



02

FOREIGN DIRECT INVESTMENT

PROTECTION AND
INTERNATIONAL
EXCHANGES



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Foreign Direct Investment Protection and International Exchanges

The protection granted to foreign investments in Colombia is based on four principles protected by the legislation:



- **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.

International Investments Agreements Negotiated

Their purpose is to promote foreign direct investments and guarantee favorable conditions for foreign investors in Colombia. Even though 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 treatment:** 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 must 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
Israel	August 2020
France	Pending

* Source: www.tlc.gov.co

International Exchanges Regime

In Colombia, the Central Bank may intervene in the market to regulate the liquidity of the financial market and the normal functioning of the internal and external payments of the economy. In this sense, the country has a regime of regulated international exchanges, in which the Board of Directors of the Central Bank is the monetary, exchange rate, and credit authority.

Likewise, the Superintendency of Companies and the Dian are entities responsible for monitoring, within their competence, compliance with the exchange rate regime, and the imposition of sanctions arising from their non-compliance.

In Colombia, the exchange rate regime is determined, among others, by the following regulations:

REGULATION	SUBJECT
Colombian Political Constitution	Articles 113, 150, and 189: On the distribution of competences among branches of public authority. It delegates the regulatory power of the exchange rate regime to the Congress of the Republic. Article 371: Establishes the competence of the Central Bank as the regulatory authority for the currency, foreign exchange, and credit. Article 372: Classifies the Board of Directors of the Central Bank as the highest authority on monetary, foreign exchange and credit matters. Article 373: Determines that the Central Bank must set the exchange rate management policy.
Law 9 of 1991	Framework Law on International Exchanges. This Law outlines the criteria and purposes that the exchange rate regime must have.
Law 31 of 1992	Organic Law of the Central Bank which establishes the rules the Central Bank must observe for the exercise of its functions, the regime of international exchanges, the rules for the issuance of the Bank's Statutes, and the inspection, monitoring, and control functions. It also determines the entities which will administer the development funds administered by the Bank, and other provisions.
Unique Decree 1068 of 2015	By which the Single Regulatory Decree of the Finance and Public Credit Sector is issued. It compiles Decree 1735 of 1993 that regulated Law 9 of 1991. It regulates, among others, the quality of resident and non-resident, and channeled operations through the foreign exchange market. It also compiles Decree 2080 of 2000, which establishes the regime of foreign capital investment in Colombia and Colombian capital abroad, and compiles the amendments introduced by Decree 119 of 2017.
External Resolution 1 of 2018	It regulates compulsory exchange transactions able to be channeled through the foreign exchange market, as well as foreign exchange market intermediaries and mechanisms for trading foreign exchange in the country.
External Regulatory DCIN-83 of the Central Bank	Regulates exchange procedures for channeling operations, registration, and exchange operations information.
Decree 2245 of 2011	It regulates the sanctioning regime for infringements of the foreign exchange regime in respect of transactions within the competence of the tax authorities of the country.



According to the Central Bank, the Exchange Regime is based on the following principles:

- Equal treatment between nationals and foreigners.
- Universality, elimination of restriction of economic sectors for foreign investment, except as expressly determined by law.
- Automaticity, according to which foreign investment does not require prior authorization except in cases expressly determined by law. However, operations must be registered before the Central Bank.
- Stability, according to which the conditions for reimbursement of investment and remitting profits may not be adversely modified.

Types of Foreign Investment

The foreign exchange market is made up of all currencies entering and leaving the country and is divided into foreign exchange market and the free market, by which foreign exchange transactions are carried out, as described in Article 4 of Law 9 of 1991, and which are “All those involving or likely to involve payments or transfers of foreign currency between residents and non-residents of the country”, according to the Decree 1735 of 1993.

- **Exchange Market:** It is defined by the Article 36 of External Resolution 1 of 2018, issued by the Board of Directors of the Central Bank, as “constituted by all currencies which must be channeled through intermediaries authorized for that purpose or through the clearing mechanism provided for in this resolution. Currencies which, however exempt from this obligation, are voluntarily channeled through this obligation shall also be part of the foreign exchange market.” Also, Article 4 of External Resolution 1 of the Board of Directors of the Central Bank, provides that the following operations shall be mandatorily channeled:
 - Import and export of goods.
 - External indebtedness operations conducted by residents, as well as the financial costs inherent therein.
 - Foreign capital investments in the country, as well as the returns associated with them.
 - Investments of Colombian capital abroad, as well as the returns associated with them.
 - Financial investments in securities issued and assets based abroad, as well as the returns associated with them, except where investments are made with foreign exchange from transactions that should not be channeled through the foreign exchange market.
 - Guarantees and warranties in foreign currency.
 - Derivative operations.

