

# 1. Foreign Investment and Exchange Regime

This chapter presents the main aspects of the Colombian Foreign Investment Regime, enunciating the fundamental principles thereof, the types and forms of investments that may be made in the country, and the requirements to perfect them. The chapter describes, in a general manner, the Colombian Foreign Exchange Regime, which aims to promote the internationalization of the Colombian economy, to stimulate foreign trade and foreign investment, to facilitate the development of everyday transactions abroad, and to give the monetary authorities true and relevant information with regard to the influx and departure of foreign currencies into and out of the country. Particular emphasis is given to the Ordinary Exchange Regime applicable to activities other than those conducted in the oil and gas and mining sectors and their related activities, as these are governed by the special foreign exchange regime, which is applicable only to branches of foreign corporations.

## 1.1 Foreign Investment

Foreign investment is considered to be any capital investment, be it direct or as part of a portfolio, made from abroad in the Colombian territory, including Colombian Free Trade Zones, by persons who do not reside in Colombia.

A foreign capital investor is considered to be any individual or legal person that owns a portfolio or direct foreign investment. Local investors of member states of the Andean Community of Nations -CAN- are considered to be local investors for the purposes of the classification of the enterprise. Loans and transactions that involve debt do not constitute foreign investments under the Colombian foreign exchange regime.

It is presumed that those appearing as foreign investors on foreign exchange forms related to registration with the Central Bank (*Banco de la República*), are non-residents; however, it is necessary to keep the documentation that evidences their non-resident status in the country. For foreign exchange purposes, Colombian residents are considered to be all individuals living inside the national territory, legal persons domiciled in Colombia, branches of foreign corporations established in the country, and foreign individuals that remain inside the country for periods of more than six continuous or non-continuous months, over a 12 month period.

### 1.1.1 Principles of the Foreign Investment Regime

#### 1.1.1.1 Equality of treatment

Foreign investment receives the same treatment as local investment. Therefore, the imposition of discriminatory or more favorable treatments or conditions on foreign investors is not permitted.

#### 1.1.1.2 Universality

Foreign investment is welcomed in any sector of the economy, save for the following cases:

- National defense and security activities
- Processing, disposal and dumping of toxic, hazardous or radioactive waste produced outside of the country.
- Private surveillance and security companies

#### 1.1.1.3 Automaticity

Carrying out foreign investment does not require any authorization, except under the special regimes governing the mining, oil and gas, insurance, television, and financial sectors, which require, in certain events, prior acknowledgment or authorization by official authorities such as ministries and offices of superintendents.

#### 1.1.1.4 Stability

The conditions for the reimbursement of the investment and for the remittance of profits that were in effect on the date of the investment's registration may not be modified in a way that adversely affects the investor. Such scenario may only take place when the international reserves are less than the value of three months of imports.

### 1.1.2 Types of Foreign Investment

#### 1.1.2.1 Direct foreign investment

This type of investment is made:

- a. In the acquisition of equity participations, shares, corporate interests, mandatory convertible bonds, or any representative interest in a company's capital.
- b. In the acquisition of rights in autonomous patrimonies established by means of a mercantile trust agreement, in order to develop an enterprise or for the purpose of buying, selling or administering shares in companies that are not registered in the National Registry of Securities and Issuers.
- c. In the acquisition of real property or certificates of participation in real estate securitization processes or investments through real estate funds, by means of public or private tender.
- d. In taking part in activities or contracts when the same do not represent equity interests in the company, and the income produced by the investment depends on the company's profits. Such is the case with technology transfer, cooperation, concession, service administration, and licensing contracts.
- e. In investments in assigned capital or as supplementary investments to assigned capital in branches established in Colombia by foreign legal persons.
- f. In the acquisition of participating interests in private equity funds.

#### 1.1.2.2 Portfolio investment

This type of investment is made through foreign capital investment funds shares, mandatory convertible bonds, and other securities registered with the National Registry of Securities and Issuers (RNVE for its initials in Spanish).

