

# FOREIGN INVESTMENT IN COLOMBIA

Overview, principles, types of foreign investment, international instruments for the protection of foreign investment, and Pacific Alliance.

Bogotá is the first city with the best investment attraction strategy in Latin America (fDi Magazine Global Cities of the Future 2016-2017)<sup>2</sup>.

## Overview

The foreign investment system comprises direct or portfolio investments that non-Colombian residents make in Colombian territory (including free trade zones).

Investors may be individuals, legal entities, or trusts holding direct or portfolio foreign investment. Credits and transactions that involve debt do not constitute foreign investment.

## Principles of the Foreign Investment System

### Equal treatment

There is equal treatment for foreign investment and national investment. There will not be discrimination or more favorable treatment for foreign investment.

### Universality

Limitless foreign investment is authorized for all sectors of the economy, except for:

- Defense and national security activities.
- Processing and disposal of toxic, hazardous, or radioactive waste not produced by the country.
- Television services, in which foreign capital cannot exceed 40% of total capital stock.

### Automaticity

As a general rule, foreign investment does not require prior authorization; however, foreign investment should be registered before the Central Bank (Banco de la República). This registration is only for statistical purposes and grants exchange rights on investment to the foreign investor.

Foreign investment only requires prior authorization or recognition by ministries or superintendence in the case of special regime for the following industries:

- Mining
- Oil & Gas
- Insurance and finance.

### Stability

Conditions for investment reimbursement and remittance of profits may not be adversely modified for the investor. Conditions can only be modified when international reserves are less than three (3) months of imports.

## Types of Foreign Investment

### Direct

i) Participations, in any proportion, in the capital of a Colombian company, Shares, quotas, capital contributions or mandatory convertible bonds, provided they are not registered before the National Securities and Issuers Registry (RNVE by- its acronym in Spanish) or a Foreign Securities Trading System;

ii) Participations, in any proportion, in the capital of a Colombian company, Shares, quotas, capital contributions, or mandatory convertible bonds, which are registered before the RNVE, when the investor declares that they have been acquired with aims of permanence;

iii) Interests or participations in trust business entered into and with trust companies subject to inspection and surveillance of the Colombian Superintendence of finance, whose purpose does not constitute portfolio investment;

iv) Real estate located in the country, purchased for any reason, either directly or through the execution of trust business, or as a result of a process of real estate securitization, a property or construction projects, provided the respective title is not registered before the RNVE;

v) Participations or economic rights derived from acts or contracts such as cooperation, concession, management services, licensing, consortia or joint ventures or those involving transfer of technology, when they do not represent an interest in a company and the income or revenue generated by the investment depend on the profits of the company;

vi) Participations in allocated capital and supplementary investments to the allocated capital of a branch of a foreign company established in the country;

vii) Shares in private equity funds, whether registered or not before the RNVE; and

viii) Intangible assets purchased to obtain an economic benefit in the country

### Portfolio

Portfolio investment means an investment made in:

i) Securities registered before the RNVE or listed in Foreign Securities Trading Systems, except for direct investment;

ii) Participations in mutual funds;

iii) Participations in securities representing tradeable certificate of deposit programs.

## Foreign Investment Registration

The Single Regulatory Decree 1068 of 2015, as amended by Decree 119 of 2017, regulates the general foreign capital investment system in Colombia and defines it as the investment made on the aforementioned assets, provided they have been purchased by a non-resident for any reason, under an act, contract or lawful transaction. This Decree, together with Resolution 8 of 2000 issued by the Central Bank Board of Directors and External Regulatory Circular DCIN 83 of the Central Bank Department of Foreign Exchange, sets forth the obligations related to international investments, including registration of direct and portfolio foreign investments and its procedures. The same Decree recognizes the exchange rights enjoyed by duly registered foreign investment, pursuant to the regulations provided for therein.

### Exchange rights granted by the foreign investment registry

- Reinvest profits or retain in surplus undistributed profits with drawing rights and obtain their registration as foreign investment.
- Capitalize amounts with drawing rights as a result of obligations derived from investment.
- Pay abroad, through the exchange channel, net profits periodically generated by investments.
- Pay abroad, through the exchange channel, the proceeds from (i) disposal of investment within the country, (ii) liquidation of the company or portfolio, or (iii) capital reduction.