Foreign-invested acts shall not constitute credits and transactions involving indebtedness.

In other words, the foreign exchange market includes foreign capital investments in Colombia, regulated by Decree 1068 of 2015, which provides for the following types of foreign investment:

Direct Investment:

The following operations are considered direct investment:

- The acquisition of shares, shares, social shares, contributions representative of a company’s capital or bonds obligatory convertible into shares.

- The acquisition of rights or shares in fiduciary business concluded with fiduciary companies subject to the inspection and supervision of the Colombian Financial Superintendence.
 - The acquisition of real estate, directly or through the conclusion of fiduciary business, or as a result of a process of real estate securitization of a property or construction projects.
 - Contributions made by the investor through acts or contracts, such as collaboration, concession, management services, licensing or those involving technology transfer, where this does not represent a stake in a company and the income generated by the investment for its owner depends on the profits of the company.
 - Additional investments to the allocated capital of branches.
 - Investments in private equity funds covered by the Third Book of Part Three of Decree 2555 of 2010 or the rules amending or replacing it.
- **Portfolio Investment:** Are considered a portfolio investment the securities registered in the national securities register and issuers, RNVE, shares in collective investment funds, as well as in securities listed in foreign securities trading systems, according to Article 2.17.2.2.1.2., Decree 1068 of 2015.
- **Free market:** Also called unregulated market, this comprises transactions that are not necessarily able to be channeled through the exchange market. While these operations are not necessarily able to be channeled through the foreign exchange market, they may be channeled voluntarily, informing the Exchange Market Intermediary (hereinafter BMI) or the Central Bank of the minimum information for operations services, transfers, and other concepts.



Registration of foreign investment

The international investment includes foreign capital investments in the country and Colombian capital investments abroad.

International investments must be registered before the Central Bank by investors, their representatives, or legal representatives of the companies receiving the investment. The registration of investments shall be made with the submission of the declaration of registration in due form. The registration of foreign capital investment to companies domiciled in Colombia is carried out by the number of shares, social shares, or representative contributions of the capital of the receiving company.

Foreign exchange movements of international investments, as already noted, will have to be channeled through the foreign exchange market, so minimum data from foreign exchange transactions for international investments will be provided to the BMI, through the Declaration of Exchange or will be transmitted directly in the case of clearing accounts.

When the channeling is made through the BMI, the exchange transaction information must correspond to the day of the purchase and sale of foreign exchange and when it is made through clearing accounts it must correspond to the day of the income or egress of the currencies in the accounts.

Modifications, changes, corrections for digitization errors, and cancellation of exchange declarations incorporated before the Central Bank must be made through the BMI that transmitted the initial declaration. The data of an exchange declaration may be modified at any time by the resident or non-resident holder of the operation. It must be indicated as "Modification" and the BMI NIT, date, number, value, and entry or egress transaction may not be changed.

Direct Investment Register¹

Direct investments made in foreign exchange shall be deemed to be recorded automatically, with the provision of the information of the minimum data required for these transactions (Declaration of Exchange), corresponding to the channeling of currencies through investors or their proxies and transmitted by BMIs or clearing accounts holders.

Direct foreign capital investments made under a lawful act, contract or operation, other than those made in foreign exchange, must be recorded at any time by investors, their representatives or legal representatives of the receiving investment companies, with the submission of Form No. 11 "Declaration of Registration of International Investments" before the Central Bank, and there is no need to present all the supporting documents of the operation.

Direct foreign capital investments resulting from corporate reorganization processes (mergers, splits) must be registered at any time by investors, their representatives or legal representatives of the receiving companies of investment, with the filing of Form No. 11A "Declaration of Registration of International Investments for Business Reorganization" before the Central Bank, and there is no need to present all the supporting documents of the operation.

Replacing Foreign Direct Investment²

The substitution of direct investment of capital from abroad is the change of the holders of the investment by other non-resident investors, as well as the change in the destination or the receiving company of the investment. The substitution may be partial or total.

The replacement of the investment must be requested by investors, their representatives or legal representatives of the companies receiving the investment, with the simultaneous submission of Form No. 12 "Declaration of Registration of Cancellation of International Investments" and Form No. 11 "Declaration of Registration of International Investments" before the Central Bank.

In cases of substitution of direct foreign capital investments arising from corporate reorganization processes, Form No. 11A "Declaration of Registration of International Investments for Business Reorganization" shall be submitted before the Central Bank.

