Investment Treaty Arbitration

In 25 jurisdictions worldwide

Contributing editors
Stephen Jagusch and Epaminontas Triantafilou

2015

GETTING THE DEAL THROUGH

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Colombia

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Background

1 What is the prevailing attitude towards foreign investment?

For several decades during the second half of the 20th century the Colombian economy, as was the case with many Latin-American economies, adopted strong protectionist measures, which eventually proved to be ill-suited for achieving long-term development.

After repeated admonishments by international bodies, especially the World Bank, Colombia decided to open the gates, lowering tariffs and pursuing the internationalisation of its economy. Such a change was made in the context of a series of greater political and social changes that materialised as a result of the enactment of a new political constitution in 1991.

As expected, the adoption of this new economic model resulted in a change of attitude towards foreign investment. Consequently, through the enactment of Law 9 of 1991, Colombia initiated a series of legislative efforts to favour a suitable climate for attracting foreign investment into the country, and to authorise and promote Colombian investment abroad.

Simultaneously, the Colombian government sought to strengthen this new attitude towards foreign investment through the negotiation and execution of international investment agreements (IIAs). In so doing, Colombia ratified the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention) in 1992 and, in the following three years, signed four bilateral investment treaties (BITs) with the United Kingdom, Peru, Cuba and Spain.

These BITs, however, did not enter into force, because of the declaration of unconstitutionality made by the Colombian Constitutional Court, which found that the rules on the prohibition of expropriation without due compensation violated article 58 of the 1991 Constitution, which at the time allowed one form of expropriation, expropriation for equitable reasons, to take place without compensation.

With the efforts to create a favourable climate for foreign investment via the assumption of international obligations proving to be unsuccessful, an amendment of the constitution was pursued by the government, encouraged through the national development plan for the period 1998–2002. With the majority of the congress's approval, the rule allowing expropriation for equitable reasons was removed from the constitution and with it, the major constitutional obstacle for the negotiation and execution of IIAs.

Furthermore, the National Council on Economic and Social Policy (CONPES) issued document number 3135, in which it defined policy guidelines for the negotiation of IIAs based on the assumption that:

> *Foreign investment increases the capital of the country, acts as a source of external financing and complements internal savings [...] creates a transfer of tangible and intangible assets that provide technology and training of the labour force, generates employment, develops productive processes and strengthens commercial ties and the export capacity of the country, making it more competitive.*

Colombia has favoured foreign investment in the country ever since the enactment of the new constitution and the change in the state's economic model that it implied, as well as national investment abroad, based on the assumption that it constitutes a key factor for long-term development. Consequently, encouragement of foreign investment has been included in all the national development plans (NDPs) approved for 1998–2002, 2002–2006, 2006–2010 and 2010–2014. Different efforts have been undertaken in several areas, especially national security, international policy, and modernisation and harmonisation of national legislation to create a favourable climate for foreign investment.

Finally, the Colombian Constitutional Court now recognises the promotion and protection of foreign investment as a necessity of the present times, in the following terms:

> *The disappearance of national borders, for certain purposes, it seems, in the long run, is a state of affairs from which states may not easily escape.*
>
> *At present, economic protectionism, which encourages countries to withdraw into themselves, ignoring the flow and reflux of international trade, can only lead such countries to submit themselves to ostracism and become a sort of pariah of the international society. By the same token, the internationalisation of economic relations becomes a necessity for the survival and development of states that transcends ideologies and political programmes.*

2 What are the main sectors for foreign investment in the state?

In 2014, the main sectors for foreign investment in Colombia were: mining (23.3 per cent of investment in the sector is foreign); manufacturing (20.2 per cent); oil (19.2 per cent); and transport, storage and communications (18.6 per cent).

According to the Central Bank, as of 8 August 2014, oil and gas and mining represented 83.7 per cent of the total inflow of foreign investment in Colombia (US$8.245 billion). (Reporte trimestral de inversión extranjera directa en Colombia a primer trimestre 2014. Agosto de 2014.)