These funds are defined as patrimonies organized under any form (mercantile trust agreements, fiduciary trusts, custodial contracts, and the like) in Colombia or abroad, with resources paid by one or more entities, individuals, or legal persons, for the purpose of making investments in the public securities market. The acquisition of shares through these funds is subject to the regulations governing public tenders for local investors, without prejudice to the regulations applicable to certain types of investments.

The administration of these funds is entrusted to an international administrator and a local administrator (trust companies and stock brokers). The latter represent the fund in all matters related to the investment and they are liable for compliance with all applicable legal and regulatory provisions.

Foreign capital investment funds may be of two different kinds:

##### 1.1.2.2.1 Institutional funds

These are funds whose resources come from private or public placements of shares or participation units abroad, and whose main purpose is to make investments in worldwide capital markets. These funds may operate in Colombia once their local administrators file the required documentation with the Office of the Superintendent of Finance pursuant to the applicable regulations, and after they have obtained their Tax Identification Numbers (NIT, for its acronym in Spanish).

##### 1.1.2.2.2 Individual funds

These funds invest in negotiable securities in the public securities market in order to channel their treasury surpluses, without such operations having to constitute their main business purpose. The establishment of this kind of fund does not require any special authorization, except as required by regulations governing local administrators.

### 1.1.3 Investment Methods

Foreign investment in Colombia may be carried out by different methods.

- a. By means of transferring foreign currencies through the exchange market, in order to make a direct contribution to the capital of a company or to acquire a third party's rights and/or shares in existing companies.
- b. In kind, directly against delivery or transfer of tangible or intangible assets, or indirectly by means of the capitalization of a sum in favor of the investor.
- c. By means of funds in local currency obtained from domestic credit transactions entered into with credit establishments, to be used for the acquisition of shares in the public securities market.

### 1.1.4 Registration of Foreign Investment

All foreign investments, regardless of their type or method, need to be registered with the Central Bank of Colombia as a necessary condition for the foreign investor to be able to exercise foreign exchange rights conferred by law. The registration procedure for foreign investments is simple and can be conducted either directly with the Central Bank through an authorized market intermediary or a current compensation account, but always by the foreign investor, his/her agent or the person representing his or her interests.

The periods and conditions for registering foreign investments differ, depending on whether the same is made directly or via portfolio, and on the method by which it is made. The general rule establishes that the registration of foreign investments occurs automatically by means of filing the international investment exchange declaration (Form No.4 of the Central Bank) with the Exchange Market Intermediary, or by means of an account deposit and subsequent filing of the exchange declaration when the foreign currency is channeled through current compensation accounts. In all other events, the registration requires filing the request and supporting documentation with the Central Bank, or filing the request and demonstrating to said entity that the investment's requirements have been fulfilled. For more information, please visit [www.banrep.gov.co](http://www.banrep.gov.co).

In the case of procedures before the Central Bank, the filing seal or the acceptance of the electronic transmission of the respective forms and communications will serve as evidence of the registration or its request, as well as of any related extensions, updates and reports of information. If necessary, an extension of the time required for the registration of the foreign investment (in the different kinds of currencies) may be requested for a maximum period of three months in addition to the initial term.

In the event of sale of the investment to residents of the country, liquidation of the investment in whole or part, reduction of capital, buyback of shares or corporate interests, or sale of real property, the interested party must cancel the corresponding foreign investment registration.

The owner of the foreign investment that transacts or sells its investment must file its Income Tax Return, together with the calculation and payment of the tax that accrues by reason of the respective operation, with the banks and other authorized entities. The filing of the Income Tax Return is obligatory for every transaction, even when no tax is accrued on the transaction.

It is important to mention that foreign investments in Colombia need to be updated each year, within the time limits and subject to the procedures established by the Central Bank of Colombia.

### 1.1.5 Foreign Exchange Rights

Once the investment is registered, the owner thereof acquires the following foreign exchange rights:

- a. To remit proven net profits generated periodically by his or her investments.
- b. To reinvest the profits or retain them in the surplus of undistributed profits with right of transfer.
- c. To capitalize sums with right of transfer, produced by obligations derived from the investment.
- d. To remit abroad, in freely convertible currency, sums received either from the transfer of the investment inside the country, from the liquidation of the company or the portfolio, or from a decrease in the capital of the company or the portfolio.

