

**DEPARTMENT OF FOREIGN AFFAIRS AND TRADE OPENING STATEMENT**  
**JOINT STANDING COMMITTEE ON TREATIES INQUIRY INTO ASPECTS OF**  
**THE PERU-AUSTRALIA FREE TRADE AGREEMENT (PAFTA)**

**Introduction**

The Department of Foreign Affairs and Trade (DFAT) provides this opening statement to the Joint Standing Committee on Treaties (JSCOT).

PAFTA is a comprehensive FTA that will open new trade and investment opportunities for Australia, building on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). It supports Australia's goals of strengthening our economic relationships with Latin America and will help to facilitate regional value chains between the Americas and Asia.

**PAFTA and the TPP-11**

As a plurilateral agreement with eleven parties, the negotiation of TPP-11 needed to take into account the interests of a diverse group of countries. PAFTA reflects Australia and Peru's bilateral interests. As such, Australia was able to secure greater market access into Peru as there were fewer market access sensitivities than with all TPP-11 parties.

In PAFTA, Peru has provided Australia with greater market access than it agreed to provide in the TPP-11. PAFTA provides for better treatment than the TPP-11 for goods covered by 1405 tariff lines. 93.5 per cent of Peru's tariff lines will be eliminated to zero on entry into force, rising to 99.4 per cent of tariff lines within 10 years.

Thousands of tariffs are phased at faster rates under PAFTA than under the TPP-11. Under TPP-11, Peru will eliminate tariffs on approx. 81 per cent of its tariff lines from entry into force of the agreement, and ultimately will eliminate 99.3 per cent of all its tariffs. The TPP11 eliminates 99.3% of tariffs over 16 years. Under PAFTA more than 99 per cent of tariffs will be eliminated in 5 years. PAFTA offers Australian exporters a significantly lower phasing period to access tariff eliminations.

Nine of Australia's top ten goods exports to Peru are industrial products. PAFTA locks in zero tariffs for all of Australia's main industrial exports to Peru. PAFTA includes tariffs commitments across a broad range of Australia's export interests:

- Machinery: 95 per cent of tariffs (up to 17 per cent) will be eliminated on entry into force, remaining tariffs will be eliminated within five years (6 or 11 years under the TPP-11)
- Paper and paperboard: 86 per cent of tariffs (9 per cent) will be eliminated on entry into force, covering over 95 per cent of Australia's current exports of these products to Peru, all remaining paper and paperboard tariffs will be phased out within five years (6 or 11 years under the TPP-11)
- Beef cuts: tariffs (up to 17 per cent) will be eliminated within five years (11 years under the TPP-11)

- Wine: elimination of tariffs (up to 9 per cent) across products of commercial interest to Australia on entry into force, with the remainder being phased out over 5 years (6 years under the TPP-11)
- Retail Medicines: tariffs on will be eliminated on entry into force (11 years under the TPP-11)
- Plastics: tariffs on many products will be eliminated either immediately or within 5 years (11 years under the TPP-11)
- Wood products: tariffs will be eliminated over 5 years (11 years under the TPP-11).

Peru provided significant new market access for Australia in PAFTA for four of its so called “price band” products (an additional variable tariff of up to 20 per cent). Australia will receive tariff-free and price band-free quotas on:

- Sugar: on entry into force of the agreement, Australia will have duty free access of 30,000 tonnes of sugar into Peru, growing to 60,000 tonnes in five years and 90,000 tonnes in 18 years;
- Dairy: on entry into force, Australia will have duty free access of 7,000 tonnes of dairy products into Peru, growing to 10,000 tonnes in five years;
- Rice: on entry into force, Australia will have duty free access of 9,000 tonnes of rice products into Peru, growing to 14,000 tonnes in five years;
- Sorghum: on entry into force, Australia will have duty free access of 15,000 tonnes of sorghum products into Peru, growing to 20,000 tonnes in five years.

The price band was not subject to reduction in the TPP-11 thereby effectively excluding trade. A comprehensive list of PAFTA market access outcomes that are better than TPP-11 outcomes is at Attachment A.

