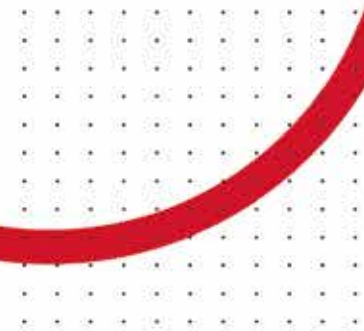




02



FOREIGN DIRECT INVESTMENT PROTECTION

AND INTERNATIONAL
EXCHANGES



BY:  LEYVA ONTIER

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What protection is granted to foreign investments in Colombia?

Protection is granted on four principles established by law:



- **Equal treatment:** The Colombian Constitution establishes that Colombian citizens and foreigners have equal rights and guarantees in accordance with the law. This means that foreign investors will have access to the benefits and guarantees provided by the government to investments made by Colombian citizens.



- **Universality:** The law allows foreign investments in all the economic sectors, except for those explicitly restricted, such as national defense and security, and toxic waste processing and disposal.



- **Automaticity:** In general, in Colombia no screening requirements apply to the investment of foreign capital, meaning that such investments do not require prior authorization, except

for some related sectors such as the financial, mining, and hydrocarbons sectors. Such investments require prior authorization from competent authorities.



- **Stability:** Conditions applicable to investments and profit remittances will not be changed in detriment of the investor. However, such conditions and rights may change in case international reserves become scarce.

How do international investment agreements negotiated by Colombia actually work?

Their purpose is to promote foreign direct investments and guarantee favorable conditions for foreign investors in Colombia. Despite the fact that each agreement has its own conditions and is a separate instrument, in general they all include a standardized set of obligations:



- **National treatment:** Grants investors from other states and their respective investments a treatment that is not less favorable than

that granted under similar conditions to national investors from the benefiting state.



- **Most-favored nation:** Grants investors from other states and their respective investments a treatment not less favorable than that granted under similar conditions to investors from other/ third states.



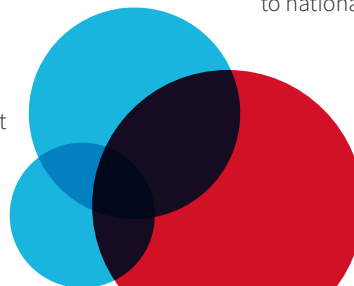
- **Minimum treatment standard:** Grants foreign investments a minimum level of treatment to foreigners investing in the benefiting country. Such level is established based on international customs and includes two types of obligations:
 - Fair and equitable treatment: Regards non-arbitrary, timely and respectful due process.
 - Full protection and security: A physical protection guarantee afforded to foreign investments, in the same manner that such protection is guaranteed to national investments.



- **Free transfer:** The obligation the benefiting state has to guarantee the foreign investor's freedom to make transfers, new investments or repatriate investments, profits, or revenues generated by said investments.



- **Prohibition of expropriation without proper compensation:** Foreign investments cannot be expropriated, unless such expropriation is made in response to public interests, and provided it is made in a non-discriminatory manner with observance of due process. Should goods be expropriated, a proper, prompt, and effective compensation shall be given. There are two types of expropriations:
 - Direct expropriation: When there is an administrative act according to which the State decides on the expropriation and establishes the respective compensation.
 - Indirect expropriation: There is no administrative act, but an act or an omission by the state affecting the investments to a degree that, in practice, it will become a direct expropriation.



- **Dispute settlement:** An arbitration clause contained in the Bilateral Investment Treaty allowing the investor to have a direct recourse to an international arbitration process, in case an obligation contained in the investment treaty has been defaulted.

Current international investment agreements

Country	Entry into force
Mexico	FTA entered into force since 1995 Amendment Protocol in 2011.
Chile	May 2009
North Triangle	Guatemala: November 2009 El Salvador: February 2010 Honduras: March 2011
EFTA	Switzerland: July 2011 Liechtenstein: July 2011 Norway: September 2014 Iceland: October 2014
Canada	August 2011
United States of America	May 2012
Spain	September 2007
Japan	September 2015
Switzerland	October 2009
Peru	December 2010
China	July 2012
India	July 2012
United Kingdom	October 2014
France	Pending
Israel	Pending

* Source: www.tlc.gov.co



What are the basic concepts of the exchange regime?



Exchange Market Intermediaries (IMC): According to Article 7 of External Resolution No. 1 of May 2018 from the Central Bank's Board of Directors, these are:

- Bank entities
- Financial corporations
- Financing entities
- Financiera de Desarrollo Nacional (FDN)
- Banco de Comercio Exterior de Colombia S.A. - Bancoldex
- Financial cooperatives
- Stock brokers
- Exchange intermediation and special financial service companies
- Companies specializing in deposits and electronic payments



Channeling: According to Article 69 of External Resolution No. 1 of 2018 from the Central Bank's Board of Directors, all foreign currency used to make foreign capital investments in Colombia should be channeled through the IMCs or the compensation accounts. On a monthly basis, Colombian residents should report such activities to the Central Bank and to National Directorate of Taxes and Customs (DIAN).