## 1.2 Foreign Exchange Market

The foreign exchange market is constituted by currencies generated from or required in any transaction which needs to be channeled through foreign exchange market intermediaries or current compensation accounts.

All exchange that not are required to be channeled through foreign exchange market intermediaries belong to the free market and, therefore, may be conducted without using foreign exchange market intermediaries or compensation accounts.

## 1.2.1 Operations that pertain to the Regulated Foreign Exchange Market

The following operations need to be channeled through the foreign exchange market:

- a. Importation and exportation of goods.
- b. Foreign debt operations conducted by Colombian residents, as well as financial costs inherent in the same.
- c. Foreign capital investments in the country, as well as returns associated with the same.
- d. Colombian capital investments abroad, as well as returns associated with the same.
- e. Financial investments in securities issued abroad, or investments in assets situated abroad, as well as returns associated with the same, except when investments are made with currencies coming from operations not required to be channeled through the foreign exchange market.
- f. Guarantees and surety agreements in foreign currencies
- g. Derivatives operations

## 1.2.2 Foreign Exchange Market Intermediaries

Foreign exchange market intermediaries are entities authorized to channel currencies pertaining to operations conducted in the regulated foreign exchange market and to operations voluntarily channeled through the same, by acquiring and selling the currencies required for or generated by such operations. The exchange rates for buying and selling currencies shall be those freely agreed by the parties to the operation, and no commissions may be charged by the intermediary.

The following entities are the foreign exchange market intermediaries that may channel operations through the foreign exchange market:

- a. Commercial and Mortgage Banks
- b. Financial Corporations
- c. Commercial Finance Companies
- d. Financiera Energética Nacional (FEN)
- e. Bancoldex
- f. Financial Cooperatives
- g. Stock brokerage firms
- h. Currency Exchange Houses

## 1.2.3 Compensation Accounts

### 1.2.3.1 Current compensation accounts

The foreign exchange regime has provided Colombian residents with a flexible mechanism for managing their operations, particularly those pertaining to the regulated exchange market, without the need to turn to foreign exchange market intermediaries. This is made possible through the opening of current accounts abroad in foreign currency, which are registered as compensation accounts with the Central Bank of Colombia.

Compensation accounts may be used to pay for imports, deposit sums resulting from the payment for exports, receive sums for foreign investment in Colombia, transfer investment profits, receive disbursements of foreign loans and pay principal and interest.

Compensation accounts may also be used to pay free market obligations necessary to fulfill the obligation to channel currencies through the exchange market, pursuant to some pre-established requirements.

The opening, managing and closing of compensation accounts are subject to the reporting requirements of the Central Bank of Colombia and the Directorate of National Taxes and Customs (DIAN, for its acronym in Spanish).

### 1.2.3.2 Special compensation accounts

As a general rule payments in foreign currencies made between Colombian residents are prohibited, except for companies engaged in the exploration and production of oil, natural gas, coal, ferronickel and uranium. As an exception to the general rule, special compensation accounts have been created in order to allow for the payment in foreign currency of obligations related to the fulfillment of obligations derived from domestic transactions between residents in Colombia who are not subject to special regimes (those related to the hydrocarbons and mining sectors and related services).

These accounts share the same characteristics of ordinary compensation accounts, but their use is restricted. In order to make payments to a resident in Colombia, the currencies in such account have to originate from operations that must be channeled through the foreign exchange market. Also, currencies received by these accounts must originate exclusively from payments for domestic operations conducted with other residents of Colombia. Such currencies may be used only to pay for operations conducted in the foreign exchange market, or to sell their remaining balances to foreign exchange market intermediaries or to other owners of traditional or special compensation accounts.