The term for applying for replacement of foreign capital investment registration is twelve months for substitutions made before 26 July 2017 and six months for those made after that date. This term is counted from the date of the transaction.

Cancellation of Direct Investment³

Cancellation of direct foreign capital investment, total or partial decrease or liquidation of an investment previously registered before the Central Bank, when for any act or legal act the investor ceases to hold investment. Cancellation must be requested by the investor, his proxy, or legal representative or by the legal representative of the company receiving the investment, with the filing of Form No. 12 "Declaration of Registration of Cancellation of International Investments".

Portfolio Investment Register

The record of the capital investment of the external portfolio carried out through the foreign exchange channeling is carried out automatically, by providing the minimum information for foreign exchange transactions (Exchange Declaration).

The registration of capital investments without channeling foreign currency is done by making an annotation in the centralized deposit of local securities.

Changes in ownership or composition of portfolio investment (substitutions) and cancellations will be reported with the "Portfolio Outer Capital Investment Format - IPEXT", in a consolidated form and without requiring individual reports.

¹ Chapter 7, External Regulatory Circular DCIN-83, Bank of the Republic. Chapter 7, External Regulatory Circular DCIN-83, Bank of the Republic.

² Article 7.2.1.4, External Regulatory Circular DCIN-83, Bank of the Republic.

³ Article 7.2.1.4, External Regulatory Circular DCIN-83, Bank of the Republic.

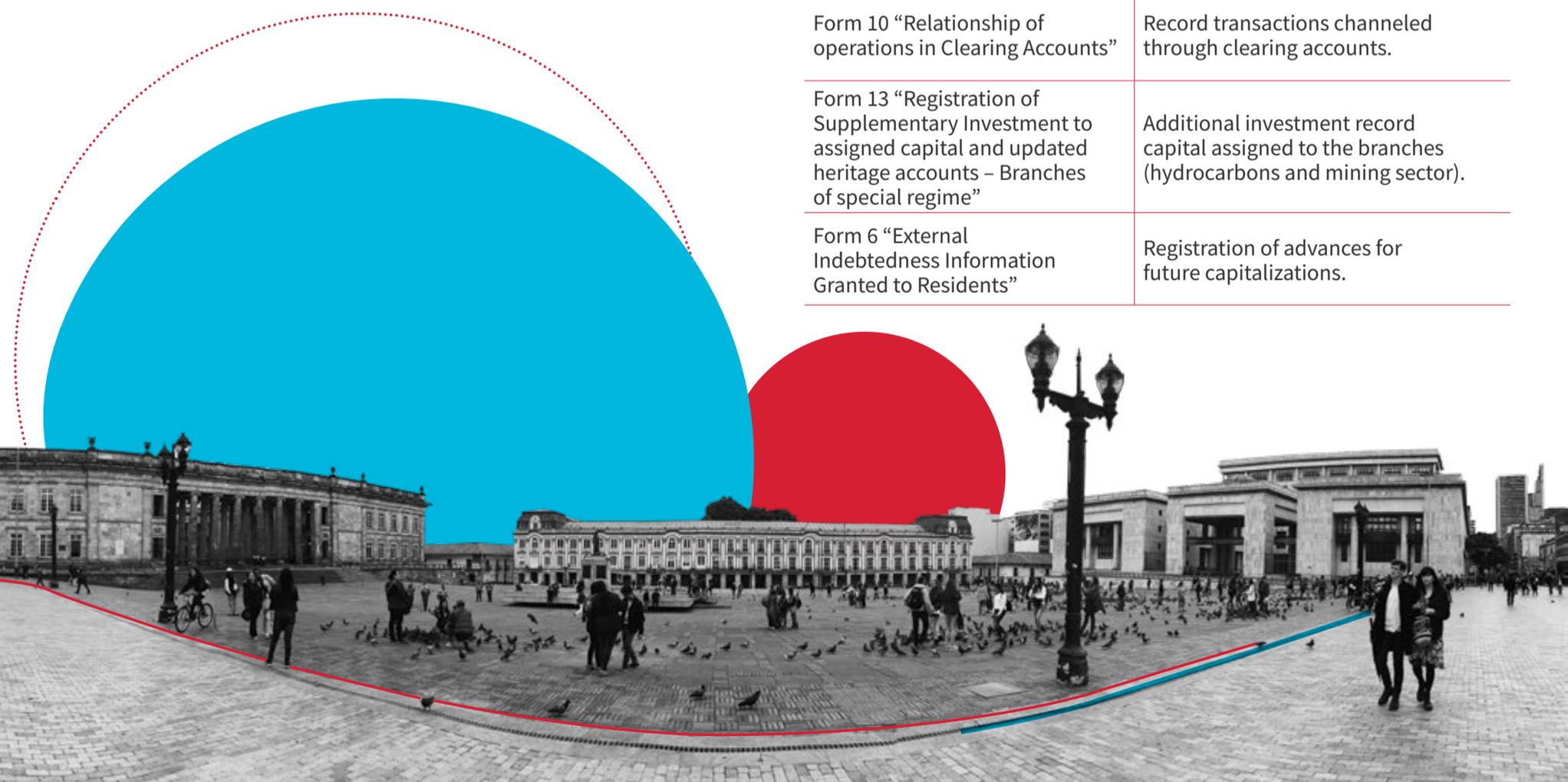
Exchange Rights Granted by the Registration of Foreign Investment