External loans: Loans between residents or IMCs and nonresidents. These should be channeled through the exchange market.



Compensation accounts: Foreign currency bank accounts opened by residents in foreign financial entities.



Exchange statement: According to Article 88 of External Resolution No. 1 of May 2018 from the Central Bank's Board of Directors, the minimum information related to exchange activities channeled through the exchange market, provided by residents and nonresidents performing exchange activities and delivered to the Central Bank by the IMCs and the compensation account holders.



International investments: Include foreign capital investments in the country (foreign investment in Colombia) and Colombian capital investments abroad (Colombian investments abroad).



Foreign capital investor: Natural or legal persons making direct or portfolio foreign investments according to Article 2.17.2.2.1.3 of Decree 1068 of 2015.



Nonresidents: For tax purposes, it includes natural persons not living in the national territory, and legal entities, including nonprofit organizations, that are not domiciled in the national territory.



Residents: Natural persons living in the national territory and public law entities, legal entities, and nonprofit organizations domiciled in Colombia, as well as their branch offices.

What is the exchange market?

The exchange market consists of all foreign currency entering and leaving the country, and it is divided between the exchange market and the free market.

Consists of all foreign currency that has to be mandatorily channeled through the intermediaries authorized for this purpose, or through the compensation mechanism. Foreign currency that, despite not being subject to this obligation, is channeled voluntarily through this mechanism is also part of the exchange market. The following operations have to be mandatorily channeled through the exchange market:

- Import and export of goods.
- External indebtedness operations between residents, and their respective financial costs.
- Foreign capital investments in the country, and their respective yields.

- Colombian capital investments abroad, and their respective yields.
- Financial investments in stocks and in assets abroad, as well as their respective yields, unless such investments are made with foreign currency generated by activities that do not have to be channeled through the exchange market.
- Endorsements and guarantees in foreign currency.
- Operations involving derivatives.

What is considered direct investment?

The following are considered direct investments:

- Acquisition of participations, shares, social quotas, payments representing company capital, or bonds that have to be converted into shares.
- Acquisition of rights or participations in trust deals executed with trust companies

subject to the surveillance of the Colombian Superintendency of Finance whose object is not listed in the conditions established in paragraph B of Article 2.17.2.2.1.2 of Decree 1068 of 2015.

- Acquisition of real estate properties, either directly, under trust deals, or as a result of a real estate securitization or of a construction project.
- Contributions made by the investor through acts or contracts, such as collaboration, concession, administration service, or licensing agreements or those involving technology transfers, provided not representing participation in a company and provided the revenues generated by the investor to the titleholder depend on the company profits.
- Investments additional to the branch offices' assigned capital.
- Investments in private capital funds, as indicated in Book 3 of Part Three of Decree

2555 of 2010 or in norms amending or replacing it.

What is considered portfolio investment?

Investments made in the National Issuers and Securities Registry (RNVE) and participations in collective investment funds and in securities listed in the foreign securities quotation systems.

Loans and operations involving indebtedness will not be considered foreign investment acts.

What is the free or non-regulated market?

It includes operations that do not have to be channeled through the exchange market. Despite these operations not having to be channeled through the exchange market, they may be voluntarily channeled, providing to the IMC or to the Central Bank the minimum information required for service operations, transfers, and other activities.



How are foreign investments registered?

- Investors, their attorneys, or the legal representatives of companies benefiting from the investment should register their international investments before the Central Bank.
- All foreign currency activities from international investments should be channeled through the exchange market.
- When such channeling is made through the IMC, the exchange operation information should correspond to that of the day when the foreign currency is purchased/sold.
- When the channeling is made through compensation accounts, the information should correspond to that of the day when the foreign currency is credited/debited to/from the compensation account.
- Amendments, changes, corrections required due to typing errors, and annulments of exchange statements should be made through the IMC that initially delivered the exchange statement.



Direct investments Registry

- Direct investments in foreign currency will be considered registered automatically with the information provided in the exchange statement.
- Foreign capital direct investments other than those made in foreign currency should be registered at any time with Form No. 11.
- Direct foreign capital investments from corporate reorganization processes (mergers, spinoffs) should be registered at any time with Form No. 11A.

Substitution of direct foreign investments

- Foreign capital direct investment substitutions: Changing the investment titleholders to other nonresident investors,

as well as changes made to the destination or the company receiving the investment. This should be requested by simultaneously submitting Form No. 12.