## 1.2.4 Foreign Exchange Declaration

The foreign exchange declaration is a formality required to evidence a foreign exchange operation when the same is channeled through the foreign exchange market by means of current compensation accounts or through duly authorized foreign exchange market intermediaries.

The foreign exchange declaration is a form pre-designed by the Central Bank for the provision of information about an operation. The declaration must be signed by the person carrying out the operation either personally or through his/her general or special representative or agent, who need not be an attorney.

When operations are conducted through foreign exchange market intermediaries, the foreign exchange form is presented to them. When they are conducted through compensation accounts, the declaration is filled in electronically by the interested party or the person acting on his or her behalf, and submitted directly to the Central Bank. In the latter case, a duly numbered and signed physical copy of the declaration needs to be kept. In some exceptional cases this copy needs to be transmitted to the Central Bank.

Since this is a private declaration, the veracity of the information provided therein, as well as the fulfillment of foreign exchange requirements, are the sole responsibilities of the person who carries out the foreign exchange operation.

The Office of the Superintendent of Companies has authority to control and sanction operations related to foreign investment and foreign debt transactions for working capital that are conducted by companies in general. The statute of limitations for the respective foreign exchange sanction action is two (2) years. The DIAN is authorized to control and sanction foreign exchange infractions related to foreign trade operations and foreign indebtedness derived therefrom. The statute of limitations for the respective foreign exchange sanction action is three (3) years. During the aforesaid terms, the competent authorities, as the case may be, have the power to investigate and sanction foreign exchange infractions.

## 1.2.5 Regulation of Foreign Exchange Market Operations

Payments by residents in Colombia for imports or exports must be made with foreign exchange market currencies. The currencies required for such purposes must be obtained through foreign exchange market intermediaries or by using current compensation accounts.

### 1.2.5.1 Importation of goods

The foreign exchange declaration for the importation of goods is made by means of Form No.1 and its attachments will depend on the type of payment made by the importer. Besides the acquisition and transfer of

currencies through foreign exchange market intermediaries or by way of current compensation accounts, residents in Colombia may pay for their imports in the following ways:

- a. In Colombian legal tender, channeling its value through foreign exchange market intermediaries by means of deposits into accounts opened in Colombian legal currency by foreign suppliers or foreign financial institutions.
- b. In legal tender, by means of drafting a counter check to the foreign supplier, when the same does not have a checking account or a savings account in Colombian legal tender.
- c. Charged to an international credit card issued in Colombia and billed in Colombian legal tender, or charged to an international credit card issued abroad or in Colombia and billed in foreign currency.

Importations may be financed by the merchandise supplier, by foreign exchange market intermediaries or by foreign financial institutions. If the foreign supplier grants a payment term of greater than 6 months from the bill of lading date, and the operation has an FOB value equal to or greater than \$10,000 USD, it is considered to be an external credit transaction, even if the value pending transfer abroad is less than said amount. In such case, the Central Bank of Colombia must be informed of the transaction within the aforementioned 6-month term, through the foreign exchange market intermediaries. For such purposes, the importer must fill out and file Form No.6 ("Information about external credit granted to residents") with a foreign exchange market intermediary. Once information about the external indebtedness has been provided in such fashion, the payments must continue to be channeled in the manner indicated, but henceforth using Form No.3 rather than Form No.1

International leasing operations are considered, by definition, as financed importations. Therefore, they must be reported to the Central Bank of Colombia using the same procedure described above.

### 1.2.5.2 Exportation of goods

The payment for exports may also be accepted in Colombian legal tender through foreign exchange market intermediaries, by means of an international credit card charge in foreign currency or in Colombian legal tender. The exchange declaration for the exportation of goods is made via Form No.2 and needs to be filled out as soon as the reintegration of the currencies into the exchange market takes place. If the payment for the exportation is accepted in Colombian legal tender, it must be made through foreign exchange market intermediaries by filing the exchange declaration for exportation of goods within five (5) business days following the channeling of the payment via an account credit.

