Statute significantly facilitates the procedures to bring new investments into the country. Although foreign investment shall be registered with CONITE, there is no time limitation for filing the application. Pursuant to an existing regulation, an investment is considered automatically approved if 15 days elapse without CONITE having issued a final resolution. A similar procedure applies for the registration of trademark, patent and technology licensing agreements, technical assistance and management contracts, and franchising agreements.

Under the delegation of authority made by Congress, the Peruvian government is considering other important measures which may significantly influence foreigners' investment decisions. Measures being considered reportedly include an aggressive privatization program, liberalization of the labor market and simplification of tax rules. The new attitude towards foreign investment, however, is already in place.