Delay in the ratification of PAFTA will have costs for certain Australian sectors. The example of beef is provided below:

<b>Duty payable on Australian beef</b>				
Duty = percent of customs value of import				
Beef – fresh or chilled carcasses and half-carcasses (HS Code 0201.10)				
Beef – frozen – carcasses and half-carcasses (HS Code 0202.10)				
Date	Duty for EIF Dec 2018	Duty for EIF 1/1/2019	Difference	Duty on US product
Dec 2018	13.8	17	3.2	8.3
1 Jan 2019	10.2	13.8	3.6	6.7
1 Jan 2020	6.8	10.2	3.4	5.0
1 Jan 2021	3.4	6.8	3.4	3.3
1 Jan 2022	Free	3.4	3.4	1.7
1 Jan 2023	Free	Free	-	Free
Beef – fresh or chilled cuts (other than fine cuts) with bone in (HS Code 0201.12)				
Beef – fresh or chilled cuts (other than fine cuts) boneless (HS Code 0201.13)*				
Beef – frozen cuts (other than fine cuts) with bone in (HS Code 0202.12)*				
Beef – frozen cuts (other than fine cuts) boneless (HS Code 0202.13)*				

Date	Duty for EIF Dec 2018	Duty for EIF 1/1/2019	Difference	Duty on US product
Dec 2018	8.8	11	2.2	5.0
1 Jan 2019	6.6	8.8	2.2	2.5
1 Jan 2020	4.4	6.6	2.2	Free
1 Jan 2021	2.2	4.4	2.2	Free
1 Jan 2022	Free	2.2	2.2	Free
1 Jan 2023	Free	Free	-	Free

\* For these cuts, the US has an annual duty-free quota, with duty payable only on shipments in excess of the quota.

In PAFTA these products have five year tariff elimination compared with eleven years in the TPP-11.

### ***Education services***

Peru has undertaken to **recognise Australian university degrees** following ratification of PAFTA. According to the ABS, Australia earned \$45 million in education exports to Peru in 2017, which comes from Peruvian students studying in Australia. The number of Peruvian students commencing higher education courses in Australia have increased by more than 26 per cent so far in 2018 compared to 2017<sup>1</sup>.

Since 2016, Peru has not recognised university degrees from any country with which it does not have a bilateral agreement. Without PAFTA, Peru will not recognise Australian university degrees and the growing number of Peruvian students in Australia would face difficulties seeking employment when they return to Peru. On the basis of bilateral FTAs, Peru already recognises university degrees from the US and EU providing them with a market advantage over Australian education providers.

### **Multiple opportunities for market access**

Australia has negotiated multiple FTA pathways for greater access with other trading partners. Bilateral FTA negotiations with Japan took place alongside TPP and Regional Comprehensive Economic Partnership (RCEP) negotiations. Australia currently has multiple FTA arrangements with Chile, Malaysia, New Zealand, Thailand and Singapore. The TPP-11 that enters into force on 30 December 2018 will increase Australia's FTA arrangements with New Zealand to three, Singapore to three and Japan to two. Every Australian FTA partner also provides access opportunities under the WTO approach.

When exporting to Peru, traders will be able to continue operating as they did before the TPP-11 and PAFTA entered into force. However, they will also be able to consider what benefits the TPP-11 and PAFTA offer their business and, if it is in their interests, to use one or both FTAs to improve access to Peru.

<sup>1</sup> Source: [https://internationaleducation.gov.au/research/International-Student-Data/Pages/InternationalStudentData2018.aspx#Pivot\\_Table](https://internationaleducation.gov.au/research/International-Student-Data/Pages/InternationalStudentData2018.aspx#Pivot_Table)

The Government is working to help Australian traders maximise the benefits of FTAs. This has included extensive outreach through FTA roadshows, the establishment of an FTA Portal, and regular consultation with businesses. The FTA Portal is a website that contains easy-to-access information about the specific benefits of Australia's FTAs in both goods and services as well as trade data. The Portal helps businesses – particularly SMEs – by improving accessibility of information on FTAs, enabling them to quickly compare FTAs and choose the one that offers the greatest benefits to their business. DFAT specifically targeted SMEs in its user testing of enhancements to the Portal to ensure it can be used effectively. The Portal has attracted over 210,000 unique users since its launch in 2015 and is attracting 2,600 users each week.

Analysis of Australia's FTA utilisation rates demonstrate that our FTAs are working to create opportunities for Australian exporters – the usage rate under our FTA with China is over 85 per cent, and figures for Japan are over 90 per cent. Australian businesses are using the rules of origin in FTAs, because doing so increases their competitiveness. Additional FTAs provide businesses with choices, but do not impose additional costs.