Foreign investment through the foreign import of currency should be channeled through the Foreign exchange market intermediary, that is, through an authorized exchange broker (IMC as per its acronym in Spanish) or a clearing account (i.e., a bank account abroad whose holder is a resident and that is registered before the Central Bank and subject to reporting obligations).

Foreign investment registration in foreign exchange is performed automatically by providing the minimum data of the exchange transaction for international investments (foreign exchange declaration) to the IMC. In case of channeling through clearing accounts, investment is regarded as registered with a credit to the account and the preparation of the respective foreign exchange declaration.

Any investment made by acts, contracts or lawful transactions other than a the import of currency, shall be registered at any time by the investors, their attorneys or legal representatives of the companies receiving the investment, by submitting Form No.

11 "Declaration of international investment registration" before the Central Bank, without supporting documents of the transaction.

Furthermore, when non-residents make prepayments for future capitalizations in Colombian companies, the transaction shall be reported as foreign debt liability by submitting Form No. 6 "Information of foreign debt granted to residents before a IMC, prior or during the disbursement, with purpose 43 "Prepayments for future capitalizations". Foreign exchange declared as prepayments for future capitalizations prior to July 26, 2017 shall be capitalized within 12 months of channeling the prepayment. In case that investment is not formalized, the non-resident shall remit abroad the equivalent in foreign exchange of the initially reimbursed amounts in legal tender. This remittance of non-formalized investments should also take place within 12 months of their channeling.

Investment activities (cancellation and substitution of foreign investment registration) shall be registered before the Central Bank within 6 months of the date of transaction, as the case may be. Substitution of foreign investment is registered by submitting Form No. 11 (or 11A in case of business reorganizations) and Form No. 12. This substitution applies in the following cases:

- Change of investment holder for another foreign investor
- Change of destination or company receiving the investment

Moreover, cancellation of foreign investment is performed by submitting Form No. 12 (or 11A in the case of business reorganizations) in case of partial or total liquidation of the investment, capital decrease, reacquisition of shares, corporate rights or property sale, classification as national investor, liquidation or death of the foreign investor, total or partial termination of acts or contracts without share in the capital, termination of trust business, total or partial liquidation of private equity funds, disposal to residents and business reorganization.

In order to keep the information of foreign investments updated, companies and branches under the general system that have, as of December 31, foreign investment registered with the Central Bank and are not obliged to submit financial statements to the Superintendence of Companies shall send

to the Central Bank Form No. 15 "Equity reconciliation – companies and branches under the general system" before July 15, if the company's NIT ends in an even number, or August 15, if the company's NIT ends in an odd number, every year.

In addition, from fiscal year 2017, Form No. 15 shall not be submitted when: i) in the fiscal year to be reported, there are no changes in foreign investment; and ii) the companies receiving the investment are in the process of voluntary or court liquidation, despite submitting financial information to the Superintendence of Companies.

## Instruments Signed by Colombia for the Protection of DFI

Below is the description of the international instruments used by Colombia for the protection of DFI in the country:

### International Investment Agreements (IIA)

In order to promote direct foreign investment in the economies and maintain favorable conditions for investors from other states in the Colombian territory, in the last decades several International Investment Agreements (IIA) have been negotiated and executed, which gave rise to Free Trade Agreements and Agreements on Reciprocal Promotion and Protection of Investments (ARPPi).

The purpose of these Agreements is to establish certain clear, foreseeable rules to protect DFI for foreign investors in Colombia. The purpose of these agreements is to create more legal security and stability for both foreign investors in Colombia and Colombian investments abroad.

### Existing IIAs

Japan	Pacific Alliance
South Korea	United States
Costa Rica	Spain
Mexico	Switzerland
Chile	Peru
The Northern Triangle	China
AFLC (Switzerland, Liechtenstein, Norway, Iceland)	India
European Union	United Kingdom
Canada	

### IIAs signed

Panama	France
Israel	Singapore
Korea	Turkey
European Union	

### IIAs being negotiated

Qatar	Azerbaijan
Russia	

### Double Taxation Agreements (DTA)

Colombia has been negotiating international agreements in order to avoid double taxation and prevent tax evasion by taxpayers in terms of income tax and equity, particularly in cross-border transactions. These agreements are governed by principles of public international law and serve as a foundation for the cooperation among States in the fight against tax evasion and the promotion of foreign investment.

