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Foreign Direct Investment in Colombia

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Foreign Direct Investment in Colombia. Does the Colombian General Regime for Foreign Direct Investment Comply with the International Standards?
(Under the Direction of THOMAS J SCHOENBAUM)

After decisions 220/88 and 291/91 of the Andean Pact, Colombia enacted law 9 of 1991. Law 9/91 empowered the National Economic and Social Policy Council (COMPES), a private government consulting agency, to promulgate rules on foreign investment. In the same year, the COMPES promulgated resolution 51 which is the base of the foreign investment regulation in Colombia. The purpose of this study is to analyze the legal aspects of foreign investment of Colombia and compare them with the international standards in order to determine whether the Colombian regulation acts in accordance to those standards or even exceeds them. The standards that will be considered are those established by the World Bank Guidelines of 1992. Finally, If the standards are not met, I will give some recommendations that could be useful for the country. Despite of the fact that political and economic aspects are extremely important for foreign investors select a country to make an investment, these aspects are not going to be considered in this thesis because of its complexity.

INDEX WORDS: Foreign Direct Investment, Colombia, World Bank Guidelines, Andean Pact, Multilateral Agreement on Investment.

FOREIGN DIRECT INVESTMENT IN COLOMBIA. DOES THE COLOMBIAN GENERAL REGIME FOR FOREIGN DIRECT INVESTMENT COMPLY WITH THE INTERNATIONAL STANDARDS?

by

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

Foreign direct investment around the world had dramatically increased in the last two decades.[1] As a consequence, many countries have enacted their foreign investment rules with the purpose of attracting foreign investment to their territories. Foreign direct investment occurs when an investor based on one country (the home country) acquires an asset in another country (the host) with the intend to manage that asset.[2]

Colombia located in the northwest corner of South America and with a population of 42.3 millions[3] has not been the exception to this trend and it has enacted its own regulation attracting foreign direct investments through Resolution 51/91.

The purpose of this study is to determine if the Colombian legislation regarding the general regime of foreign direct investment complies with the general international standards in this matter. In addition, this study wants to give the reader the general characteristics of the Colombian legislation that may help prospective investors in the country to learn about the law in Colombia. The international standards to be considered in this study are the 1992 World Bank Guidelines on the treatment of foreign direct investment.[4] The guidelines were prepared at the request of the Word community by a World Bank committee integrated by institutions such as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the

[1] WTO Secretariat, *Trade and Foreign Direct Investment* (Annual Report), 1 (Oct. 9, 1996).
[2] Id at 3.
[3] Source Coinvertir available in www.coinvertir.gov

International Centre for Settlement of Investment Disputes (ICSID)[5]. The guidelines formulate generally accepted international standards that support the goal of promoting foreign direct investments.

The study will be divided in six main parts: Chapter 1 will be the introduction. Chapter 2 will describe the generalities of the political and legal system of Colombia and how it works. In addition, it will include a general overview of the Colombian legal system describing the division of powers and the functions of each one. Body of laws will be also considered in order to give the reader a general overview about the legislative process of Colombia as well as how international treaties are inserted to domestic legislation. Finally, there will be also a brief description of the court system of the country.

Chapter 3 will include the origin and development of foreign direct investment legislation in Colombia. It includes a brief description of the beginning of the "Apertura", the Colombian's economic liberalization plan, oriented to promote free trade and foreign investments. In this chapter the Andean Pact regulations on foreign investments will be developed since they have been incorporated to the Colombian legislation. This chapter will also illustrate Law 9/91 that empowered the National Economic and Social Policy Council (COMPES), a private government consulting agency, to promulgate foreign investment rules. In the third chapter, the Statute of foreign direct investment of Colombia, which include Resolution 51/91 of COMPES and

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[4] World Bank, *Guidelines on the Treatment of Foreign Direct Investment* 31 ILM 1363 (1992).
[5] Seymur J Rubin, *Introductory Notes to the Report of the Development Committee and Guidelines on the Treatment of Foreign Direct Investment* 31 ILM 1363 (1992).

other resolutions and decrees issued afterwards which partially modify or repeal it, will be described.

Chapter 4 will describe foreign investment regulations in the international field. There will be a description about different agreements regulating foreign direct investment: Bilateral agreements, regional agreements and multinational agreements considering their binding or not binding effect and their relevance to Colombia. The chapter will also contain the description of the guidelines on the treatment of foreign direct investment of 1992.

Chapter 5 will include an analysis of the Colombian regulation in order to determine if it complies with the international minimum standards for foreign direct investments contained in the 1992 Guidelines. The aspects to be developed in this part will be: admission or entry of foreign investments into host countries, the general standards of treatment to foreign investors by their host states and some particular aspects of such treatment as the transfer of capital and returns, expropriation and unilateral alterations or termination of contracts and settlement of disputes.

Finally, Chapter 6 will be the conclusion which states if the Colombian law on foreign direct investment complies with the standards of the World Bank Guidelines.

CHAPTER 2

THE COLOMBIAN LEGAL SYSTEM

General Overview

Colombia has been defined by its Constitution as a democratic and unitary republic.[6] The Constitution also defines the Colombian political system as a participatory and pluralistic democracy.[7] It denotes that Colombian citizens participate in political decisions. The Colombian constitution institutes the principle of separation of powers within the state. As a consequence, there are three branches of government: legislative, executive and judicial. All of them are independent from each other but collaborate harmoniously.[8]

The first of the three branches is the legislative branch that is constituted by Congress. The Senate and the House of Representatives are part of the Colombian Congress. Among the main functions of the Colombian Congress we find: the creation of laws, the constitutional amendment and the politic control over the government.[9] The difference between the Senate and the House of Representatives lies down in their form of election. On the one hand, the 100 members of the Senate are elected on a national basis.[10] On the other hand, the members of the House of Representatives are elected in a local basis. Two representatives are elected in each department (political subdivision of

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[6] Colom. Const. Art. 1 (1991)
[7] Id. Art. 1
[8] Id. Art. 113.
[9] Id Art. 114 # 2.
[10] Id. Art. 171

the Colombian State). In addition to those two representatives, departments with more than 250,000 habitants elect one more representatives per each 250,000 habitants.[11]

The second branch of the government is the executive branch. The executive branch is headed by the president of the republic who is freely elected for a four-year term.[12] The president is the head of the state, the head of the government and the supreme administrative authority of the state.[13] Among the main functions of the president we find the appointment of the ministers (who head an executive department of government), the management of international relations, the sign of treaties and conventions with other nations, the act to make the laws effective (potestad reglamentaria) etc.[14]

The last branch of the government is the judicial branch. It is divided in three jurisdictions. The first of these jurisdictions is the ordinary jurisdiction. The maximum authority of the ordinary jurisdiction is the Supreme Court, which is the supreme tribunal in ordinary jurisdiction matters[15] (civil, labor and criminal). The Supreme Court also judges the president of the republic and the ministers. In addition, it investigates and judges the members of Congress.[16] The justices of the Supreme Court are appointed for a period of eight years[17] and are chosen by the members of same Supreme Court from a list of names given by the Superior Council of Judicature (Consejo Superior de la Judicatura).[18]

[11] Id. Art. 176
[12] Colomb. Const. Art. 190.
[13] Id. Art. 115.
[14] Id. Art 189.
[15] Id. Art. 235 (1).
[16] Id Art. 235 (2, 3)
[17] Id. Art. 233.
[18] Id. Art. 231

The contentious administrative jurisdiction is the second jurisdiction established by the constitution. Its maximum authority is the Council of State (Consejo de Estado). Among the main functions of the Council of State we find the following: to be the highest tribunal in contentious administrative matters[19], to declare null or unconstitutional any decree expedited by the government in the case that the Constitutional Court has not jurisdiction[20], to be a consulting body of the government in administrative affairs[21], to prepare and present projects of constitutional reform[22] etc. The members of the Council of State are appointed by its own members from a list of names submitted by Council of the Judicature (Consejo Superior de la Judicatura).[23]

Finally, the last jurisdiction of the judicial branch is the Constitutional Jurisdiction. This jurisdiction was instituted by the Constitution of 1991. It maximum and unique authority is the Constitutional Court. The main function of the Constitutional Court is to ensure the integrity and the supremacy of the Constitution.[24] In addition, the Constitutional Court decides the unconstitutional claims initiated by any citizen over the laws or constitutional reforms,[25] and reviews the constitutionality of presidential decrees.[26] The Constitutional Court is also competent to decide the constitutionality of international treaties the laws approving those treaties.[27] The justices of the Constitutional Court are appointed for a period of eight years by the Senate from a list of

[19] Colomb. Const. Art. 237 (1)
[20] Id. Art. 237.(2)
[21] Id. Art. 237 (3)
[22] Id. Art. 237 (2,4)
[23] Id. Art. 233.
[24] Id. Art. 241
[25] Id. Art. 241 (1)
[26] Id. Art. 241 (7)
[27] Id. Art. 241 (10)

three candidates submitted one by the President, one by the Supreme Court and one by the Council of the State.[28]

Body of Laws and its Hierarchy

After having seen the division of powers in Colombia, it is important now to learn something about the Colombian legal system. The Colombian legal system is based on Roman law (Civilian System).[29] As a consequence, judges and courts do not make laws. In fact, Colombian Constitution states that judges are compelled to follow the law.[30] However, Art. 230 of the Constitution also states that judges may consider the equity, the jurisprudence, the general principles of law and the doctrine in order to decide a particular case. Despite of the fact that judges may look for the real meaning of the law at the time to decide a particular matter, their decisions do not constitute the creation of a new law. In other words, courts and judge decisions do not become a general rule applicable to other cases.[31]

As we saw, in Colombia judges do not make laws. Nevertheless, three uniform court decisions given by the Supreme Court of Colombia as a maximum tribunal on the same point of law constitute "probable legal doctrine". As a result, courts may apply that doctrine to similar cases.[32] Despite of the fact that the Supreme Court can make this doctrine, it can not create laws. As a consequence, laws in Colombia are enacted either by

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[28] Id. Art. 239.
[29] Luz Stella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 Ind. Int'l & Comp. L. Rev. 59,69 (1995).
[30] Colomb. Const. Art. 230
[31] See Nagle, *supra note 24 at 76.*
[32] German Cavelier, *Legal Aspects of Doing Business in Latin America*, 218 (Dennis Cambel ed. International Business Series) (1984).

Congress or by the executive branch in exercise of its regulatory power[33] or when Congress delegates its power to it.[34]

Hierarchy of Laws

In the first place of the Colombian body of laws we find the Constitution. Constitution is considered law of laws.[35] It means that in case of any conflict between any law and the Constitution, the application of the Constitution prevails.

In the second place of the hierarchy we find the treaties. The President under the ability given to him by the Constitution concludes treaties with foreign nations and other international entities.[36] The treaties signed by the President are not self executed. It means that they need to be ratified by the Colombian Congress in order to become law.[37]

In the third place of the hierarchy we find the law. Law is a rule of conduct enacted in the way established by the constitution.[38] The Colombian Congress has the power to create amend, interpret, and derogate the law.[39] Congress can adopt codes in every branch of the legislation[40] such as civil, criminal, labor, etc.