### **Labour Market Testing (LMT) Waiver and Temporary Entry Commitments**

Temporary entry commitments in FTAs can help facilitate trade and investment. The PAFTA negotiation succeeded in securing access for Australian business visitors, investors, technicians and other skilled professionals seeking to work temporarily in Peru. This outcome reflects Australian commercial interests, particularly in the mining and mining services-related sectors.

Under PAFTA, Peru has undertaken not to require labour market testing for Australians working temporarily in Peru, but Australia has retained the right to require labour market testing for Peruvian contractual service suppliers seeking to work temporarily in Australia. Australia has existing World Trade Organization commitments not to impose labour market testing on Intra-Corporate Transferees or Independent Executives and this has been reaffirmed in PAFTA. In 2017, there were more Australians working temporarily in Peru than Peruvians working in Australia.

### **Investor-State dispute settlement in PAFTA**

Investment is a major feature of the Australia-Peru economic relationship.

Australian companies are amongst the largest foreign investors in Peru's mining sector, with an estimated \$5 billion worth of investments. During consultations on PAFTA, stakeholders that supported the inclusion of Investor-State dispute Settlement (ISDS), included the Minerals Council of Australia, Rio Tinto, and BHP. The Australian Fair Trade and Investment Network (AFTINET) opposed the inclusion of ISDS.

An ISDS mechanism has existed between Australia and Peru for over 20 years pursuant to the *Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol* which entered into force on 2 February 1997 (1997 IPPA).

PAFTA provides an opportunity to update this older-style bilateral investment treaty, with its broadly drafted provisions, with a modern investment chapter containing detailed investment protections and explicit procedural and substantive safeguards. (The 1997 IPPA will

terminate upon entry into force of PAFTA, or upon entry into force of TPP-11 for Peru and Australia, whichever happens first.)

Peru is not among the first six countries for which the TPP-11 will enter force on 30 December, 2018. Peru has a different ratification process for TPP-11 which is not as straightforward as the ratification process for PAFTA, so it may be some time before it enters into force for Peru. During this time, if PAFTA is not ratified, the 1997 IPPA will continue to apply.

At the time of negotiating PAFTA, there was some uncertainty around the future of the TPP-11. In this context, the desirability of providing certainty and continuity in relation to the enforcement of investment protections for the significant level of Australian investment in Peru, militated in favour of the inclusion of ISDS provisions in PAFTA.

The ISDS mechanism in PAFTA includes the safeguards that are contained in the TPP-11 investment chapter, as well as additional safeguards. Both TPP-11 and PAFTA explicitly recognise that governments have an inherent right to regulate in the public interest, such as in relation to health and the environment. PAFTA also includes a broader safeguard on public health measures, as well as a general exceptions provision in relation to, amongst other things, animal or plant life or health, and the conservation of exhaustible natural resources. Like TPP-11, PAFTA also maintains Australia's right to take measures for the protection of its essential security interests. Unlike the TPP-11, ISDS does not apply to the financial services chapter in PAFTA.

PAFTA includes procedural safeguards to enhance the arbitration process, including:

- a requirement that hearings will be open to the public;
- a requirement that documents filed in the arbitration, as well as the tribunal's decision, will be made public;
- expedited review of claims that are baseless, or manifestly without legal merit; and
- rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court or other dispute settlement procedures.

PAFTA includes requirements that arbitrators comply with rules on independence and impartiality, including on conflicts of interests.

A table of safeguards from the PAFTA text is at Attachment B.

Given Australia's significant investment profile in Peru, the desirability of updating the 1997 IPPA, the inclusion of robust procedural and substantive safeguards, and the overall balance of the deal, the Government decided that it was in the national interest to include ISDS in PAFTA.

## **Conclusion**

PAFTA would contribute to Australia's FTA coverage by providing Australian companies advantages vis-a-vis their international competitors in pursuing investment and export opportunities in a fast growing region.

PAFTA negotiations were launched, in part, to capture the gains from TPP, and this consideration has changed with the TPP-11's imminent entry into force. PAFTA would support additional benefits for Australia, including strong market access outcomes, updated ISDS provisions, and recognition of Australian university degrees. These benefits will not be available if the agreement is not ratified.