3 Is there a net inflow or outflow of foreign direct investment?

Colombia was ranked 19th host economy of the world, and 4th in its region, with a net inflow of US$16.354 billion in 2013. With regard to the outflow of foreign direct investment, after a considerable decrease in 2012, 2013 closed with a net of US$7.652 billion, making Colombia as the third biggest home economy in the region (http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf).

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

There is no legislation governing investment agreements between foreign investors and the state or state-owned entities.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Colombia is party to a number of BITs and FTAs that contain investment chapters. All BITs and FTAs with investment chapters, and their current status, are presented below.

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Agreement	Entry into force	Approving law	Current status
Chapter XVII of the FTA G2 (Mexico and Colombia)	1995	Law 172 of 1994	Standing agreement. Decision of constitutionality C-178 of 1995
BIT Peru	2003	Law 279 of 1996 (Modifying Protocol Law 801 of 2003)	Standing agreement Decisions of constitutionality C-008 of 1997 and C-961 of 2003
Chapter IX of the Chile FTA	2009	Law 1,189 of 2008	Standing agreement Decision of constitutionality C-031 of 2009
BIT Spain	2007	Law 1,069 of 2006	Standing agreement Decision of constitutionality C-309 of 2007
Chapter XII of the Northern Triangle FTA (Guatemala, El Salvador and Honduras)	Guatemala: 2009 El Salvador: 2010 Honduras: 2010	Law 1,241 of 2008	Standing agreement Decision of constitutionality: C-446 of 2009
BIT Switzerland	2009	Law 1,198 of 2008	Standing agreement Decision of constitutionality C-150 of 2009
BIT Peru (broadened)	2010	Law 1,342 of 2009	Standing agreement Decision of constitutionality C-377 of 2010
Chapter V of the EFTA FTA	2011, only with respect to Liechtenstein and Switzerland	Law 1,372 of 2010	Standing agreement Decision of constitutionality C-941 of 2010
Chapter VIII of the Canadian FTA	2011	Law 1,363 of 2009	Standing agreement Decision of constitutionality C-608 of 2010
Chapter X of the United States FTA	2012	Law 1,143 of 2007 (Protocol of amendment Law 1,166 of 2007)	Standing agreement Decision of constitutionality C-750 of 2008
BIT China	2012	Law 1,462 of 2011	Standing agreement Decision of constitutionality C-199 of 2012
BIT India	2012	Law 1,449 of 2011	Standing agreement Decision of constitutionality C-123 of 2012
BIT United Kingdom	2014	Law 1,464 of 2011	Standing agreement. Decision of constitutionality C-169 of 2012
FTA European Union (not including the countries that have ratified FTAs with Colombia)	Provisional application since July 2013. Currently stayed by an order of the Constitutional Court	Law 1669 of 2013	Signed. Pending internal approval
FTA Pacific Alliance (Colombia, Chile, Mexico and Peru)	Pending	Pending	Signed. Pending internal approval
BIT South Korea	Pending	Pending	Signed. Pending internal approval
BIT Belgium and Luxemburg	Pending	Pending	Signed. Pending internal approval of all parties
BIT Japan	Pending	Pending	Signed. Pending internal approval
BIT Singapore	Pending	Pending	Signed. Pending internal approval
BIT Turkey	Pending	Pending	Under negotiation
BIT Uruguay	Pending	Pending	Under negotiation
BIT Qatar	Pending	Pending	Under negotiation
BIT Azerbaijan	Pending	Pending	Under negotiation
BIT Russia	Pending	Pending	Under negotiation
BIT Kuwait	Pending	Pending	Under negotiation

6 Is the state party to the ICSID Convention?

Colombia signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 18 May 1993. On 15 July 1993, Colombia ratified the Convention. It entered into force on 14 August 1997.