The president can also create law when Congress delegates its power to it. This delegation only should occur when there are extraordinary conditions and can not exceed

[33] Colomb. Const. Art 189 # 11.
[34] Id. Art. 150 #10.
[35] Id. Art 4.
[36] Id. Art189 # 2.
[37] Id. Art. 150 # 16.
[38] Colomb. Civil Code Art 4.
[39] Colomb. Const. Art 150 # 1.
[40] Id. Art 150 # 2.

a period of six months.[41] However, in case of such delegation, the executive branch can not enact codes, tax laws etc.[42].

Finally, the executive branch also has the power to regulate the laws enacted by Congress. This regulation is made through the enacting of decrees and resolutions by the president.[43]

[41] Id. Art. 150 # 10.
[42] Id. Art. 150 # 10.
[43] Id. Art. 189 # 11.

CHAPTER 3

ORIGINS AND DEVELOPMENT OF FOREIGN DIRECT INVESTMENT LEGISLATION IN COLOMBIA

Decree 444 of 1967

The origin of foreign direct investment legislation initiated with Decree 444 of 1967[44]. With Decree 444 started a long period of restriction on foreign direct investments.[45] Decree 444 established the requirements that foreign investors had to complete in order to make an investment in Colombia. At that time, every investment required a previous approval of the National Planning Office (Departamento Administrativo de Planeacion, DNP) The DNP had to evaluate several aspects of the new investment in order to determine if the investment was convenient to the country. Among the aspects that were considered we find the effect on employment generation of the investment, the net effect in the balance of payments, the use of raw materials and other domestic products by the foreign investment, the existence of domestic capital in the investment and the contribution of the investment to the Andean integration.[46] In addition, investments intending export increases or export diversification obtained preferential treatment.[47]

[44] Roberto Steiner & Ursula Geidon, *Foreign Direct Investment in Latin America* 137 (Manuel R Argosin ed.) (1995).
[45] Id.
[46] Decree 444/1967 Art 110.
[47] Id. Art 110 paragraph.

Decree 444 also established that once the investment was admitted, it had to be registered in the Exchange Office (Oficina de Cambios) in order to repatriate any profit gained by the investment. The profit remittance was limited to 10% of the registered capital, and the repatriation of the capital was limited to the value of the net investment. Any increase in the investment amount was not allowed to repatriate.[48]

Decision 24 of 1973 of the Commission of the Andean Pact

Foreign direct investment legislation in Colombia changed in the decade of the 70's. In 1973, the Andean Pact Commission adopted the Common Foreign Investment and Technology Licensing Code (Decision 24 of 1973[49]). Decision 24 was enacted with the purpose to control the negative effects on foreign investments in the Andean area.[50] As a consequence, Decision 24 established several restrictions to foreign investments in different ways.

Among the changes introduced by Decision 24 we find that foreign investments were not authorized in areas already being carried out by domestic corporations.[51] Moreover, foreign direct investment was prohibited when it was conducted to acquire stocks or any other rights in companies of domestic investors. Decision 24 also imposed restrictions to foreign enterprises that wanted to take advantage of the pact's intraregional free trade scheme. Any foreign enterprise establishing in the Andean area and which

[48] Id. Art 116.
[49] Andean Pact, *Decision 24/73* 16 ILM 138 (1977).
[50] Thomas A. O'keefe, *How the Andean Pact Transformed it Self into a Friend of Foreign Enterprise*, 30 Int'l Law. 811, 814 (1996).
[51] Decision 24 of 1973 of Cartagena Agreement Art. 3. 16 IM 138 (1977).

wanted to stay in the free trade scheme had to sell at least 51% of its shares to nationals of the Andean Pact.[52]

In regard to the remittance of profits, Decision 24 limited them to the 14% of the value of such investment annually.[53] In addition, Decision 24 prohibited foreign direct investment in several areas such as public utilities, insurance, banking, etc.[54]

Decision 220 of 1987 of the Commission of the Andean Pact

After a period of strong restrictions on foreign direct investment, the commission of the Andean Pact enacted Decision 220/87, which replaced Decision 24.[55] Decision 220, the Common Foreign Investment and Technology Licensing Code, imposed less restrictive rules on foreign direct investment. Decision 220 was divided in five chapters. The first two chapters are directly related to foreign direct investment. Chapter I includes definition of foreign direct investment, registration, repatriation of profits etc. Chapter II includes conversion of ownership agreements and determines how to obtain benefits from the Andean pact exemption program. Among the most important changes established by Decision 220 we see that member countries may authorize foreign investors to acquire shares or ownership rights belonging to national or subregional investors.[56] In addition, Decision 220 permitted the remittance of earnings of foreign investments up to 20% of the investment. Nevertheless, each member country could authorize higher percentages.[57] Furthermore, Decision 220 made the transformation of foreign companies in mixed

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[52] See O' Keefe *supra note 43 at 814*.
[53] Decision 24/ 71 Art 37
[54] Id. Arts 41-43.
[55] John R Pate, *Introductory Notes of Decision 220/87 of the Andean Pact*, 27 ILM 974, 975 (1988).
[56] Decision 220/87, Art 4 27 ILM 980 (1988)

companies voluntary.[58] However, if foreign companies decided not to transform, they lose access to the Andean integration trade scheme. Decision 220 was incorporated to the Colombian legislation by Resolution 44/87 and Decree 1265/87.[59]

Economic Liberalization Plan "Apertura"

In the 1990's foreign direct investment regulation in Colombia changed dramatically. In August of 1990 Cesar Gaviria took office of the presidency of Colombia. The Gaviria administration initiated a profound economic reform known as "Apertura".[60] "Apertura" included changes in trade, labor, foreign exchange and tax regime. "Apertura" removed tariff and non-tariff barriers to trade and implanted a new regulation in exchange transaction and foreign investment.[61] In 1991, in the middle of those important changes a new Constitution was enacted in Colombia. According to this new trend, the new Constitution states that the Colombian government will promote the internationalization of the economy and the economic, social and political integration with Latin America and the Caribbean.[62] Likewise, article 100 of the Constitution establishes that foreigners have the same civil rights than nationals.

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[57] Id Art. 15.
[58] Id. Art 26.
[59] John R Pate, *Introductory note to Decision 220/87*, 27 ILM 974 (1988).
[60] Document prepared by the American Embassy in Bogota, Colombia, *Colombia Investment Climate Statement*, Market Reports (1992).
[61] David Bushnell, *Colombia an opening economy*, 27 (Collen M Callaham and Frank R. Gunter eds) (1999).
[62] Colom. Const, Art 226-227. (1991).

Decision 291 of 1991 of the Commission of the Andean Pact

After those important changes at the domestic level, the Commission of the Andean Pact issued Decision 291 in March of 1991, the Common Code for the treatment of foreign capital and trademarks, patents, licenses and royalties.[63] Decision 291 finally eliminated all prior restrictions on foreign direct investment imposed by Decision 24. As a consequence, Decision 291 returned power to member nations of the Andean Pact to adopt their own rules regarding foreign direct investment.[64] The Commission agreed to eliminate the restrictions to foreign investors and to stimulate the free circulation of subregional capital. In order to ensure that goal, decision 291 states that foreign investors shall have the same rights and obligations of national investors.[65]

Decision 291 is divided in five chapters. The first chapter refers to definitions of foreign direct investment, foreign companies, neutral capital, reinvestment etc. Chapter two refers to the rights and obligations of foreign investors, including national treatment, free transferability of capital, free convertibility of foreign exchange, repatriation of stock, reinvestments, settlement of disputes etc. Chapter three concerns the national competent entities in each member country to assure the application of foreign direct investment regulation. Chapter four refers to the importation of technology and chapter five concerns to the treatment of investments of the Andean Development Corporation and the entities that may opt for the treatment of neutral capital.

In regard to the transfer of profits, Decision 291 states that owners of foreign direct investments shall have the right to transfer abroad in freely convertible foreign

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[63] Decision 291/ 91 of the Andean Pact 30 ILM 1283 (1991).
[64] David J. Pascuzzi, *International Trade and foreign Investment in Colombia: A Sound Economic Policy Amidst Crisis*, 9 Fla. J. Int'l L 443, 451 (1994).

exchange the proven net earnings derived from their investments.[66] In addition, article 5 establishes the right to repatriate any sums resulted from the sale, liquidation or reduction of the investment. Finally, it is important to mention that Decision 291 states that member countries shall apply their domestic legislation with respect to the solution of conflicts deriving from foreign direct investments.[67]

Law 9 of 1991

Following Decision 291/91 of the Andean Pact, the Colombian Congress enacted law 9 of 1991 to implement those new changes in the Colombian economy.[68] Law 9/91[69] states that the executive branch shall regulate foreign exchange affairs.[70] As a consequence, the law regulates the exchange regime under the following premises: promotion of the internationalization of the Colombian economy, promotion of the Colombian exports, stimulation of the foreign investments in Colombia, etc.[71] Law 9/91 empowered the Consejo Nacional de Politica Economica y Social (COMPES), a government consulting agency, to regulate the investment regime in Colombia.[72] In addition, Law 9 states that foreign investors will not receive more or less favorable treatment that the national investors receive.[73] Furthermore, article 15 establishes that the conditions of remittance of profits can not be changed to disfavor foreign investors unless

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[65] Decision 291/91 Art 2.
[66] Id Art. 4.
[67] Id Art 10.
[68] See Pascuzzi *supra note* 57 at 452.
[69] Diario Oficial año cxxvii N. 39634 Enero 17, 1991 (Colombia).
[70] Law 9/91 Art 1.
[71] Id. Art 2.
[72] Id. Art 3 and 15.
[73] Id Art 15 paragraph.

the international reserves of the country drop to an amount below to three months of imports.

Resolution 51 of 1991 of the COMPES

After those important changes established in law 9/91 and based on the power given to it, the COMPES enacted Resolution 51 of 1991.[74] Resolution 51 has been modified by Resolution 52/91, Resolutions 53,55,56 and 57/92, Resolution 60/93 of the COMPES and Decree 2348/93, Decree 98/94, Decree 1812/94, Decree 2012/94, Decree 2764/94, Decree 517/95, Decree 1295/96, Decree 1874/98 and Decree 241/99.

Resolution 51 and the resolutions and decrees that modify it constitute the Colombian Statute for foreign direct investment. The Statue is divided in five sections. Section I refers to the scope of application and definitions on foreign direct investment. Section II contains the general regime for foreign capital investments in Colombia. Section III refers to the special regimes for foreign capital investments: financial, hydrocarbon and mining sectors. Section IV considers the general regime for Colombian investments abroad. Finally, section V regulates duration and revocations.