<b>Peru-Australia FTA : Investor-State Dispute Settlement Safeguards</b>	
<p><i>PAFTA includes the procedural and substantive safeguards in relation to ISDS that are contained in the TPP-11 Investment Chapter. PAFTA also includes additional safeguards, including broader safeguards on public health measures as well as a general exceptions provision that applies to the investment chapter. An illustrative list of safeguards is set out below.</i></p>	
<b>Safeguard</b>	<b>PAFTA Text</b>
<p>Explicit recognition that Australia and Peru have an inherent right to regulate to protect public welfare, including in the areas of health and the environment.</p>	<p><b><u>Article 8.16: Investment and Environmental, Health and other Regulatory Objectives</u></b>            Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.</p>
<p>Specific general exceptions provision for the investment chapter.</p>	<p><b><u>Article 8.18: General Exceptions</u></b>            1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:</p> <ul style="list-style-type: none"> <li>a. necessary to protect human, animal or plant life or health;</li> <li>b. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter;</li> <li>c. imposed for the protection of national treasures of artistic, historic or archaeological value; or</li> <li>d. relating to the conservation of living or non-living exhaustible natural resources.</li> </ul> <p>2. The Parties understand that the measures referred to in subparagraph 1(a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph 1(d) include environmental measures relating to the conservation of living or non-living exhaustible natural resources.</p>
<p>Public health measures cannot be challenged in an ISDS claim, including the Pharmaceutical Benefits Scheme, Medicare Benefits</p>	<p><b><u>Footnote 17, Chapter 8</u></b>            No claim may be brought under this Section in relation to a measure that is designed and implemented to protect or promote public health. For greater certainty, for Australia, such measures include: measures comprising or related to the Pharmaceutical</p>

<p>Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator.</p>	<p>Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator. A reference to a body or program in this footnote includes any successor of that body or program.</p>
<p>The scope of the application of ISDS provisions has been limited. These limitations include:</p> <ul style="list-style-type: none"> <li>• social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities</li> <li>• measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage</li> <li>• Australia’s foreign investment framework, including decisions of the Foreign Investment Review Board.</li> </ul>	<p><b><u>Chapter 8, Annex 8-D: Foreign investment framework</u></b></p> <p>A decision under Australia’s Foreign Investment Framework, which comprises Australia’s Foreign Investment Policy; <i>Foreign Acquisitions and Takeovers Act 1975</i> (Cth); <i>Foreign Acquisitions and Takeovers Regulation 2015</i>(Cth); <i>Foreign Acquisitions and Takeovers Fees Imposition Act 2015</i> (Cth); <i>Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015</i> (Cth); <i>Financial Sector (Shareholdings) Act 1998</i> (Cth); and Ministerial Statements, shall not be subject to the dispute settlement provisions under Section B or Chapter 27 (Dispute Settlement).</p> <p><b><u>Annex I and Annex II (Non-Conforming Measures (NCMs))</u></b></p> <p>Australia has carve outs in its NCMs annexes relating to: social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities (Annex II, page 8), creative arts, Indigenous cultural expressions and other cultural heritage (Annex II, page 12) and Australia’s foreign investment framework (Annex I, page 3-5; Annex II, page 5-6).</p> <p>These NCMs annexes also contain a range of other carve outs.</p>
<p>Non-discriminatory regulatory actions to safeguard public welfare objectives, such as public health, safety or the environment, do not constitute indirect expropriation, except in rare circumstances</p>	<p><b><u>Annex 8–B: Expropriation</u></b></p> <p>5. Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,<sup>21</sup> safety and the environment, do not constitute indirect expropriations, except in rare circumstances.</p> <p><sup>21</sup> For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.</p>

<p>The fact that a subsidy or grant has not been issued or renewed, or has been reduced, does not breach the minimum standard of treatment obligation, even if it results in loss or damage to the investment. This includes subsidies issued under Australia's Pharmaceutical Benefits Scheme.</p>	<p><b><u>Article 8.6: Minimum Standard of Treatment</u></b></p> <p>5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.</p>
<p>Government action which may be inconsistent with an investor's expectations does not constitute a breach of the minimum standard of treatment obligation, even if it results in loss or damage to the investment.</p>	<p><b><u>Article 8.6: Minimum Standard of Treatment</u></b></p> <p>4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.</p>
<p>Parties have a right to take measures for the protection of their essential security interests.</p>	<p><b><u>Article 28.2: Security Exceptions</u></b></p> <p>Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>
<p>ISDS hearings will be open to the public, and documents filed in the arbitration, as well as the tribunal's decision, will be made public.</p>	<p><b><u>Article 8.25: Transparency of Arbitral Proceedings</u></b></p> <p>1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:</p> <ol style="list-style-type: none"> <li>a. the notice of intent;</li> <li>b. the notice of arbitration;</li> <li>c. pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 8.24.2, Article 8.24.3 and Article 8.29;</li> <li>d. minutes or transcripts of hearings of the tribunal, if</li> </ol>