When the exporter grants the foreign buyer a payment term greater than 12 months from the final declaration of exportation, and the operation has a value in excess of \$10,000 USD, the operation is construed as a foreign debt transaction (active credit) and needs to be reported to the Central Bank of Colombia by filing Form No. 7 ("Information about external credit granted to nonresidents") within twelve (12) months following the date of the declaration of exportation.

On the other hand, if the foreign buyer decides to pay in advance the value of future exportations of goods, the Colombian exporter shall have four (4) months from the date of channeling the currencies through the foreign exchange market intermediary or the current compensation account, in order to carry out the respective exportation. If the term for the exportation exceeds four (4) months, the transaction is construed as an external debt transaction that needs to be reported to the Central Bank of Colombia prior to the expiration of said term, on Form No.6. This transaction cannot constitute a financial obligation that accrues interest for the Colombian exporter, nor may it generate an obligation different from that of delivering the merchandise.

Finally, the Foreign Exchange Regime allows exporters to obtain loans from foreign financial institutions or foreign exchange market intermediaries in order to pre-finance the exportation of goods.

### 1.2.5.3 Loans in foreign currency

Revenues and expenditures in foreign currencies related to loans in foreign currencies obtained or granted by residents in the country need to be channeled through the foreign exchange market.

Residents and foreign exchange market intermediaries may obtain loans in foreign currency only from foreign financial institutions registered by the Central Bank of Colombia (passive credit). For the purposes of obtaining loans abroad, reinsurance companies domiciled abroad, promotion oriented multilateral financial funds, and foreign risk capital funds are considered to be foreign financial institutions. On the other hand, residents in Colombia may also grant loans in foreign currency to residents abroad (active credit), regardless of the period and destination of said currencies.

All external loans (active or passive in nature) granted or obtained by residents in Colombia must be channeled through the foreign exchange market and must be reported to the Central Bank of Colombia prior to their

disbursement by means of filling out and filing Form No.6 or Form No.7 with a foreign exchange market intermediary.

#### 1.2.5.4 Investment of Colombian capital abroad

The Foreign Exchange Regime recognizes two types of investments of Colombian capital abroad: direct investments, and financial investments or investments in foreign assets.

##### Direct investments

These are made by residents in Colombia in the capital of foreign companies. This type of investment and its respective movements need to be reported to the Central Bank of Colombia on Form No.4

##### Financial investments or investments in foreign assets

This type of investment includes:

- a. The purchase of securities issued abroad or assets located abroad.
- b. The purchase of private foreign obligations, external public debt, and bonds and debt securities representative of external public debt.
- c. Transfers abroad originating in the placement with residents of securities issued by foreign companies and foreign governments, or guaranteed by them, authorized by the Office of the Superintendent of Finance of Colombia.

These investments may be made via the foreign exchange market or the free market with currencies used in foreign exchange operations that are not required to be channeled. If they are made via the foreign exchange market, they are understood to be automatically registered by means of Form No.4, once the currencies are transferred. If the investment is made with currencies from the free market, and its value is greater than \$500,000 USD, the operation must be reported by means of Form No.11 before July 30<sup>th</sup> of the following year.

### 1.2.6 International Investment Treaties

As part of the strategy adopted by Colombia to improve foreign trade relations, the country is presently involved in the negotiation and signing of Agreements on the Reciprocal Promotion and Protection of Investments (APPRI for its initials in Spanish) as well as Free Trade Agreements that include provisions on foreign investments.

APPRI are international bilateral treaties that regulate the treatment of foreign investment. Their main purpose is to establish clear and stable rules for investments made by the nationals of one of the parties in the territory of the other, based on the principles of justice and transparency and on international standards. In addition, APPRI include obligations with respect to the treatment and protection to be provided for investments, as well as mechanisms for resolving disputes related to the same.