Article 2 of Resolution 51 defines a foreign capital investment, as an investment made in Colombian territory by individuals no residents in Colombia and foreign persons. That definition also includes those investments made by Colombian residents abroad or in

[74] Resolution 51/91 and the further resolutions and decrees that partially modified or repeal it are contained in the Statute of Foreign Direct Investment compiled by Coinvertir. Coinvertir is a promotion agency created by the government in November, 1992. The purpose of Coinvertir is to promote, attract and facilitate the flow of foreign investment in Colombia. (See Pascuzzi at 454) See also Coinvertir web page (www.coinvertir.gov) English version.

a Colombian free trade zone. Resolution 51 states that foreign capital investment includes foreign direct investment and portfolio investments.[75]

Foreign direct investment in Colombia may take place in the following ways: Contributions in kind to the capital of a company. Those contributions may be tangible goods such as imports of machinery and equipment, or intangibles such as technological contribution, trademarks or patents.[76] Monetary contributions may be made by imports of foreign currency convertible into domestic currency as a direct contribution to the capital of a company or as an acquisition of shares and rights.[77] In addition, contributions can also be made by the import of freely convertible foreign currency for the purchase of real estate.

Foreign investments in Colombia are based on three fundamental principles. The first is the principle of equal treatment. Equal treatment means that foreign investment in Colombia is subjected to the same treatment as national investment. According to article 3 of Resolution 51 domestic and foreign investors are equal before the law. As a consequence, discrimination against foreign investors is not allowed. The second principle is universality. Universality means that foreign capital investment may be made in any proportion in all sectors of the Colombian economy. However foreign investments are prohibited in activities of national defense and security and the processing and disposal of dangerous or radioactive waste not produced inside the Colombian territory.[78] Finally, the last principle is automaticity. According to article 9 or Resolution 51/91 foreign investors may invest in most all areas of the Colombian economy without prior

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[75] Resolution 51/91 Art 4.
[76] Id Art 7 (a) (c).
[77] Id Art 7 (b).

approval excluding the sectors considered in article 8. In addition, there are two sectors subjected to special regimens. They are the financial sector and the hydrocarbon and mining sectors. Those special regimens are considered in section three of Resolution 51 chapters I and II.

Resolution 51 also establishes registration as a requirement for all foreign investments. In this regard the law states that all foreign capital investments including additional investments, capitalization and reinvestment of profits with remittance rights must be registered in the central bank (Banco de la Republica). This registration must be requested by the investor within three months after the date of the investment.[79]

Chapter IV of Resolution 51/91 establishes the exchange rights and other guarantees for foreign investors. The investment of foreign capital made in compliance with the statute gives the owner the following rights: First, the Statue confers investors the right to remit abroad in freely convertible currency the proven net profits produced regularly by the investment.[80] That remittance must be based on the balance sheet at the end of each financial year. Second, foreign investors have the right to reinvest the obtained profits or to retain remissible profits which have not been distributed in the retain profit account.[81] Third, foreign investors may capitalize remissible amounts produced by the investment.[82] Finally, investors have the right to remit abroad in freely

[78] Id Art 8.
[79] Id Art 15 (a).
[80] Resolution 51/91 Art 16 (a).
[81] Id Art 16 (b).
[82] Id Art 16(c).

convertible currency any sums received from the sale, liquidation of reduction of capital of the investment.[83]

The exchange rights for foreign investors are guaranteed by article 17 of Resolution 51 which states that the conditions for the remittance of profits and reimbursement of investments can not be changed in disadvantage to the investor, except temporarily when the international reserves are less than three months of imports.

In regard to dispute resolution, sanctions and controls, Resolution 51 in Chapter VII establishes the applicable law and jurisdiction, the representation of foreign capital investors, sanctions to foreign investors and control and supervision of foreign investments in the country. According to article 23 of Resolution 51, Colombian legislation will apply to the resolution of disputes or conflicts derived for the application of the statute of foreign investment. However, if there is any treaty or international agreement providing otherwise, those treaties or agreements will apply. In addition, every dispute related to foreign capital investment will be also subjected to the jurisdiction of the Colombian courts and Colombian arbitration rules unless international treaties or agreements provide differently. Furthermore, international arbitration will be governed by decree 2279 of 1989 and the provisions that add or modify it.[84]

As we see, Resolution 51/91 regulates the most important aspects on foreign direct investments. However, it is necessary to consider other laws and decrees that are

[83] Id Art 16 (d).
[84] Resolution 51/91 Art 23.

directly related to foreign direct investment matters. Since they are the most important part of this study, they will be developed and analyzed in chapter 5.

CHAPTER 4

FOREIGN DIRECT INVESTMENT AGREEMENTS AT THE INTERNATIONAL LEVEL RELEVANT TO COLOMBIA

General Overview

After having described the foreign direct investment legislation in Colombia, it is now important to establish the foreign direct investment regulation at the international level that are related to the country. Agreements relating foreign direct investment can be classified in binding and not binding agreements. In the binding agreement classification according to the number of parties we find bilateral investment treaties, regional and multilateral instruments, and plurilateral instruments.[85]

Binding Agreements

Bilateral Investment Treaties (BITS)

Bilateral Investments Treaties, commonly known as BITS, have been adopted for many developing countries in order to enhance their legal framework for foreign investments.[86] Bilateral investment treaties usually regulate four main areas: admission of investment, treatment, expropriation and settlement of disputes.[87] Bilateral investment treaties have become very important and influential for the formulation of the World

[85] WTO Secretariat, *Trade and Foreign Direct Investment* (Annual Report), 20 (Oct. 9, 1996).
[86] Rudolf Dolzer and Margarete Stevens, *Bilateral Investment Treaties*, xi (Martinus Nijhoff Publishers) (1995).
[87] Id At xii.

Bank guidelines on foreign direct investment of 1992 since those guidelines cover the same areas that a BIT regulates.[88]

In the last forty years, several countries have signed many BITS making them one of the most important legal instruments affecting foreign direct investments.[89] BITS started in Europe where developed countries signed this kind of agreements with developing countries in order to protect their investments abroad.[90] The first bilateral investment treaty was signed on November 25, 1959 between Germany and Pakistan.[91] Nowadays many bilateral investment treaties have been signed by different countries around the world. Latin American countries, as we saw in Chapter II, use to oppose to any international rule concerning foreign direct investments. However, as the liberalization of markets occurred, they started to sign numerous BITS. Colombia has signed various bilateral investment treaties with developed and developing countries such as United Kingdom, Spain, Peru and Cuba.[92]

Regional and Plurilateral Agreements

Regional and plulirateral treaties are the second kind of binding agreement related to foreign direct investment. At the regional level, in one hand, there are some agreements that regulate foreign direct investment as a part of a broader framework.[93] In this group we find the European Community Treaty of 1957, the Agreement on Arab Economic Unity of 1957, the North America Free Trade Agreement of 1992, and the

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[88] See Dolzer *supra note 81* at xiii.
[89] Id at 2.
[90] Id at 1.
[91] Id at 1.
[92] Source Coinvertir *supra note* 58.
[93] WTO Secretariat, *Trade and Foreign Direct Investment* (Annual Report) 23 (Oct. 9, 1996).

Andean Subregional Integration of 1969.[94] On the other hand, there are other agreements that constitute a separate entity in foreign direct investment matters. In this group we find the Protocol on Promotion and Reciprocal Protection of Investment within MERCOSUR of 1994, Community Investment Code of the Economic Community of the Great Lakes of 1987(CEPGL), Decision 291 of the Commission of the Cartagena Agreement: Common Code for the Treatment of Foreign Capital and on Trade Marks, Patents and Royalties of 1991, etc.[95]

Colombia as a member of the Cartagena Agreement of 1969 (Andean Community) has been governed by Decision 24/70, Decision 220 of 1987 and now by Decision 291 of 1991. Colombia specifically recognize the validity of article 3 of the treaty creating the Court of Justice of the Cartagena Agreement[96] that states that the decisions of the commission are going into effect in the country members upon their publication in the Official Gazette of the Andean Group unless the Decision provides for a later date.[97]

Multilateral Agreements (TRIMs)

At the plurilateral level we find several instruments related to foreign direct investment such as the Code of Liberalization of Capital Movements (OECD) of 1961 and the Declaration on Investment and Multinational Enterprise (OECD) of 1976.[98] Moreover, it is important to mention the existence of the Agreement on Trade Related

[94] Id at 23.
[95] WTO Secretariat, *Trade and Foreign Direct Investment* (Annual Report) 24 (Oct. 9, 1996).
[96] 18 ILM 1203 (1979).
[97] John R Pate, *Introductory notes of Decision 220 of 1987 of the Andean Pact*, 27 ILM 974 (1988).
[98] Id at 24.

Investment Measures (TRIMs).[99] The TRIMs is a WTO agreement that regulates investment measures related to trade in goods. The TRIMs was signed in September 27 of 1994 and intends not only to promote the expansion and progressive liberalization of world trade but also to facilitate investments across international frontiers.[100] TRIMs seeks to eliminate all trade-related measures in a specific period of time. This period consists in two years for developed countries, five years for developing countries and seven years for least developed countries.[101]

Even though TRIMs does not regulate foreign direct investment directly, it promotes the facilitation of investment across international frontiers. In other words, it intends to eliminate measures in trade that may affect investments. As a consequence, TRIMs constitutes an important instrument in foreign direct investment matters inasmuch as it establishes certain rules to WTO members, in order to avoid measures on imports that may affect foreign investments in WTO member countries.

Despite the globalization of the economies, nowadays there is not a plurilateral binding agreement that regulates foreign direct investment. However, the absence of a plurilateral instrument does not mean that there have not had any attempts to enact an agreement regulating foreign direct investment specifically. In fact, in 1995 after several years of preparatory work the Organization for Economic Cooperation and Development (OECD) begun negotiations for a Multilateral Agreement on Investment (MAI)[102]

[99] Agreement on Trade Related Investment Measures 1994 WL 761642.
[100] See WTO Secretariat, *supra note* 89 at 32.(TRIMs preamble).
[101] Agreement on Trade Related Investment Measures Art 5 (2).

Multilateral Agreement on Investments (MAI)

The Multilateral Agreement on Investment was developed at the OECD forum since the OECD members "account 85 percent of the foreign direct investment outflows and 60 percent of inflows".[103] The importance of a multilateral agreement has been recognized by OECD members since the bilateral approach is not an efficient tool in an integrating world economy.[104] The MAI negotiation text as of April 24, 1998[105] contains a preamble expressing the purpose of the agreement, that is the economic cooperation among country members and the establishment of a multilateral framework for investment. The MAI is aimed to promote " an open international investment climate removing obstacles to the crossborder flow of capital, and facilitating the establishment of enterprises".[106] The MAI includes direct investment but also portfolio investment, real estate and rights under contract.[107]

In addition, the Multilateral Agreement on Investment is based in the principle of no discrimination. The MAI develops the "National Treatment Principle" that implies that the parties of the agreement can not treat foreign investors and their investments less favorably than they treat their own investors.[108] Moreover, the agreement includes the "Most Favored Nation Treatment" principle that means that country parties agree not to give any preferential treatment to any other party or third country based on reciprocity or any other arrangement. In other words, country parties can not discriminate among the

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[102] Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 Cornell Int'l L.J, 467, 467 (1998).
[103] OECD Policy Brief, *The Multilateral Agreement on Investment*, N2, 1 (1997).
[104] Id at 2.
[105] www.oecd.org/daf/investment/html
[106] See Geiger *supra note* 96 at 469.
[107] See OECD Policy Brief *supra note* 97 at 3.
[108] Id at 4.

investor and their investment.[109] The MAI also includes other provisions such as transparency, transfer of funds, entry and stay of foreign personnel, expropriation and settlement of disputes. Transparency means that the laws and procedures for foreign direct investment must be available to the public. Transfer of funds refers to all payments, capital, profits, dividend etc. must be freely remitted from and to the host country. Entry and stay of key personnel implies that host countries should authorize the entry and stay of managers and other specialized personnel to work in the host country. The MAI also states that expropriation may only occur for a public purpose, and it will be always subjected to a prompt and effective compensation. Finally, in regard to the resolution of disputes the MAI provides consultations as a way to resolve any dispute between home and host state or between the investor and the host state. In addition, the agreement provides binding arbitration as a way to solve any dispute.[110]

The purpose of the MAI is not to place a set of rules governing matters such as labor standards, industrial relations, intellectual property rights etc. However, it seeks to constitute an international framework for foreign investment among country members.[111] Even though many countries have special interest in the MAI, the negotiations of the agreement have been specially difficult since it should consider several matters such environmental issues, privatization, de-monopolization and concessions.[112]

Despite of the fact the MAI is being discussed at the OECD forum, eighth non-member countries have joined the negotiation as observers. They are Argentina, Brazil,

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[109] Id at 4.
[110] Id at 4.
[111] See Geiger *supra note* 96 at 474.
[112] Id at 472.