Foreign investment duly registered before the Central Bank confers on the investor the following foreign exchange rights, according to the Article 2.17.2.2.3.1. Decree 1068 of 2015:

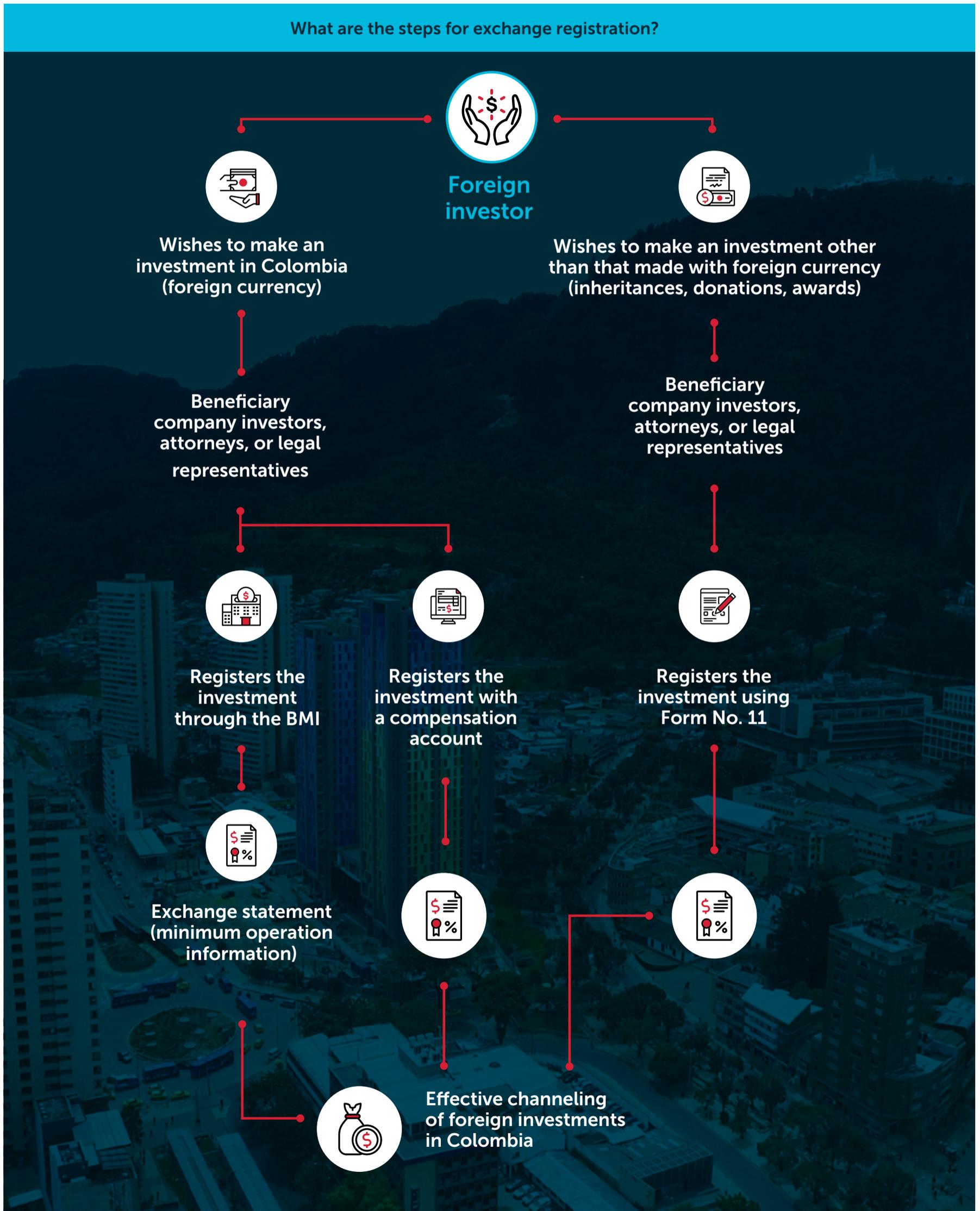
- Reinvest profits or retain non-distributed profits in the surplus with the right to send the money.
- Capitalize the sums that are entitled to be sent, if they are the result of obligations arising from the investment.
- Remit freely convertible net profits periodically generated by the investments based on the results contained in the balance sheets and the act or contract governing the contribution of the foreign direct investment.
- Remit abroad the sums received as a result of the alienation of the investment within the country, or the liquidation of the company or the reduction of its capital.