The main elements present in these agreements are:

- a. National Treatment: Each party must grant to the investors of its counterparty, and their investments, a treatment that is not less favorable than that granted under similar circumstances to its own investors.
- b. Most Favored Nation Treatment: Each party must grant to the investors of its counterparty, and their investments, a treatment that is not less favorable than that granted under similar circumstances to investors of other countries.
- c. Fair and Equitable Treatment: Each party must grant the other the same opportunities to develop its business and to defend its interests.
- d. Prohibition of illegal expropriation: The possibility of carrying out expropriations without just cause or in a discriminatory manner is restricted, and remains viable exclusively for reasons of public utility or social interest, subject to due process, carried out in a non-discriminatory manner in good faith and accompanied by the payment of a prior, speedy, proper and effective indemnification.

Presently, Colombia has International Investment Agreements in force with Mexico (chapter on investments in the Free Trade Agreement between Colombia and Mexico), Peru and Spain. In addition, International Investment Agreements have been signed with Switzerland (May, 2006), Peru comprehensive treatment (December, 2007) and China (November, 2008), and such agreements are currently being negotiated with Belgium (concluded but pending signature), India, Germany, the United Kingdom, France and South Korea.

## 1.2.7 Arbitration

The laws of Colombia allow individual parties to resort to the arbitral procedure in order to resolve their disputes. Arbitration may be agreed to in a contract, in which case it is understood that the arbitration clause applies, or may be initiated when a dispute takes place before a formal arbitration agreement is reached, in which case the parties act pursuant to a promise to arbitrate. The parties are at liberty to choose the arbitrators. This choice may be made by common agreement of the parties, or they may designate a third party to name the arbitrators. Contracts entered into with public entities may also be subject to arbitration, in which case the arbitration shall be decided in accordance with the law (in other cases, the arbitration may be decided *ex aequo et bono*). The arbitration tribunal shall be composed of a minimum of three arbitrators, unless the contract has a small value, in which case only one arbitrator will be necessary.

It is also permissible for the parties to agree to submit their disputes to international arbitration, provided that one of the following conditions exists:

- a. If the parties are domiciled in different States.
- b. If the place of performance of an important part of the obligations related to the subject matter of the dispute is in a State different from the State in which the parties have their main domicile.
- c. If the matter subject to the arbitral clause affects the interests of more than one State and the parties have so expressly agreed.
- d. If the dispute directly and unequivocally affects the interests of international commerce.

International arbitration is governed by international treaties signed and ratified by Colombia, which prevail over the internal laws of the country. The parties may agree on the applicable substantive and procedural law.

## 1.2.8 Legal Stability Contracts

The laws of Colombia have established this type of contract in order to guarantee an investor the continuity of the determinative legal conditions present at the time the investment was made. These contracts assure the investors who sign them that if during the effective term of the same any of the laws identified in the contract as being determinative for the investment is adversely amended, the investors will have the right to the continued application of said laws in their original form for the remainder of the term of the respective contract (between three and twenty (20) years). Foreign portfolio investment is excluded.

The following are the requirements for entering into these contracts:

- a. The making of a new investment or enhancement of an existing one for a value equal to or greater than 7,500 times the monthly minimum legal wage in force at the time, at present approximately \$1,500,000 USD.
- b. The submission of a request for a contract to the Legal Stability Committee. Such request must be accompanied by a study that demonstrates the origin of the investment resources, as well as a detailed description of the activity to be conducted, together with any feasibility studies, plans and technical studies that the project may require, and the number of jobs expected to be created.
- c. The identification of the specific laws for which stability is requested, providing the reasons that demonstrate the importance and determinative character of the same for the proposed investment.
- d. The payment to the Nation of a premium equivalent to 1% of the value of the investment made each year; the rate may be lowered to 0.5% for non-productive periods.

The following laws may not be subject to stability contracts:

- a. Laws that harmonize rights, guarantees and duties established in the National Constitution with respect to international treaties ratified by Colombia.
- b. The social security regime.
- c. Compulsory investments decreed by the government under exceptional circumstances.
- d. Indirect taxes
- e. Laws declared unconstitutional or illegal during the term of duration of the Legal Stability Contracts.
- f. Regulations issued by the Central Bank of Colombia.
- g. Prudential regulations applicable to the financial sector.
- h. The rate regime applicable to public utilities.
- i. The legal obligation to declare and pay taxes.