Chile, Estonia, Hong Kong, China, Latvia, Lithuania and the Slovak Republic.[113] The MAI had a May 1997 deadline to enter into force, unfortunately at that date no agreement was reached by the prospecting parties. It was followed by a six months suspension of negotiations in April of 1998. So far an agreement has not been reached.

Non Binding Agreements, The World Bank Guidelines of 1992

In the absence of a plurilateral binding agreement related to foreign direct investment, it is essential to consider other instruments with international recognition in order to determine if a specific legislation complies with the international standards in foreign direct investment. In this regard, even if they do not constitute a binding instrument, the World Bank Guidelines on the Treatment of Foreign Direct Investment constitute the only existing instrument that may comply with this goal.

The World Bank Guidelines of 1992

In 1991, the World Bank Group through its Development Committee prepared a set of universal standards for the legal treatment of foreign direct investment.[114] Those standards were developed by a small working group integrated by members of different institutions of the World Bank Group such as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for settlement of Investment Disputes (ICSID).[115] At that time the work group

[113] OECD Ministerial Statement on the Multilateral Agreement on Investment MAI (Apr. 28, 1988) http://www.oecd.org/news-and-events/release/ nw98-50a.html.

[114] World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment* 31 ILM 1363 (1992).

[115] Lewis T Preston (President of the World Bank) *Introductory Note of the World Bank Guidelines* 31 ILM 1363 (1992).

decided to prepare a set of guidelines not legally binding that could influence the development of the international legislation in foreign direct investment.[116]

The main purpose of the guidelines is to establish a generally acceptable international standards in the promotion of foreign direct investment.[117] In other words, it pretends to include the minimum features that a domestic legislation should include to attract foreign investments to the country. This characteristic is extremely important inasmuch as countries in the world may determine if their foreign investment laws may compete with other foreign legislation. For that reason, even if the World Bank Guidelines are not legally binding they constitute a very important tool in the regulation of foreign direct investment at the international level.

The guidelines are based on several bilateral investment treaties as well as multilateral agreements and national codes. Therefore, they develop a consistent instrument in the field of foreign direct investments.[118] The guidelines are divided in five parts: Scope of application, admission, treatment, expropriation and unilateral termination of contracts and settlement of disputes.

Guideline I, Scope of Application

Guideline I refers to scope of application. It defines the intend and purpose of the guidelines. Guideline I states that they may be applied by members of the World Bank Group to private foreign investments. In addition, the guidelines are intended to be a complement of bilateral and multilateral binding agreements related to foreign direct

[116] 31 ILM 1366.
[117] Id at 1367.
[118] Id at 1363.

investment.[119] Guideline I also establishes that the World Bank Guidelines should be applied not only to new investments in the host countries but also to investments established before. Finally, Guideline I states the general premise of equal treatment for all investors in alike circumstances (non-discrimination principle). However, Guideline I emphasizes that it is not a suggestion to give preferential treatment to foreign investors over national investors.[120]

Guideline II, Admission of Foreign Direct Investment

Guideline II covers the admission of foreign direct investment in host countries. Guideline II expresses that each state should encourage foreigners to invest capital, technology and managerial skills in its territory by facilitating the admission and further establishment of foreign investment.[121] It also encourages the avoidance of complicated procedural regulation and the imposition of unnecessary requirements that may affect the installment of foreign investments.[122] Moreover, Guideline II determines that host states should not require certain performance as a condition of the admission of the investment. On the contrary, it suggests that it is more effective to determine the areas where investment are prohibited or restricted. For instance, investments that could affect national security or investments related to public policy, public health and protection of the environment may be restricted to nationals..[123]

[119] Guideline 1 Scope of Application 31 ILM 1363.
[120] Guideline I N. 3.
[121] Guideline II 2 (a).
[122] Guideline II 2 (b).
[123] Guideline II 3, 4, 5.

Finally, Guideline II states that each state should publish adequate information including regulations, procedures, requirements and prohibitions relating to foreign direct investments. This provision seeks transparency in the foreign investment field.[124]

Guideline III, Treatment of Foreign Direct Investment

Guideline III covers the area of treatment of foreign investment. This guideline set a group of standards applicable to the establishment, operation, management, control and exercise of rights related to the investment.[125] In this regard, guideline II considers that each state should extend fair and equitable treatment to all investors in its territory in the following matters[126]: Protection and security of the investors and their rights (it includes control and benefits over investors property and protection to intellectual property), granting of permits, granting of import and export licenses and the authorization to employ and stay of foreign personnel.[127] In addition, Guideline III emphasizes that treatment established for investors will not discriminate on grounds of nationality.[128] In other words, the host country could not give a preference treatment to foreign investors from one country if it does not extend the same preference treatment to other foreigners.

In regard to the transfer of profits and other sums, Guideline III provides that each state should allow the freely transfer of part of the salaries and wages of foreign personnel, the net revenues produced by the investment, the transfer of sums coming form the liquidation or sale of the investment as well as other sums to pay contractual

[124] Guideline II 6.
[125] Guideline III 1.
[126] Guideline III 2.
[127] Guideline III 3 (a).
[128] Guideline III 3 (b).

obligations related to the investment.[129] Guideline III determines not only the possibility of transferring the sums obtained by the investments but also the way to do it. In fact, the World Bank states that the transfers will be made in the currency brought by the investor, in any currency designated as freely by the International Monetary Fund (IMF), or in any currency designated by the investor at the applicable market rate of exchange at the moment of the transfer. [130]

Moreover, Guideline III states that in case of any delay in the transfers of amounts proceeding from salaries, revenues, liquidation of investment etc., the host state will be subject to interest at the normal rate applicable to the local currency during the time counted since the amount has been provided to the central bank for transfer until the date the transfer is effected.

The third guideline also suggests that host states should facilitate not only the reinvestment of profits in their territories but also the procedures of sale and liquidation of those investments if the investors decide so.[131] In other words, investors should be free to make decisions in regard to the profits obtained from the investment. Numeral 8 of Guideline III encourages each state to prevent corruption and promote transparency in the treatment of foreign investments.[132] In this regard, Guideline III suggests international cooperation by developing mechanisms to guarantee fair practices on foreign investments.

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[129] Guideline III 6 (a) (b) (c) (d)
[130] Guideline III 6 (2) (a) (b) (3).
[131] Guideline III 7.
[132] Guideline III 8.

Finally, Guideline III in reference to tax matters establishes that each state should have reasonable and stable tax rates as the best incentives for foreign investors.[133] It specifically discourages any exemptions and fiscal incentives to attract foreign investors.

Guideline IV, Expropriation and Unilateral Termination of Contracts

Guideline IV refers to expropriation and unilateral alterations or termination of contracts. Guideline IV establishes that expropriation in whole or in part of a foreign private investment must be made in good faith, for a public purpose and without discrimination on the grounds of nationality.[134] In addition, in case in case of expropriation each state should pay appropriate compensation to the investor. In order to be considered appropriate, compensation will be deemed “adequate”, “effective” and “prompt”.[135] Compensation is “adequate” when it is based on the fair market valued determined before the taking by the government.[136] The fair market value will be acceptable if it is calculated using a method agreed by the state and the foreign investor or by any body or organization designated by the parties.[137] If there is not an agreement between the state and the foreign investor, the fair market value will be acceptable if it is calculated with reasonable criteria. For instance, a reasonable criteria would be the amount that a willing buyer would normally pay to a willing seller. In addition, Guideline IV recommends some other standards emphasizing that any one does not have exclusive validity. Among the standards mentioned by Guideline IV we find the “replacement

[133] Guideline III 9.
[134] Guideline IV 1.
[135] Guideline VI 2.
[136] Guideline IV 3.
[137] Guideline IV 4.

value" and the "book value". The "replacement value" means, "the cash amount required to replace the individual assets of the enterprise in their actual state as of the date of the taking".[138] On the other hand, "book value" means

> "The difference between the enterprise' s assets and liabilities as recorded on its financial statements or the amount at which the taken tangible assets appear on the balance sheet of the enterprise, representing their cost after deducting accumulated depreciation in accordance with generally accepted accounting principles".[139]

In order to be "effective", compensation should be paid in the currency brought by the investor or in any currency designated as freely usable by the International Monetary Fund or any currency accepted by the investor.[140] Finally, compensation will be considered "prompt" if it is paid without delay.[141] Nevertheless, compensation may be paid in installments in the shortest possible period (no exceeding five years from the taking and applying a market related interest) if the state faces exceptional circumstances such as established foreign exchange stringencies or the use of resources of the International Monetary Fund. Compensation will not proceed if it is a consequence of a sanction against the investor when he violates any state law, and that violation is recognized by a court of law.[142]

Moreover, Guideline IV also establishes that in the occurrence of non-discriminatory nationalization because of large-scale social reforms, compensation would be defined by the Host State and the investor through international arbitration.[143]

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[138] Guideline IV 6 (iii).
[139] Id.
[140] Guideline IV 7.
[141] Guideline IV 8.
[142] Guideline IV 9.
[143] Guideline IV 10.

Finally, Guideline IV states that when a host state acts as a sovereign and not as a contracting party any unilateral termination of contract or an amendment of a contract, compensation will be determined in the way it has been explained in this guideline. On the other hand, if the state acts as a contracting party liability will be determined under the applicable law of the contract.[144]

Guideline V, Settlement of Disputes

Guideline V regulates the settlement of disputes regarding foreign direct investment. Guideline V establishes that disputes between private foreign investors and the host state will be settled through negotiations between them. If negotiations do not work, disputes will be settled by national courts or by independent arbitration or conciliation if they are agreed.[145] Independent arbitration may be agreed by the host state and the investor or by the host and the home state.[146] In the case of independent arbitration and when the host state is a party of the ICSID convention (the International Centre for Settlement of Investment Disputes), the host state is encouraged to accept the arbitration under the ICSID procedures. Otherwise, this is if the host state is not a party of the ICSID convention, Guideline V suggests the "ICSID Additional Facility" for the settlement of disputes through arbitration.

