

COMMUNICATION FROM PERU

The following communication, dated 17 June 1998, was received from the Permanent Mission of Peru with the request that it be circulated to Members.

Bilateral Treaties for the Promotion and Reciprocal Protection of Investment: The Case of Peru

1. Background

In 1990, after two decades of pursuing a strictly regulatory and restrictive policy on foreign investment, Peru decided to adopt a policy of promotion of external capital flows. This is taking place in the context of a process of structural reform, initiated for the purpose of liberalizing and deregulating the economy by reconstructing the relationship between the public and private sectors, following a reappraisal of the market and competition as essential factors in the efficient allocation of resources. In this model, growth is private sector-driven and the treatment of foreign capital is based on the principle of equality.

2. The Foreign Investment Promotion Act

Against this background, the Foreign Investment Promotion Act was promulgated for the purpose of creating a climate favourable to foreign investment, in recognition of the fact that both foreign investment and foreign technology are essential for dynamic economic growth.

The principal characteristics of the Act are as follows:

- It recognizes the need to remove obstacles to and restrictions on investment and to guarantee equality of rights and obligations as between foreign and domestic investors.
- It signals that the State is promoting and guaranteeing existing and future foreign investment in the country in all sectors of economic activity and in any entrepreneurial or contractual form permitted by the law.
- It eliminates the need for prior authorization and performance requirements, as well as acknowledging the right to purchase shares owned by domestic investors.

- It establishes that foreign investors enjoy the rights to freedom of trade and industry and freedom to export and import.¹
- It guarantees the right of foreign investors to the free transfer of capital, without the need for prior authorization.

3. The bilateral investment treaties

However, it is not sufficient for a country to offer foreign investors flexible, open and stimulative legislation. One of the important factors influencing the decision to invest is the protection of the investment.

It was therefore necessary to send the international community a clear signal concerning the political intention to respect the domestic legislation, which grants foreign investors a series of internationally recognized guarantees and rights, and to keep it unchanged over a reasonable period of time.

In these circumstances, the bilateral treaties for the promotion and reciprocal protection of investment perform a dual function: (a) they constitute a means of offering these guarantees: and (b) they form a fundamental part of the national policy for attracting foreign investment.

Between 1992 and 1996, Peru signed 26 bilateral treaties for the promotion and protection of investment.²

4. By way of conclusion

The experience accumulated during these years appears to indicate the following:

4.1 Although there is no doubt that bilateral investment treaties can be important in considering country risk, this is only one of the numerous factors that the investor takes into account when deciding where to invest. The bilateral investment treaties are necessary but not sufficient.

4.2 Even where there are treaties offering protection, the investment decision will be mainly determined by the existence of investment opportunities with real market possibilities and adequate levels of return, in a context of macroeconomic stability. Once these and other factors have been taken into account, the investor will seek stability in the rules that govern his investment and the assurance of effective protection against non-commercial risks.

4.3 The lack of a bilateral treaty may not be the determining factor in investment flows. This can be illustrated by two examples, namely Chilean and United States investment in Peru.

¹Subsequently, the Constitution approved by Congress in 1993 recognized the principles of freedom of enterprise, trade and industry, free competition, equality of treatment for domestic and foreign investment and freedom to hold and dispose of foreign currency.

²Peru has signed bilateral treaties of this type with Argentina, Australia, Bolivia, China, Colombia, Czech Republic, Denmark, El Salvador, Germany, Republic of South Korea, Romania, Slovak Republic, Spain, Sweden, Switzerland, Thailand, United States (OPIC), and Venezuela.

4.3.1 Between 1993 and 1996, the flow of Chilean capital into the Peruvian economy amounted to US\$1,000 million, if direct investment and portfolio investment are taken into account.³ However, no bilateral investment promotion and protection treaty has yet been signed.

4.3.2 In the case of United States investment, the stock of direct investment increased from US\$622 million in 1992 to US\$1,456.62 million in 1997. Moreover, we should also consider other forms of investment, such as the flows of capital intended for oil company exploration operations. North American companies have announced and, in many cases, committed up to US\$2,978.2 million in investments over the next few years. What is remarkable is that Peru and the United States have not even begun negotiations on the signing of a bilateral investment promotion and reciprocal protection treaty. On the other hand, the Government of Peru has signed a financial cooperation agreement with OPIC, on the basis of which the insurance agency has been providing cover since 1994. In 1996 alone, OPIC issued insurance covering US\$855.3 million of investment. At the same time, some United States companies have requested risk insurance from MIGA, a multilateral agency of which Peru has been an active member since December 1991.⁴

³According to the estimates of the Chilean Chamber of Commerce total Chilean investment in Peru could amount to US\$2,000 million.

⁴Altogether, the Government of Peru has approved 14 requests submitted by foreign investors to MIGA, for a total investment of US\$303.51 [Sic] million.