7 Does the state have an investment treaty programme?

The first step of Colombia's investment treaty programme was taken on 2 October 2001, when the CONPES adopted document 3135, thereby defining policy guidelines for the negotiation of IIAs.

Later, under the NDP 2002–2006, adopted via Law 812 of 2003, and under the NDP 2006-2010, adopted through Law 1151 of 2007, the attraction of foreign investment became a cornerstone of public policy. Because of this governmental effort a broad list of partners were interested in trade and investment negotiations. During 2007-2010 Colombia launched its negotiation agenda with Chile, Switzerland, Mexico, the United Kingdom, the United States, Canada, Korea, China, India, France, Germany, Japan, Italy, Belgium, Sweden and the Netherlands.

The aforementioned NDP is expressly committed to raise the standards of protection for foreign investment already existent in the Colombian legal system. Consistent with this aim, foreign investment remains a key state policy. This policy was again enshrined in the NDP 2010-2014, and is expected to be found in the coming 2014-2018 NDP.

Regulation of inbound foreign investment

8 Does the state have a foreign investment promotion programme?

Colombia encourages foreign investment through Proexport, which promotes international tourism, foreign investment and non-traditional exports. Proexport identifies market opportunities, designs strategies of market access and performs specific promotion activities abroad. With regard to foreign investors, it provides information, public- and private-sector contacts, as well as assistance, which continues after the investment is established in the territory. All the services provided by Proexport in this regard are free of charge and confidential (www.investincolombia.com.co/services-provided-to-investors.html). Additionally, inbound foreign investment is encouraged through the establishment of different benefits to investors, such as the possibility to develop businesses in free zones and tax exemptions granted in a sector-by-sector basis (www.investincolombia.com.co/investment-incentives.html).

9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Besides applicable constitutional rules, especially article 100 that establishes equal protection between nationals and foreigners, the regulatory

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framework for foreign investment in Colombia is mainly constituted as follows:

- Law 9 of 1991 (on foreign exchange);
- Law 31 of 1991 (on the nature and functions of the Central Bank);
- Law 963 of 2005 (on legal stability contracts);
- Decree 1735 of 1993 (on foreign exchange regulations);
- Decree 2080 of 2000 and its amendments (general regime of foreign investment in Colombia and of Colombian investment abroad);
- Decree 2245 of 2011 (on the penalty regime and exchange administrative proceeding applicable by the foreign exchange authority);
- Decree 1939 of 2013 (on how to address investment-related disputes)
- Resolution 305 of 2014 of the Ministry of Commerce, Industry and Tourism (establishing the proceedings to address international invested-related disputes)
- External Resolution 8 of 2000 of the Board of the Central Bank and its amendments (complements the Foreign Exchange Regime); and
- Regulatory Circular DCIM-83 and its amendments chapter 7 (on foreign exchange market regulation).

According to the foregoing regulation, the Colombian legal system recognises and accepts two types of foreign investment: foreign direct investment (FDI) and portfolio investment. The following, are activities considered as FDI:

- acquisition of a company's shares, quotas, capital, capital representative contributions, or convertible bonds;
- acquisition of rights in trust agreements;
- acquisition of real estate rights;
- contributions that do not amount to participation in a company and whose revenues depend directly of the company's profit;
- supplementary investment to the assigned capital of a branch; and
- investment in local private investment funds.

FDI in Colombia can take place in one of the following forms:

- capital contributions of foreign currency;
- contribution of tangible assets as non-reimbursable imports to a company located in Colombia or in a free zone in Colombian territory;
- contribution of non-tangible assets, such as technology and industrial or intellectual property rights;
- funds in Colombian pesos with the right to be remitted abroad, such as dividends; and
- funds in Colombian pesos, from local credit operations, granted for the acquisition of shares in the stockmarket.

Additionally, the investor must bear in mind that any operation, in order to qualify as FDI, must further fulfil the following requirements:

- the investor must hold the nature of non-resident in Colombia;
- the contributions must be made through any of the aforementioned forms; and
- the funds must be effectively destined to the realisation of the investment.