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[144] Guideline IV 11.
[145] Guideline V 1.
[146] Guideline V 2.

CHAPTER 5

COLOMBIAN LEGISLATION BEFORE THE FOREIGN DIRECT INVESTMENT GUIDELINES

In this chapter, the general regime for foreign direct investments in Colombia will be analyzed in order to determine if it complies with the general standards established by the World Bank in its 1992 Guidelines. For that purpose, it will be necessary to analyze not only Resolution 51 of 1991 but also several domestic rules that are directly related to the regulation of foreign direct investment in the country. At this point, labor law, tax law and foreign exchange regulation will be mentioned and analyzed in order to give the reader the legal framework for foreign direct investment in Colombia. The exercise will consist in the comparison of the guidelines provisions with the Colombian regulation in each one of the points that the World Bank developed: Admission of foreign investment, treatment, expropriation and unilateral termination of contracts and settlement of disputes.

Guideline II, Admission of Foreign Investment

Facilitation of the Admission and Establishment of Investments and the no Imposition of Unnecessary Conditions.

The admission of foreign investment constitutes the first major element to be analyzed in this study. The term “admission” refers to the entry of foreign investment to the territory of any country.[147] As we saw in Chapter 4, Guideline II expresses that each state should encourage foreigners to invest capital, technology and managerial skills in its territory by facilitating the admission and further establishment of foreign investments. It also declares that host states should not require certain performance as a condition of admission. On the contrary, it suggests to host states to set a list with the areas where the host state is not interested in having foreign investment.[148] In this regard Resolution 51 of 1991 establishes the principle of universality of access to any Colombian economic sector.[149] As a consequence, foreign capital investment may be made in any proportion in all sectors of the economy excluding activities of defense and national security and the processing and disposal of dangerous or radioactive waste not produced in Colombia.[150] However, this specific rule was not conceived initially like it is now. In fact it has been modified by Decrees 2012/94, 2764/94, and 241/99.

When article 8 of Resolution 51 was originally conceived, it only prohibited foreign investment in national security and defense matters and the processing and disposal of dangerous radioactive waste not produced in Colombia. However, Decree 2012 and 2764 of 1994 modified it, extending the prohibition to other sectors of the economy. They were investments in real estate companies and investment in titles issued as a result of a securitation of real estate. Then Decree 2764 modified a little bit those limitations. As a result, foreign investment was forbidden to companies mainly engaged in the purchase, sale or lease of real state, excepting the companies which that activity

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[147] James D Nolan, *A comparative Analysis of the Laotian Law on Foreign Investments, the World Bank Guidelines on the Treatment of foreign Direct Investments and Normative Rules of International Law on Foreign Direct Investment*, 15 Ariz J Intl & comp. Law 659, 667(1998).
[148] Guideline II 3, 31 ILM 1363 (1992)
[149] Coinvertir, *Colombia-Legal Framework- 1999*. Available in www.coinvertir.gov (English version).

was developed with properties built by themselves and to investments in titles issued as a result of the securitation of real estate or construction projects through real estate funds.[151]

Finally, in 1999 the Colombian government enacted Decree 241 amending article 8 of Resolution 51/91. As a result, the only two sectors where foreign investment are prohibited are activities of national security and defense and the processing and disposal of dangerous or radioactive waste not produced in Colombia.[152] Nevertheless, the Consejo Nacional de Politica Economica y Social (COMPES), a government consulting agency, could identify any sector of the economy to determine if the government admits foreign investment in it.[153]

As we saw, Colombian regulation allows foreign investment in most of the sectors of the economy. The only prohibitions are based on the belief that investment in those areas represents a menace to the security of the country. In fact, the government has continually tried to facilitate foreign direct investment limiting it only in two areas. It means that the Colombian legislation in regard on the admission of the investment complies with the standards established by Guideline II of the World Bank.

In reference to the avoidance of complicated procedural regulation and the imposition of unnecessary requirements, Resolution 51 states that foreign investment in Colombia is approved automatically.[154] In this regard, article 9 states that all foreign investment that is intended to be made in Colombia in any sector of the economy is

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[150] Resolution 51/91 Art 8.
[151] Decree 2764/94 Art 1.(Adding (c) and (d) to Art 8 of Resolution 51).
[152] Decree 241/99 Art 2.
[153] Resolution 51/91 Art 8 Paragraph.
[154] Resolution 51/91 Art 9.

authorized. Therefore, Colombia does not require any conditions or complicated procedures to prospective investors.

Article 9 of Resolution 51 also has been modified since it was originally conceived in 1991. Decree 517/95 required a prior approval from the National Planning Department (Departamento Nacional de Planeacion) for investments in the area of public services such as electric energy, water works and sewage. Investment in other areas such as postal services, public health and communication and activities of processing and disposal of waste also required prior authorization of the Planning Department.[155] Finally, in 1996 Decree 1295 amended article 9 of Resolution 51/91 eliminating any prior governmental approval in the admission of foreign investment.[156] Consequently, the elimination of the prior approval form the National Planning Department speeded up the foreign investment process in Colombia.[157]

Requirement of Registration of Foreign Direct Investment

Even though admission of foreign direct investment in Colombia is automatic, Resolution 51/91 requires that all foreign capital investment, including additional investment, capitalization and reinvestment of profits must be registered in the Bank of the Republic.[158] The registration must be requested by the investor or his representative within the three months following the date of the investment. However, the three-month period can be extended to six months if the interested party with justification requests and

[155] Decree 517/95 Art 1 (a) (b)
[156] Decree 1295/96 Art 5.
[157] Consuelo Alarcon, *Colombia- Update on Foreign Investment Regulations*, Market Reports (1996).
[158] Resolution 51/91 Art 15.

extension of the term.[159] Even though the existence of this exception, “once the term has expired and no registration request has been made, neither the sum invested nor the profits will benefit from the right to be remitted abroad”.[160] In other words, registration of the investment constitutes a requirement to exercise exchange rights by foreign investors. Nevertheless, a foreign investor may still register the investment in the Bank of the Republic after the legal period has expired provided that the investor declares the foreign capital as a foreign investment and it has been actually invested in Colombia.[161]

Recommendation of Publishing a Handbook Containing Legislation and Procedures Relevant to Foreign Investment.

Guideline II also encourages each state to publish in the form of a handbook or other medium easily accessible to prospective investors containing adequate information about the legislation and procedures related to foreign investment. In this respect, Colombia through “Coinvertir,” a promotion agency created by the government in November, 1992[162], is continually updating all foreign investment regulation in English and Spanish language. The purpose of Coinvertir is to promote, attract and facilitate the flow of foreign investment in Colombia.[163] In addition to the statute of foreign direct investment (Resolution 51/91 English version) which was compiled by the government to enable the reader to consult all rules in force regarding to foreign investment in a single

[159] Id.
[160] Resolution 51/91 Art 15 (a).
[161] Id Art 15 Paragraph 7 (a).
[162] See Pascuzzi *Supra note 57*at 454 Coinvertir is available in the net at www.coinvertir.gov.
[163] Id.

text, Coinvertir offers information about the Colombian economic factors, public order, recent investments made in Colombia, etc.

Conclusion

Having described the Colombian legislation principles regarding the admission of foreign investments, it is possible to conclude that Colombian legislation complies with the standards established by the World Bank in its 1992 Guidelines. It is also possible to conclude that the country is interested in attracting foreign investment to the country making easier the entry of foreign capital and the posterior establishment of the investment. This interest is reflected in the evolution of the rules in the restricted areas of the economy to invest as well as the elimination of prior authorization to invest in certain areas of the Colombian economy. The existence of Coinvertir also shows a national interest to attract foreign direct investment to the country.

Guideline III, Treatment of Foreign Investment

Guideline III of the World Bank regarding to the treatment of foreign direct investment develops a group of standards to be applicable to the establishment, operation, management control and exercise of rights of any foreign investment.[164]

Non Discrimination on Grounds of Nationality

Guideline III indicates a preference for a “fair and equitable treatment”[165] of foreign investment. As a consequence, discrimination on grounds of nationality is not encouraged. Guideline III establishes that domestic and foreign investors are equal before the law. In addition, Guideline III considers some points in regard to fair and equitable treatment to foreigners. Among the most important we find Protection and security of the person of the investor, his property, rights and interest.[166] Inthis regard, the Colombian legislation through Resolution 51 is based on the principle of equal treatment.[167] In addition, article 100 of the Colombian Constitution declares that foreigners have the same civil rights that nationals have. Therefore, foreigners have the same protection to their property and also have the same rights that nationals.

Authorization of Employment of Foreign Personnel

Guideline III also proclaims that each host state should authorize the employment of foreign personnel.[168] This includes the issuance of the necessary entry and stay visas to the foreign personnel.[169] Regarding this recommendation, the Colombian immigration and labor law regulates the following: Immigration in Colombia is regulated by Decree 2241 of 1993.[170] Decree 2241 establishes that foreigners entering, traveling through, temporarily remaining or residing in Colombian territory must have a valid passport, travel document or any official document issued on his name and the corresponding visa or entry permit.[171] Furthermore, Decree 2241 establishes different types of visa that foreigners may obtain to entry to the county. Among them we find - Resident visa, which

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[164] Guideline III 1.
[165] Guideline III 2.
[166] Guideline III 3 (a).
[167] Resolution 51/91 Art 3.
[168] Guideline III 4 (b).
[169] Guideline III 3 (a).
[170] German Cavelier, Legal Aspects of Doing Business in Latin America,26 Supp 3 (1995).
[171] Decree 2241/93 Art 2.

is issued, to investors and other professionals. It does not have expiration date and requires the following documents: Valid passport, information about the activity to be developed in the country, health certification, and judicial certification (that demonstrates that the foreigner does not has been processed in a criminal trial).[172] The Colombian consulates with the authorization of the visa division may issue resident visas.[173] - Temporary visa: is issued for a limited period of time of three years. It may be renewed for an extended period of time with the presentation of the renewed labor contract before the immigration authorities.[174] Decree 2241/93 also refers to tourist visa, student visa, etc.

In regard to labor legislation relating to the authorization of hiring of foreign personnel, the Colombian legislation establishes that companies in Colombia having more than 10 employees may hire foreign employers in a proportion not superior to 10% of the ordinary employees and not more than 20% of the management personnel.[175] Nevertheless, the employer may exceed those limits by obtaining authorization from the ministry of labor.[176] The ministry of labor may increase the proportion established in the law "when referring to strictly technical and essential personnel and only for the necessary time to train Colombian personnel"[177] or when the employer prior request to the ministry of labor shows evidence with the necessary documents that hiring of alien

172 Id Art 26.
173 Id Art 27
174 Id Art 28.
175 Colomb. Labor Code Art 74.
176 Art. 75 Colomb Labor Code.
177 Either Cavelier p 60-64 or Art consider changing words

employees in bigger proportion is needed.[178] This authorization is granted for a limited period of time while Colombian personnel is trained.