Presentation of the Exchange Forms Before the Central Bank

FORM	OPERATION
Exchange declaration "Minimum information of exchange operations for international investments"	Registration of foreign exchange transactions by international investments (currency).
Form 11 "Declaration of Registration of International Investments"	Registration of direct investments of foreign capital underacts contract or lawful operation, different from those made with currencies. Registration of investments made with the channeling of foreign exchange in financial institutions that have BMI quality.
Form 11A "Declaration of Registration of International Investments due to Business Reorganization"	Direct investment register of foreign capital derived from reorganization of business processes.
Form 12 "Declaration of Registration of Cancellation of International Investments"	Cancellation of foreign investment.
Form 11 "Declaration of Registration of International Investments" and Form 12 "Declaration of Registration of Cancellation of International Investments"	Substitution due to change of foreign investor, receiving company or Investment destination.
Form 11A "Declaration of Registration of International Investments for Business Reorganization"	Substitution derived from business reorganization processes. Investment cancellation by business reorganization processes.
Form 10 "Relationship of operations in Clearing Accounts"	Record transactions channeled through clearing accounts.
Form 13 "Registration of Supplementary Investment to assigned capital and updated heritage accounts – Branches of special regime"	Additional investment record capital assigned to the branches (hydrocarbons and mining sector).
Form 6 "External Indebtedness Information Granted to Residents"	Registration of advances for future capitalizations.



Step by step of the exchange registration



Exchange Sanctions and Monitoring Authorities

The exchange rate infringement, established in Decree 2245 of 2011, is an administrative contravention of the provisions constituting the exchange rate regime. Persons who violate the exchange rate regime in respect of operations whose supervision and control is the responsibility of the Dian shall be punished with the imposition of fines to be calculated under the provisions of Article 3 of Decree 2245 of 2011.

The infringements include the non-filing of the exchange declaration or its improper presentation, the payment or receipt of payments through the non-exchange market for compulsory transactions able to be channeled, as well as improperly channeled operations through the exchange rate market, among others, according to Article 3 of Decree 2245 of 2011.

Moreover, taking into account the competition conferred on the Superintendency of Companies, in respect of the application of the sanctioning regime for infringements of the foreign exchange regime in the field of foreign investment in Colombia, Colombian investment in the external indebtedness, under the procedure laid down in Decree 1746 of 1991, sanctions may amount to 200% of the amount of the violation.

Concepts of the exchange regime

The following are some basic definitions for understanding the exchange regime:

- **Exchange Market Intermediaries (BMI):** 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 (Bancoldex)
 - Financial cooperatives
 - Stockbrokers
 - 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 BMIs 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 loan:** Loans between residents or non-residents are external loans and must be channeled through the foreign exchange market. External loans may be stipulated, disbursed, and paid in legal currency or foreign currency, as agreed by the parties. External credits and changes to their conditions shall be reported to the Central Bank.
- **Clearing Accounts:** Foreign currency bank accounts hold by residents in foreign financial institutions, which once a compulsory exchange operation is channeled through them, acquire their compensatory nature and must be registered before the Central Bank, as established in Article 37 of the External Resolution May 1, 2018, of the Board of Directors of the Central Bank.
- **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 BMIs and the compensation accountholders.
- **International Investments:** Include foreign capital investments in the country (foreign investment in Colombia) and Colombian capital investments abroad (Colombian investment abroad).
- **Foreign Capital Investor:** Natural or legal persons making direct or portfolio investments according to Article 2.17.2.2.1.3., Decree 1068 of 2015.
- **Non-Residents:** 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.
- **Grant of Guarantees and Warranties:** Residents may grant other residents, BMIs, and non-residents guarantees and warranties to back up any obligations.
- **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.