The only areas in which foreign investment is forbidden are national defence and security and processing, disposal, and discard of toxic, dangerous or radioactive substances produced abroad. Further limitations include:

- foreign participation in companies that provide television services cannot exceed 40 per cent of the company's capital (Law 680 of 2001);
- shareholders in surveillance and security companies must be natural persons, of Colombian nationality (Decree 356 of 1994); and
- limitations listed as non-complying measures in relevant international agreements.

Once the foreign investor has decided to invest in the country and has identified the form through which such investment must be made, the investment must be registered with the Colombian Central Bank. Colombian foreign exchange regulations allow for capital contributions that constitute foreign investment into the country to be deposited in compensation accounts in foreign banks so as to eliminate the risk of fluctuating currencies. These accounts must be registered before the Colombian Central Bank. Finally, according to special regulation, investments in banking and finance must be previously authorised by the financial supervisory body. Investments in the oil and gas sector, on the other hand, are granted special benefits in the exchange market, once registered.

10 Identify the state agency that regulates and promotes inbound foreign investment.

As described in question 8, Proexport is tasked with the promotion of inbound foreign investment. Regulation, on the other hand, has not been attributed to one single authority. The central government regulates investment and the board of directors of the Central Bank regulates all aspects related to foreign exchange. Different supervisory bodies, for example, those with responsibilities for finance, corporations, health and public services, watch over companies under their jurisdictions and may impose sanctions whenever applicable. The National Directorate of Taxes and Customs (DIAN) also exerts jurisdiction over certain tax and customs matters.

11 Identify the state agency that must be served with process in a dispute with a foreign investor.

Unless otherwise agreed in the relevant IIA, the state agency that must be served with the process in a dispute with a foreign investor is the Directorate of Foreign Investment and Services of the Ministry of Commerce, Industry and Tourism (DIES).

Investment treaty practice

12 Does the state have a model BIT?

Throughout the 2000s, Colombia adopted three model BITs that have attempted to reflect the mainstream trends in international investment law and policy. The 2003 Model BIT was characterised by its simplicity, including narrow definitions of the different standards of treatment. This model did not prompt a surge of negotiations of either BITs or investment chapters of FTAs. The Colombian Investment Negotiating Team later adopted the 2006 model BIT, which evolved into the 2009 model BIT. Consequently, Colombia has:

- included a more detailed definition of investment, excluded procedural matters from the most-favoured-nation clause;
- extended the concept of indirect expropriation, included clauses advocating greater guarantees of regulatory powers;
- conferred binding force to the interpretative declarations issued by the parties to the treaty; and
- established a statute of limitations.

The Colombian Investment Negotiating Team is working on modifying this model to include the latest case law developments on the matter. Model BITs are not available online.

13 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Colombia has a central repository of treaty preparatory materials at the archives of the Ministry of Foreign Affairs. The Ministry holds records of Colombia's international relations dating back to the late 1820s. Notwithstanding, diplomatic reports, parliamentary ratification records, memoranda and other correspondence are not available to the public. Subscribed and ratified treaties are available online in the treaties' library of the Ministry of Foreign Affairs at: http://apw.cancilleria.gov.co/tratados/SitePages/Men%4C3%BA.aspx. The Ministry of Foreign Affairs treaties' online library enables users to research the existence of treaties and obtain key information, such as place of signature and date of entry into force. In respect of investment agreements, either BITs or FTAs, all preparatory materials can be found in the Ministry of Trade and Tourism.

14 What is the typical scope of coverage of investment treaties?

Colombia generally adopts a broad and comprehensive definition of investment, whereby it usually means every kind of economic asset that has the characteristics of investment, namely the commitment of capital or other resources; the expectation of gain or profit; and the assumption of risk for the investor.