Even though the Colombian labor law in regard to the authorization of employment of foreign personnel is very restricted, it is important to remark that the Colombian human resource is considered as a strong point of the country by foreign companies already established in Colombia. This conclusion came out form a study developed by Coinvertir[179] and the National Planning Department in 1999 where those two organizations identified obstacles and opportunities for foreign investors in Colombia. The program consisted in making a survey to 121 foreign companies established in Colombia.[180] The conclusion of the program was the base of a recommendations made by the National Planning Department to the Colombian government in order to improve the conditions of foreign investors in Colombia. Sixty four percent of the foreign investors in regard to the Colombian labor force manifested that the Colombian human resources constituted a strong point to attract foreign investment to the country.[181]

Conclusion

As we saw, the Colombian immigration law does not interfere with the entry and stay of foreigners to the country. On the contrary, it seems to be easy to get a visa if the

[178] Art 75 Colomb. Labor Code.
[179] Coinvertir is a promotion agency created by the government in November, 1992. The purpose of Coinvertir is to promote, attract and facilitate the flow of foreign investment in Colombia. (See Pascuzzi at 454) See also Coinvertir web page (www.coinvertir.gov) English version.
[180] Programa Coinvetir- DNP, Obstaculos y Oportunidades Para la Inversion Extranjera en Colombia (1999).
[181] Id at 14.

foreigner comply with the minimum requirements to apply for it. On the other hand, the Colombian labor law is restricted regarding to the employment of foreigners since it does not allow the freely entry of foreign employees to the country. This situation may discourage foreign investment when the investor considers bringing his own personnel to develop the investment. However, a prospective investor should consider the good reputation that the Colombian human resources have among the foreign investor already established in the country.

Possibility of Transfer of Sums Abroad Produced by the Investment

Guideline III presents a list about the types of assets that host countries should allow to transfer abroad freely.[182] According to Guideline III, such transfer will be made either in the currency brought in by the investor or any other currency designated as freely usable currency by the International Monetary Fund (IMF).[183]

Possibility of Transfer of Part of Salaries of Foreign Personnel

Guideline III states that each state should allow the freely transfer of salaries and wages of foreign personnel, and in case of liquidation or early termination of the employment should allow the transfer of the total of salaries and wages.[184] In attention to this point, the Colombian legislation allows the freely remittance of profits abroad earned by foreign employees in Colombia once the have paid the applicable income tax and the

[182] Guideline III 6.
[183] Guideline III 6 (2).
[184] Guideline III 6 (1) (a).

remittance tax rate.[185] As a consequence, the Colombian legislation does permit the freely transfer of salaries and wages once the employee has paid the applicable taxes.

Possibility of Transfer of Other Sums.

Guideline III also mentions the transferring of the net revenues produced by the investment as well as the sums obtained form the sale or liquidation of the investment. In order to remit those sums abroad, Guideline III states that such transfer will be made either in the currency brought in by the investor or any other currency designated as freely usable currency by the International Monetary Fund.[186]

In respect to this point, Resolution 51 of 1991 enumerates the exchange rights that foreign investors possess.[187] Consequently, foreign investors have the following rights: Foreign remittance of proven net profits produced regularly by the investment, capitalization of profits or the retention of any remissible profits not distributed, and foreign remittance of any sums received as a result of the sale of the investment or the liquidation or reduction of capital of the investment. Furthermore, article 16 establishes the procedure to remit sums abroad stating that

"For the purposes of the purchase of foreign currency and the exercise of such right, the investor shall present a certificate of the fiscal auditor or equivalent in which the amount of the investment, the net profits generated by the investment, and where necessary, all the additional details which are indispensable to prove said net profits are stated."[188]

[185] Tax code (decree 624/89) Art 9.
[186] Guideline III 6 (2).
[187] Resolution 51/91 Art 16.

Foreign Exchange Regulation in Colombia (Law 9/91 and Resolution 21/93)

In order to determine exactly how the remittance of sums produced by the investment is done, it is important to have a basic knowledge of the foreign exchange regulation in Colombia. In 1991, the Colombian Congress established a group of general rules that the government must consider enacting a new exchange regime.[189] As a consequence, the Colombian government enacted Resolution 57 of 1991 which first regulated the foreign exchange system. Then in 1993 Resolution 57 was replaced by Resolution 21 of 1993 which now governs the foreign exchange regime. Resolution 21 of 1993 only made some modifications to the system imposed by Resolution 57/91.[190] Before 1991, the Central Bank of Colombia ruled all foreign exchange transactions through the office of exchange making the purchase of foreign currency a very difficult process inasmuch as the person who wanted to do that had to apply for an exchange license.[191] Now, under the new system, it is not longer necessary to obtain an exchange license to remit money abroad.[192]

The foreign exchange market in Colombia is divided in two categories: - The exchange market, which includes the majority of foreign exchange transactions[193] such as import and export of goods, foreign indebtedness, foreign investments, and their profits, investments made by Colombians abroad and their royalties, guarantees in foreign currency etc.[194] The second division of the foreign exchange market is the free market.

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[188] Id Art 16 (a) Second Paragraph
[189] Law 9/91 (preamble)
[190] Devid J Pascuzzi, *International Trade and Foreign Investment in Colombia; A Sound Economic Policy Admits Crisis*, 9 Fla. J. Int'l L 443 (1994) at 455.
[191] Id at 454.
[192] Id at 454.
[193] Id at 455.
[194] Resolution 21/93 Art 7 (See also Law 9/91 Art 4).

The free market is composed by all the transactions not included in the exchange market but that could be voluntarily channeled through the exchange market[195]. In this group we find earnings originated from personal services, labor contracts etc.[196] As a consequence, transactions of the exchange market must be channeled through the authorized intermediaries established by law. According to Resolution 21/93 the authorized exchange intermediaries are the commercial banks, financial corporations, the FEN (Financiera Electrica Nacional), Bancoldex and other authorized agents.[197]

As a result of the implementation of the foreign exchange system, foreign capital to be invested in Colombia must be channeled through the exchange market.[198] As a consequence, once a foreign investment is registered in the country, the investor must fill out and submit an exchange declaration into the Bank of the Republic.[199] The exchange declaration must be subscribed by the investor or his representative and must include the conditions of the transaction, the amount of the investment, etc.[200] After the investment is registered and established in Colombian according to the requirements of the law, foreign investors may proceed to transfer freely any sums produced by the investment.[201] For this purpose, the investor must fill out every time an exchange declaration including the net profits that he wishes to remit abroad or any sums produced by the liquidation, sale, or reduction of capital of the investment. The exchange declaration must be sent to the Bank of the Republic attaching a certification issued by the company's auditor or a

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[195] Resolution 21/93 Art 6.
[196] See Pascuzzi *supra note* 185 at 455.
[197] Resolution 21/93 Art. 68.
[198] Id Art 37.
[199] Id Art 1.
[200] Id Art 1.
[201] According to the exchange rights established in Resolution 51/91 Art 16.

certified public accountant setting the amount to be remitted abroad and the payment of the corresponding taxes.[202] In addition, it is important to mention that the exchange rate is not set by the government but by the markets.[203] As a result, the Superintendent of banks certifies daily a “representative market rate” that is based on the sale and purchase of foreign currency made by the banks on the previous day.[204]

Conclusion

As we saw, the Colombian legislation regarding the transfer of sums produced by foreign investments complies with the standards established by the guidelines. The procedure established in the foreign exchange regime is not complicated and the remittance of sums abroad can be performed through banks and other authorized agents, making easier transfer abroad for foreign investors. In addition, the Colombian legislation allows the remittance of sums produced by the sale of liquidation of the investment without restrictions. Finally, it is relevant to notice that the conditions for the remittance of profits and other sums produced by the investment may not be changed in a unfavorable way to foreign investors except temporarily when international reserves are insufficient to cover three months of imports.[205]

Reasonable and Stable Tax Rates

Guideline III of the World Bank in regard to the treatment of foreign investment also recommends the use of reasonable and stable tax rates instead of tax exemptions to

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[202] Resolution 21/93 Art 38.
[203] See Pascuzzi *supra note* 185 at 455.
[204] Id at 455.

foreign investors. In this regard, the Colombian tax code[206] establishes several kind of tax relevant to foreign investors. The Colombian tax code establishes on the one hand that foreigners with no residence in Colombia only pay taxes from the income earned in Colombia plus the remittance tax when they transfer any sums abroad.[207] On the other hand, foreign residents pay taxes for the income earned in Colombia and for the income earned abroad only after the fifth year of residence.[208] Article 10 of the tax code defines the term residence for tax purposes. As a consequence, foreigners who remain in Colombia for a period of six months or more continuos or discontinuous in a year are considered residents for tax purposes.

Article 24 of the tax code defines the receipts earned in Colombia and abroad that constitute income for tax purposes. It includes income generated by labor contracts, profits produced by a company, selling of goods, commercial activities, etc**.**

Taxes to be Paid as a Consequence of a Labor Contract

Numeral 5 of article 24 of the Colombian tax code establishes that salaries and wages are considered as income earned in Colombia. Consequently, foreigners must pay taxes over the wages and salaries obtained by them. In regard to the payment of taxes form wages and salaries, article 383 to 388 of the Tax Code regulates the matter. For that purpose, the tax code establishes a system that consists of a retention of a percentage of the salary that the employer must do every month according to a progressive rate

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[205] Law 9/91 Art 15.
[206] Law 624/89.
[207] Tax Code Art 9.
[208] Tax Code Art 9.

schedule determined by the law.[209] The rate varies depending on the amount of the salary from 0.09% to 35%. As a result, foreign employees pay taxes over the salaries and wages that they get in Colombia. In addition, employees must pay the remittance tax (when they remit salaries abroad) which will be explained later on in this chapter.

Other Colombian Taxes

The Colombian law establishes the following national taxes: Income tax, remittance tax, value-added tax (VAT), stamp tax and registration fees.[210] Furthermore, the Colombian tax regulation includes local taxes. They are property taxes and industry and commerce taxes.[211]

National Taxes

Income Tax

The first kind of national tax is the income tax. Income tax is paid over the net income of a person or company regardless of its foreign participation or percentage.[212] Consequently, domestic and foreign companies pay taxes in the same way. The net income is constituted by income that includes all earnings of a business including premium in shares, profits and dividends, less costs, and less deductions (such as sums paid during the tax year, industry and commerce tax, value added tax etc.).[213] The income tax rate for nationals and foreign companies is 35%[214] which is paid annually.

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[209] Tax Code Art 383.
[210] Coinvertir, *Colombia - Practical Guide for the Incorporation & Functioning of a Company, 14* (2000) Available in www.coinvertir.gov.
[211] Id At 18.
[212] Id at 14.
[213] Id at 14.
[214] Tax Code Art 240. Tariff modified by Law 223/95.

At the personal level, foreign residents (foreigners who spend six moths or more in Colombia in a period of time of one year[215]) are taxed on income and windfall profits in a progressive rate schedule where the highest rate is 35%.[216] On the other hand, non-resident investors are subject to a 35% on income.[217] In addition, dividends received by foreigners no residents pay a 7% rate in case of dividends or profits on which the distributing company has already paid the tax. However, if the dividends are reinvested the tax will be deferred, and if the reinvestment remain for a period of time no less than five years, the dividends or profits are exempted.[218]

Articles 36 to 57 of the tax code establish the receipts that constitute neither income nor occasional gains. Among those exemptions we find: distribution of profits in stock as a result of a capitalization.[219] and dividends or distributing earnings received by partners, stockholders that are Colombian residents. In order to get the exemption, the company must have paid all relevant taxes prior distribution.[220] Furthermore, according to article 246 of the tax code dividends obtained by Colombian branches of foreign corporations does not pay income tax.