The main characteristic promoted by DTAs to facilitate foreign investment are that they create legal stability with respect to the unification of concepts and definitions as such as, residency for tax purposes, and reduction of the effective and consolidated tax burden.

Currently, there are double taxation agreements of general application in force between Colombia and Spain, Canada, Mexico, Chile, Switzerland, India, Portugal, Czech Republic and South Korea.

Similarly, for certain activities related to air and marine transport, there are agreements in force with Argentina, Germany, Brazil, Venezuela, Italy, the United States and France. In addition, under Decision 578 of 2004 issued by the Andean Community, a system was implemented to avoid double taxation and prevent tax evasion among member countries (Bolivia, Ecuador, and Peru).

Furthermore, the agreement with France has already been signed and is pending entry into force. Some of the countries with which

Colombia is also negotiating double taxation agreements of general application are the United Kingdom, Japan, the Netherlands, Belgium and the United States.

### Free Trade Agreements (FTA)

Colombia has signed 18 Free Trade Agreements (FTA) that give it access to more than 1,500 million consumers in the world and preferential treatment with respect to customs duties in more than 45 countries.

As of this date, the FTAs in force are:

FTA	El Salvador,
Colombia – Mexico	Guatemala and Honduras
CAN	CARICOM
MERCOSUR	Chile
EFTA	Canada
United States	Agreement of partial application with Venezuela
Cuba	Nicaragua
European Union	Pacific Alliance
Korea	Costa Rica

### The agreements signed by Colombia pending entry into force are:

Panama	Israel
--------	--------

### Pacific Alliance

The Pacific Alliance is a regional integration area among Colombia, Mexico, Chile and Peru, whose populations combined amount to 217 million people, nearly 37% of the Latin American population. The average GDP per capita of the Pacific Alliance is US \$16,759 in 2015.

The objectives of the Pacific Alliance concerning trade and investment issues are:

- To build a deep integration area to advance progressively towards the free circulation of goods, services, capitals and people.
- To promote higher growth, development and competitiveness of the economies of the Parties.
- To create a platform for political coordination and economic and

commercial integration with a global scope focused on Asia Pacific.

- Law 31 of 1992 (Article 59)
- Single Regulatory Decree 1068 of 2015
- Decree 199 of 2017

With reference to investment protection agreed in Chapter 10 of the Pacific Alliance Framework Agreement, the following advances should be highlighted:

- Creation of an Investment Subcommittee that promotes cooperation and exchange of information to facilitate the investment climate in the region.
- Unification of concepts referring to Foreign Investment protection such as the concept of Investment, Covered Investment, Investor of a Party, Investor of a non-Party country, among others.
- Establishment of the principles of National Treatment, Most Favored Nation Treatment, and Minimum Level of Treatment.
- Unification of investment treatment in case of dispute.
- Procedural framework for conflict resolution in case of clear investment disputes.

Some of the advances in investment facilitation in member countries include the following objectives to be achieved:

- Unification of a Single Foreign Trade Counter among the four countries.
- Regional accumulation of origin and strengthening of the possibilities to incorporate the investor into regional and global value chains.
- Unification of rules in public purchases in Party countries.
- Project for unification of phytosanitary certificates in Party countries.

### **Mechanisms for conflict resolution in relation to foreign investment**

According to the obligation of the Colombian state to promote internationalization of economic, political, social and ecologic relations, Colombia is part of the International Centre for Settlement of Investment Disputes (ICSID). The ICSID is an institution of the World Bank whose purpose is to facilitate the resolution of investment disputes that arise between investors and states. Most of international investment agreements signed by Colombia have this instance to settle disputes between Investors and the state.

### **Applicable Regulatory Framework**

- Constitution of 1991 (Article 189 (11))
- Law 9 of 1991 (Article 15)
- Decree 1746 of 1991