Colombia distinguishes between foreign direct investment and portfolio investment although the character of foreign direct investment or portfolio investment does not limit the protection afforded by Colombian IIAs. However, at the request of the Central Bank, Colombia has being inclined to exclude from the definition of investment in most BITs, public debt which is a form of portfolio investment.

Regarding investor's qualifications, in a large number of Colombian IIAs dual nationals of the parties to the relevant IIA are excluded from the application of the treaty.

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Update and trends

IIAs recently signed by Colombia tend to introduce clauses regarding sustainable investment (environmental protection safeguards), whereby a party to the BIT may adopt any measure that it deems appropriate to guarantee that the investment activities in its territory should be done taking into account environmental issues.

Examples of this trend are: UK–Colombia BIT (in force since 10 September 2014); Canada–Colombia BIT; France – Colombia BIT (Not yet in force); Turkey–Colombia BIT (Not yet in force); Korea – Colombia BIT (pending internal approval); Japan –Colombia BIT (not yet in force). Likewise, recent IIAs tend to include a non-binding obligation to ensure the best efforts of the home country to encourage corporate social responsibility behaviour by its investors in the host country.

On the other hand, regarding national legislation, there are two bills being studied by congress that call for a renovation and restructuration of the surveillance and security statute.

One of the most debated topics relates to foreign participation in companies that provides private security services. One of the bills calls for an absolute ban of foreign investment in these companies, while the other advocates for the elimination of existing limitations.

Moreover, as a general rule Colombia offers protection to any foreign national or legal person (typically defined by incorporation under the laws in any part of the home state) operating in the territory of the home country. However, under the 2009 Model BIT, Colombia explicitly requires that the legal entity have substantial business activities in the territory of the party. An entity will be deemed to have substantial business activities in the territory of a party, when it has a real economic and continuous link with that party, or real or genuine economic activities there.

15 What substantive protections are typically available?

Generally, IIAs signed by Colombia contain the following types of clauses whereby protection is granted to foreign investors: national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, prohibition of performance requirements, prohibition of unlawful expropriation, guarantee of free transfers related to investments (both for initial capital, as well for any revenue until liquidation), and compensation for losses (because of war or other armed conflict, state of national emergency, civil disturbance or other similar event in that area). Colombia generally does not include umbrella clauses in its IIAs.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Colombia has never been involved in an investment treaty dispute.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

See question 16.

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

See question 16.

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

See question 16.

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

See question 16.

21 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Colombia has never been involved in an investment treaty dispute. However, pursuant to CONPES Document No. 3684, Decree 1939 of 2013 and Resolution 305 of 2014, issued by the Ministry of Commerce, Industry and Tourism, Colombia has outlined its strategy to address investment-related disputes. The defence of the state has been assigned to the Ministry of Commerce, Industry and Tourism, with the support of the National Agency for the Legal Defence of the State and with the participation of the inter-institutional support group appointed by members of the agency's board. We do not understand this to mean that the Colombian government will refrain from retaining outside counsel when faced with an investment claim.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Colombia is a party to the following international instruments on recognition and enforcement of foreign arbitral awards:

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the Montevideo Convention), approved by Law 16 of 1981;

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- Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention), approved by Law 44 of 1986; and
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), approved by Law 39 of 1990.

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

See question 16.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

See question 16.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

In the event that commencement of recognition and enforcement proceedings is needed to obtain the payment of the amounts ordered in a foreign award, such proceedings must be carried out according to the rules laid down in Law 1563 of 2012, which are modelled on the New York Convention. Consequently the only reasons for denying recognition of a foreign arbitral award are, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- the subject matter of the difference is not capable of settlement by arbitration under Colombian law; or
- the recognition or enforcement of the award would be contrary to the public policy of Colombia.

Recognition can only be denied on the basis of the certification of any of the foregoing reasons and always at the request of the interested party. Ex officio declaration is permitted only in the last two cases. The award becomes automatically enforceable before the competent judicial authority once recognition is granted.

Under the ICSID Convention, ICSID awards do not require recognition to be enforceable.

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