Remittance Tax

The second kind of national tax is the remittance tax. Remittance tax is caused on the transfer abroad of any income or occasional gain obtained in Colombia. In case of foreign companies, the remittance tax is caused by the simple act of obtaining dividends.

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[215] Tax Code Art 10.
[216] Tax Code Art 241.
[217] Tax Code Art 247.
[218] Tax code Art 245.
[219] Coinvertir, Colombia - *Legal Framework*, 37 (1999) and Tax Code Art 36-3.

As a consequence, all profits pay remittance tax since it is presumed that they are remitted abroad.[221] Nevertheless, if the profits are reinvested, the payment of the tax is deferred, and, if the reinvestment is kept for a period of time of five years the profits are exempted of the remittance tax.[222]

The remittance tax rate varies depending on the origin of the sums remitted abroad.[223] The rate for the remittance of profits obtained by foreign corporations is 7%.[224] This rate was gradually reduced from 12% in 1992, 10% in 1994, 8% in 1995 and 7% in 1996 and following years. Article 322 of the tax code establishes the exceptions to the payment of the remittance tax. Among the exceptions we find interest of foreign loans obtained by certain companies, profits obtained in free trade zones, etc. Remittance tax is described in articles 321 to 328 of the tax code. Remittance tax is paid annually in case of branches and it is paid together with the income tax cancellation. In case of subsidiaries, the payment is made at the time of the transfer abroad.[225]

Value Added Tax (VAT)

The third kind of tax is the value-added tax. (VAT). The VAT is a national levy on services, sales of goods and imports.[226] In addition, some services performed from abroad for clients setting in Colombia are also subject to the VAT. Among those services we find consulting services, insurance services, translate services, etc.

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[220] Tax Code Art 48.
[221] Tax Code Art 319.
[222] Tax code Art 319.
[223] Tax Code Art 321
[224] Id Art 321-1.
[225] Coinvertir, *Colombia - Practical Guide for the Incorporation & Functioning of a Company, 16* (2000) Available in www.coinvertir.gov
[226] Tax Code Art 420.

There are several exceptions to the VAT. Among the most important we find: public utilities, [227] natural gas,[228] health and dental services, etc.[229] Furthermore, there is a special exemption that includes the temporary import of heavy machinery for basic industries (such mining and heavy chemistry, generation and transmission of energy, etc.) not produced in Colombia.[230] The rate of the value added tax is 16% (increased from 15% by Law 633/2000). Finally, VAT is described in the tax code in articles 420 to 513.

Stamp Tax and Registration Fee

The fourth kind of national tax is the stamp tax. The stamp tax is paid for the registration or signature of documents that certified the existence of a contractual obligation.[231] The value of the of the contract determine the payment of stamp tax. Documents containing a contract value over 53.500.000 pesos (aproximate.28,000 US dollars) pay stamp tax.[232] The standard rate of stamp tax is 1.5% of the value of the contract.[233] The payment is performed at the time of the execution of the agreement.[234] The stamp tax is regulated in articles 514 to 554 of the tax code.

The last kind of national tax is the registration fee. This levy is charged in the registration of acts or contracts in public record offices and chambers of commerce. The registration fee is paid when it is mandatory by law.[235]

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[227] Id Art 424.
[228] Id Art 424-6
[229] Id Art 476.
[230] Id Art 428.
[231] Tax Code Art 519.
[232] See *supra note* 217 at 17.
[233] Tax Code Art 519.
[234] See *supra note* 217 at 17.

Local Taxes

Industry and Commerce Tax and Property Tax

At the local level, there are two kind of taxes: Industry and commerce tax, and property tax. The industry and commerce tax applies to the industrial and commerce activity while the property tax is charged on real estate located in a municipality.[236] The tax rates vary among each municipality. For industrial activities the rate varies form 0.2% to 0.7% per month and the tax base includes income obtained for the sale of goods other than exports. On the other hand, the tax rate for commercial activity varies from 0.2% to1.0%.[237] Finally, the tax rate for property tax ranges from 0.1% to 0.16%. Local taxes are paid annually.[238]

Conclusion

Guideline III encourages the establishment of reasonable and stable tax rates instead of tax exemptions to foreign investors. In this regard, the Colombian tax regime states the same rates to nationals and foreigners and it does not establish exemptions to foreigners. However, recent tax reforms have increased tax rates. For instance, the corporate rate was increased from 30% to 35% in 1995.[239] In addition, the VAT rate increased from 15% to 16% in the year 2000.[240] Some other tax rates have gradually decreased through the years and some are even disappeared such as the remittance tax rate for dividends obtained from branches of foreign companies which decreased from

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[235] Id at 17.
[236] See *supra note* 217 at 17.
[237] Id at 17.
[238] Id at 18.
[239] Law 223/95 Art 99.

12% in 1993 to 7% in 1996 and subsequent years.[241] Despite of those variations in the Colombian tax regime, corporate tax rate remains in the average rate of 30% to 35% found in most Latin American countries and favorable by world standards.[242]

Finally, it is important to mention that Colombia has signed international and bilateral treaties to avoid dual taxation. Among those we find agreements with the United States, Argentina, Brazil, Germany and Venezuela.[243] That situation shows an effort of the Colombian government to maintain favorable tax conditions to foreign investors.

Guideline IV, Expropriation and Unilateral Alteration or Termination of Contracts

Expropriation

Guideline IV of the World Bank recommends that in case of expropriation, it should occur in accordance to legal procedures in pursuance of good faith of a public purpose, without discrimination on the grounds of nationality, and against the payment of appropriate compensation.[244] Guideline IV also suggests the use of different methods to determine the value of the asset taken by the government.

Purpose of Expropriation

In regard to expropriation, the Colombian legislation establishes in its Constitution of 1991 that private property and owner rights are guarantee under the

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[240] Law 633/2000.
[241] Tax Code Art 321-1.
[242] Peter D. Byrne, *Foreign Tax Problems of US Companies Doing Business in Latin America*, 50 U. Miami L. Rev 483, 485 (1996).
[243] Coinvertir, *Colombia - Legal Framework* (1999). Available at www.coinvertir,gov.
[244] Guideline IV 1.

law.[245] However, expropriation of private property is permitted in pursuance of a public purpose, prior indemnification of the owner. In this regard, the Colombian Congress on July 30 of 1999 amended article 58 of the Constitution repealing the provision that permitted the government to expropriate private property for equity reasons without compensation. That kind of expropriation was possible through the favorable vote of all the members of the Senate and the House of Representatives.[246] Expropriation without compensation discouraged foreign investment in Colombia because of the legislative uncertainty that it produced to prospective investors.[247]

Expropriation procedure in Colombia is regulated in the Civil Procedure Code. At the same time, several laws regulate certain classes of expropriation attending it causes. Articles 451 to 459 of the Civil Procedure Code regulate the judicial procedure of expropriation. Once the judicial decision is registered, the judge gives the indemnification of the expropriation to the former owner of the property.[248]

Expropriation occurs for different causes such as expropriation for the construction of water and electric systems (regulated by Law 56 of 1981), expropriation in pursuance of the agricultural reform (regulated by Law 160 of 1994 and Decree 1139/95), and expropriation to develop the urban reform (regulated by Law 9 of 1989, Law388/97 Decree 0762/98, and Decree 1420/98). Each of those kinds of expropriation establishes negotiations with the owner of the property as a way to avoid an expropriation procedure, the methods of valuing the property to be taken, etc.

[245] Colom. Const. Art 58.
[246] Colom. Const. Art 58 (prior to amendment).
[247] Latin American Energy Partnership, *Colombia Ends Threat of Nationalization Without payment*, sect 16 Vol6 (1999) Available in Lexis.
[248] Civil Procedure Code Art 458.

Non Discrimination on the Basis of Nationality

In regard to the provision that expropriation should proceed without discrimination on the basis of nationality, the Colombian legislation does not take into account the nationality of the owner of the property to be expropriated. Therefore, national and foreign owners of property may experience expropriation when the conditions established in the law met.

Compensation in Case of Expropriation.

Guideline IV recommends that compensation should be “appropriate”. Therefore, compensation is appropriated if it is “adequate” “effective” and “prompt”. According with the World Bank compensation is “adequate” when it is based on the fair market value of the taken asset. Guideline IV mentions some methods of valuation of the property such as the “book value” and the “replacement value”. However, the guideline does not gives an exclusive validity to those methods. In this regard, the Colombian legislation establishes different methods to establish the value of the property. For instance, Decree 1420/98 which regulates the method of valuing a property expropriated under the urban reform states that the market value of a real property is the probable price that a willing buyer would pay to a willing seller with the knowledge of the judicial and fiscal condition of the property.[249] On the other hand, Decree 1139/95 in reference of the valuation of property expropriated under the agricultural reform states that the price of the property to be taken is obtained from an investigation of the agricultural real estate market considering factors such as the value of the land and its location, the value of similar property sold in the last two years (considering the selling price), etc. In addition, those decrees establish that persons who perform the valuation must have knowledge in the field and have a bachelor degree. The law also describes the calculating methods that may be applied in the valuation of a property. In addition to the property value investigation performed by the governmental entity that wants to expropriate an estate, the civil procedure code establishes the performing of a valuation inside the judicial process of an asset in order to determine its value market.[250] Since the methods described in the Colombian legislation are objective, they guarantee a fair compensation of the owner of the property to be taken.

Moreover, Guideline IV considers compensation "effective" when it is paid in the currency brought by the investor or another currency designated as freely usable by the International Monetary Fund. In this regard, the Colombian Civil Procedure Code establishes that all payments are made in Colombian pesos[251]. However, if one of the parties is a foreigner, it is possible to agree a payment in a foreign currency. Nonetheless, this arrangement is not performed inside the judicial process.[252]

Finally, Guideline IV states that the payment is "prompt" if is paying without delay. In this regard the Colombian legislation assures the promptness of the payment since it is made through the judge office right after the registration of the judicial decision of expropriation.[253]

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[249] Decree 1420/98 Art 2.
[250] Civil Procedure Code Art 456.
[251] Check art CPC
[252] External Resolution 8/2000 of the Bank of Republic Art 75.
[253] Civil Procedure Code Art 458.

Conclusion

The elimination of expropriation without prior compensation in 1999 gave the investors a guarantee that expropriation only may occur under conditions previously established by law eliminating any uncertainty that existed before. Furthermore, expropriation occurs only through a judicial decision and it only proceeds in pursuance of good faith of a public purpose such as the urban reform, the agricultural reform, etc. complying in this way with Guideline IV. In addition, the Colombian legislation establishes mechanisms that assure the appropriate compensation in case of expropriation. As a consequence, expropriation rules comply with the standards of guideline IV. Finally, it is important to remark that negotiation with the owner of the property is encouraged, and it is considered as a prior stage of the judicial expropriation procedure.[254]

Unilateral Termination of Contracts

Guideline IV also refers to the unilateral termination of contracts.[255] Guideline IV states that unilateral termination of contracts may occur only in pursuance of a public purpose and when the state acts as a sovereign and not as a contracting party.[256] In Colombia when the state or any governmental entity acts as a contracting party, regulation regarding to contracts (civil and commercial law) is applicable.[257] However, if the Colombian State or any governmental entity act as a sovereign in a contract, Law 80 of 1993 and the Contentious Administrative Code regulate those matters.