	<p>available; and</p> <p>e. orders, awards and decisions of the tribunal.</p> <p>2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.</p>
<p>A Party that is not involved in an ISDS case has a right to make oral and written submissions.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.</p>
<p>The ability to permit submissions from interested individuals, including from civil society and non-governmental organisations.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>3. After consultation with the disputing parties, the tribunal may accept and consider written <i>amicus curiae</i> submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.</p>
<p>There is a requirement that the burden of proof rests with the claimant to establish its claim against a government, which also directs tribunals to decide cases in accordance with established interpretations of investment commitments.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>7. For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 8.6, the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.</p> <p><b><u>Article 8.26: Governing Law</u></b></p> <p>1. Subject to paragraph 2, when a claim is submitted under Article 8.20.1(a)(i) or Article 8.20.1(b)(i), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable</p>

	<p>rules of international law.<sup>19</sup></p> <p><sup>19</sup> For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact.</p>
<p>There are rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court or other dispute settlement proceedings.</p>	<p><b><u>Article 8.22: Conditions and Limitations on Consent of Each Party</u></b></p> <p>2. No claim shall be submitted to arbitration under this Section unless:</p> <ul style="list-style-type: none"> <li>a. the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and</li> <li>b. the notice of arbitration is accompanied: <ul style="list-style-type: none"> <li>i. for claims submitted to arbitration under Article 8.20.1(a), by the claimant’s written waiver; and</li> <li>ii. for claims submitted to arbitration under Article 8.20.1(b), by the claimant’s and the enterprise’s written waivers,</li> </ul> </li> </ul> <p>of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 8.20.</p>
<p>There is an expedited review of claims that are baseless, or manifestly without legal merit.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal’s jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 8.30 or that a claim is manifestly without legal merit:</p> <ul style="list-style-type: none"> <li>a. an objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment;</li> <li>b. on receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor;</li> </ul>

	<p>c. in deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 8.30, the tribunal shall assume to be true the claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute; and</p> <p>d. the respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.</p>
<p>The ability of the Parties to issue interpretations of the Agreement, which must be followed by ISDS tribunals.</p>	<p><b><u>Article 8.26: Governing Law</u></b></p> <p>2. A decision of the Joint Commission on the interpretation of a provision of this Agreement under Article 26.2.2(f) (Functions of the Joint Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.</p> <p><b><u>Article 8.27: Interpretation of Annexes</u></b></p> <p>1. If a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint Commission on the issue. The Joint Commission shall submit in writing any decision on its interpretation under Article 26.2.2(f) (Functions of the Joint Commission) to the tribunal within 90 days of delivery of the request.</p> <p>2. A decision issued by the Joint Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Commission fails to issue such a decision within 90 days, the tribunal shall decide the issue.</p>
<p>Mechanisms to disincentivise unmeritorious claims, such as through the award of costs against a claimant and the ability for a respondent government to recoup costs.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>6. When the tribunal decides a respondent’s objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.</p>

	<p><b><u>Article 8.30: Awards</u></b></p> <p>4. For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney’s fees.</p>
<p>Interim review and award challenges.</p>	<p><b><u>Article 8.24: Conduct of the Arbitration</u></b></p> <p>10. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any comments and issue its decision or award no later than 45 days after the expiration of the 60 day comment period.</p> <p><b><u>Article 8.30: Awards</u></b></p> <p>9. A disputing party shall not seek enforcement of a final award until:</p> <ul style="list-style-type: none"> <li>a. in the case of a final award made under the ICSID Convention: <ul style="list-style-type: none"> <li>i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or</li> <li>ii. revision or annulment proceedings have been completed; and</li> </ul> </li> <li>b. in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 8.20.4(d): <ul style="list-style-type: none"> <li>i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or</li> <li>ii. a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.</li> </ul> </li> </ul>
<p>Time limits on bringing a</p>	<p><b><u>Article 8.22: Conditions and Limitations on Consent of Each Party</u></b></p>

<p>claim.</p>	<p>1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 8.20.1 and knowledge that the claimant (for claims brought under Article 8.20.1(a)) or the enterprise (for claims brought under Article 8.20.1(b)) has incurred loss or damage.</p>
<p>A requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests.</p>	<p><b><u>Article 8.23: Selection of Arbitrators</u></b></p> <p>5. The Parties shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 27 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.</p>