- The time allowed for the above is 12 months for substitutions made before July 26 of 2017, six months for those made thereafter. This time counts from the date of the operation.

Foreign direct investment cancellation

- Cancellation of foreign capital direct investment: Reduction or full or partial liquidation of an investment previously registered before the Central Bank. This should be requested by delivering Form No. 12.

For additional information on foreign investment registration, please refer to the Central Bank's External Regulatory Circular DCIN83.

Portfolio investment registration

- Foreign capital portfolio investments made by channeling foreign currency are automatically registered upon the information contained in the exchange statement being delivered.
- Foreign capital portfolio investments with no foreign currency channeling are registered with the local securities centralized deposit account annotation.
- Titleholding or portfolio investment composition changes (substitutions) and cancellations will be reported through the Foreign Capital Portfolio Investment Form (IPEXT), in a consolidated manner and without a separate report.

What exchange rights are granted by the registration of foreign investment?

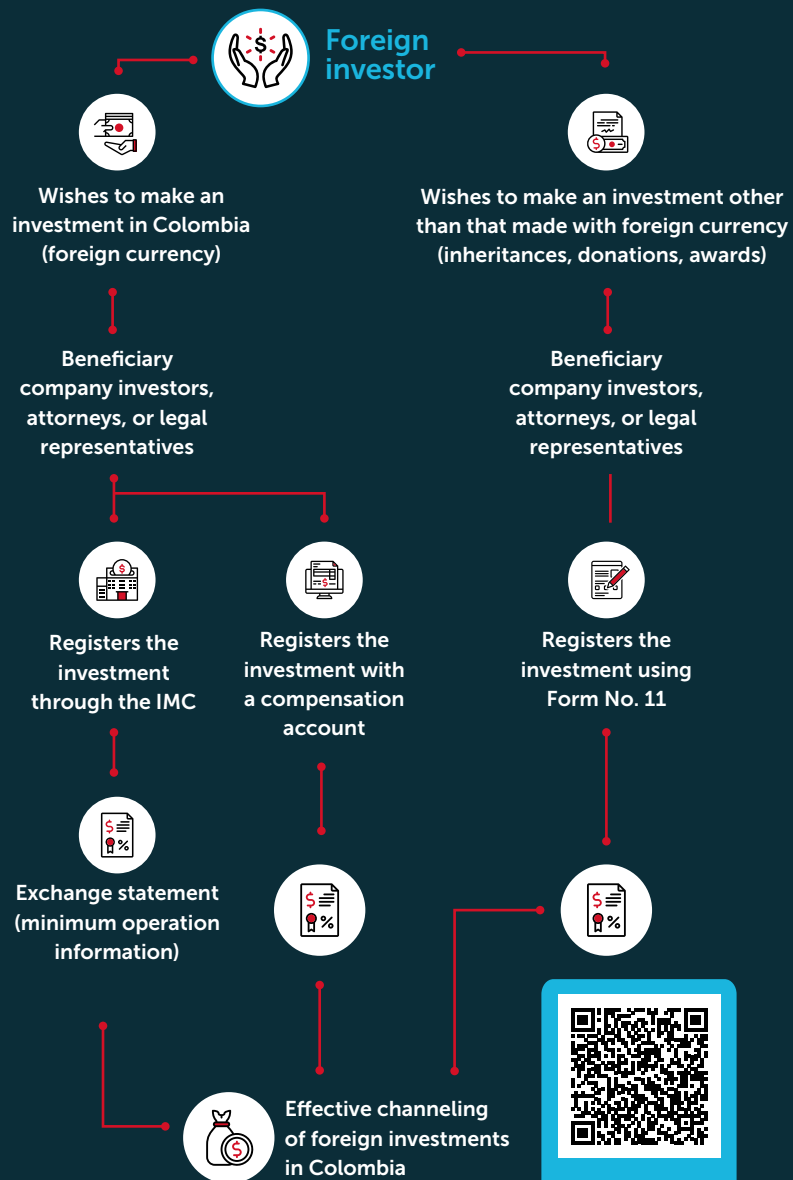
Foreign investments properly registered before the Central Bank afford the following exchange rights to the investor, according to article 2.17.2.2.3.1 of Decree 1068 of 2015:

- Reinvesting profits or withholding in surplus accounts undistributed profits with remittance rights.
- Capitalizing amounts that can be remitted, provided they result from obligations arising from the investment.

- Remitting abroad, in freely convertible currency, verified net profits periodically generated by the investments, based on end-of-year general balance sheets, or based both on these and the act or contract governing the remittance in the case of a direct investment.
- Remitting abroad amounts generated by the sale of the investment in the country, by the company liquidation, or by its capital reduction.



What are the steps for exchange registration?



More information on this topic