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[254] Law 56/81 Art 18, Law 160/94 Art 33 etc.
[255] Guideline IV 11.
[256] Id.

As the Guideline IV mentions, when the state acts as a sovereign, it has extra powers to terminate, interpret and modify any contract but only under the requirements established in the law. In this regard, the Colombian legislation in Law 80/93 determines different ways that the State may use to assure the execution of a contract, when it acts as a sovereign in that contract. As a result, the government may unilaterally terminate, modify and interpret contracts. In that case, the state only with the purpose of avoiding a paralysis of the performing of a public service may modify, interpret the clauses of a contract and even terminate it if certain conditions are present.[258] However, the law establishes the payment of compensation and indemnification with the purpose of maintaining the equity of the contract.[259] As a consequence, governmental entities acting as a sovereign in a contract may include exceptional clauses of unilateral termination, interpretation and modification of contracts. Nevertheless, these clauses make part of every contract even if they do not appear in the document.[260] Unilateral interpretation of contracts is described in article 15 of Law 80/93 and unilateral modification is contained in article 16.

Article 18 of Law 80/93 refers to the termination of the contract caused by the breach of contract of the contracting party (Caducidad). “Caducidad” is declared when the contracting party breaches the contract and this breach heavily affect the execution of the contract. In that case indemnification of the contracting party does not proceed.

In addition, articles 50 to 58 of Law 80/93 describe the responsibilities of the government and the contracting party before the contract. Article 50 establishes that the

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[257] Law 80/93 Art 13.
[258] Id Art 14-1.
[259] Id.

government entities are responsible for the illegal actions that they may perform. In that case, the state must pay not only a indemnification to the contracting party but also the profits that the contracting party did not receive as a consequence of that illegal act. In the same way, article 52 establishes the responsibilities of the contracting party.

Finally, Law 80/93 determines that any dispute between the government and the contracting party may be settled through negotiations.[261] However, in case of negotiations fail, the contentious administrative jurisdiction resolves the dispute.[262]

Conclusion

As we saw, the Colombian legislation regarding to the unilateral termination of contracts complies with the standard of Guideline IV. Even though Law 80/93 considers unilateral termination of the contract with the purpose of avoiding a paralysis of the performing of a public service, it considers compensation and indemnification of the contracting party. In cases where the state acts as a contracting party, the government is subject to the civil and commercial legislation in the same way that the other contracting party is. As a consequence, in those cases the state does not have extra powers to terminate, modify or interpret a contract.

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[260] Id Art 14-2.
[261] Id art 68.
[262] Id Art 75.

International Agreements in which Colombia Makes Part that Protect Foreign Investments

At this point it is important to mention in which Colombia makes part or is a member that protect foreign investments in the country inasmuch as it is directly related to the treatment of foreign investments. In this regard, it is relevant to mention that Colombia is a member of the Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC).

Multilateral Investment Guarantee Agency (MIGA)

Colombia is a member of the Multilateral Investment Guarantee Agency (MIGA). MIGA is a World Bank agency created to encourage foreign investments among its member countries especially in its developing member countries. MIGA has been created to offer guarantees to investors against non-commercial risks.[263] MIGA guarantees four types of non-commercial risks.[264] They are - <u>The currency transfer risk</u>. This is the risk of loss as a consequence of host government restriction on the transfer of currency outside the country.[265] <u>Expropriation risk</u> which guarantees the risk of loss resulting from administrative or legislative actions of the host government that deprive foreign investors of their ownership, control, or substantial benefits of their investments.[266] However, it does not include non-discriminatory measures applicable by the host state with the purpose of regulating economic activity in its territory. <u>Risk of repudiation or breach of</u>

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[263] Jurgen V
oss, *The Introductory Note to Convention Establishing the Multilateral Investment Guarantee Agency*, 24 ILM 1605 (1985).
[264] MIGA Agreement Art 11 24 ILM 1605 (1985)
[265] Id Art 11 (a) (i).

contract: The guarantee in this case proceeds when the investor has no access to a forum to determine the claim of repudiation or breach of a contract, or when the decision is unreasonable delayed, or when the decision favoring the investor can not be enforced.[267] And the risk of war and civil disturbance.[268]

Article 12 of MIGA describes the eligible investments that may be guaranteed by the agency. In this group we find direct investments, transfer of foreign exchange with the purpose of modernizing, expanding or developing an existing investment, etc. In addition, article 13 describes as eligible investors for the guarantee any natural person who is national of a member country other than the host country as well as juridical incorporated persons who have their principal place of business in a member country. The investor interested in being covered by the guarantee must submit an application to the board of the MIGA in order to obtain approval.[269] The Colombian Congress approved the convention establishing the Multilateral Investment Guarantee Agency through Law 149 of 1994.

Overseas Private Investment Corporation (OPIC)

In addition of its membership to the MIGA, Colombia has been covered by the Overseas Private Investment Corporation (OPIC) since August of 1985.[270] OPIC was created in 1971 to support US private investments in developing countries.[271] OPIC

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[266] Id Art 11 (a) (ii).
[267] Id Art 11 (a) (iii) (b) (c).
[268] Id Art 11 (a) (iv).
[269] Id Art 11 (b).
[270] Investment Guarantee Agreement Between the United States of America and Colombia (1985) WL 286149 treaty.
[271] Ana-Mita Betancourt, OPIC *Political Risk Insurance for Infrastructure Projects in Emerging Markets*, 745 PLI/ COMM179 (1996).

offers guarantee to investors who are US citizens, or corporations or partnerships created under the law of the United States or foreign corporations owned at least in 95% by US citizens.[272]

The investment to be made must bring a positive effect in the US economy as well as the economic and social development of the host country.[273] In order to assure this goal OPIC insures eligible investments against currency inconvertibility, expropriation and political violence.[274] The investor who wants to be covered by OPIC must submit an application to the OPIC's board of directors which make a decision about it.[275]

Conclusion

The existence of these international agreements protecting investments in Colombia brings a positive effect to the flow of foreign investments in the country. Investors covered by the guarantees offering by the MIGA and OPIC may increase the security of the investment against several risk that may eventually affect the investment in a country as Colombia. Therefore, the membership of Colombia in those agreements constitutes an advantage to Colombia to attract new investments to its territory inasmuch as it minimizes the possible obstacles that investors may face when they decide to invest in Colombia.

[272] Id at 183.
[273] Id at 185.
[274] Id at 185.

Guideline V, Settlement of Disputes

As we saw in chapter III, the last point of the World Bank guidelines refers to the settlement of investment disputes. Regarding to this point, Guideline V encourages negotiations as a way to solve foreign investment disputes. If negotiations fail, disputes should be resolved through national courts and other mechanisms including conciliation and binding independent arbitration.[276] The World Bank encourages that both sides of the dispute may appoint arbitrators. Finally, Guideline V recommends that in case of independent arbitration it should be done under the convention establishing the International Centre for Settlement of Disputes (ICSID).

Existence of Independent Arbitration

In regard to the settlement of disputes through arbitration, the Colombian constitution expressly authorizes persons other than judges to administrate justice as a conciliators and arbitrators.[277] In addition, the Colombian Congress through Law 267/96 approved the convention establishing the International Centre for Settlement of Disputes (ICSID). As a consequence, international arbitration in Colombia is governed by this convention. The Colombian legislation provides as a general rule that disputes must be settle by Colombian courts. However, international arbitration proceeds under certain conditions. Arbitration in Colombia was initially regulated by Decree 2270 of 1989. Then in 1998 Law 446 brought several changes to different areas of the Colombian legislation. The main goal of Law 446/98 was to take away different conflicts from the

[275] Id at 192.
[276] Guideline V 1.
[277] Colomb. Const. Art 116.

judge offices in order to make more efficient the administration of justice. Article 166 of Law 446 gave the power to the government to enact a statute of alternative mechanisms of settlement of disputes during the next two months of the enactment of Law 446. As a result in September 7 of 1998 the government enacted Decree 1818/98, the Statute of Alternative Mechanisms of Settlement of Disputes.

Part II of Decree 1818/98 defines arbitration as a mechanism where the contracting parties ask for a solution of a conflict to arbitrators.[278] Article 196 to 221 regulates the international arbitration according to Law 267/96 that approved the ICSID convention. According to article 196 of Law 267 international arbitration proceeds when the contracting parties decide it and when whatever of the following requirements meet: -1- the parties are domiciled in different countries, -2- the country where the most important part of the contractual obligation are to be met is not the one where the parties have their main domicile, -3- the place of arbitration agreed by the parties is in a country or state other than the one where parties are domiciled if the parties agreed that, -4- the subject matter to be settled through arbitration involves the interest of more than one state or country, and -5- the dispute has a direct and unequivocal impact on the interest of international trade [279]

Article 199 states that arbitrators may settle disputes surged between the state (host state acting as a contracting party) and the investor (foreign investor of any other contracting party of the ICSID). In regard to the appointment of arbitrators, Decree

[278] Decree 1818/98 Art 115.
[279] Id Art 196.

1818/98 establishes that the majority of the arbitrators can not have the same nationality of one of the contracting parties unless they agree to do it.[280]

Conclusion

The Colombian legislation regarding to the settlement of disputes complies with Guideline V of the World Bank since the legislation governed international arbitration is based on the convention establishing the International Centre for Settlement of Investment Disputes. As a consequence, when the conditions for international arbitration meet, Colombia follows the procedures of the ICSID convention. In this way, in case of international arbitration the ICSID procedures are applied inasmuch as they were inserted to the Colombian legislation through Law 267/96. In addition, Decree 1818/98 is based on Law 267/96 making possible to conclude that the Colombian legislation regarding international arbitration complies with Guideline V of he World Bank.

[280] Id Art 205.

CHAPTER 6

CONCLUSION

After having analyzed the Colombian general regime of foreign direct investment as well as several regulations directly related with foreign investment, it is possible to conclude that in general the Colombian legislation concerning foreign direct investment complies with the standards established by the World Bank in the 1992 guidelines. However, as it was remarked, the labor regulation in reference to the authorization of employment of foreign personnel is restricted since it does impose limits in the hiring of foreign personnel.

In addition, it is possible to conclude that Colombia is making an effort to attract foreign investment to its territory as it has been demonstrated through the evolution of the foreign direct investment legislation in the last two decades. Moreover, the creation of an organization as Coinvertir, which is dedicated to promote foreign investment in the country and to identify the weak points of the Colombian legislation in order to make it friendly to foreign investors, constitutes a positive effect in the field of foreign direct investment.

Even though a prospective investor should consider not only the legislation of a country but also the economic and order public conditions of it, the fact that the legislation complies with the standards of the World Bank constitutes a good start in the process of deciding where to make an investment.

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