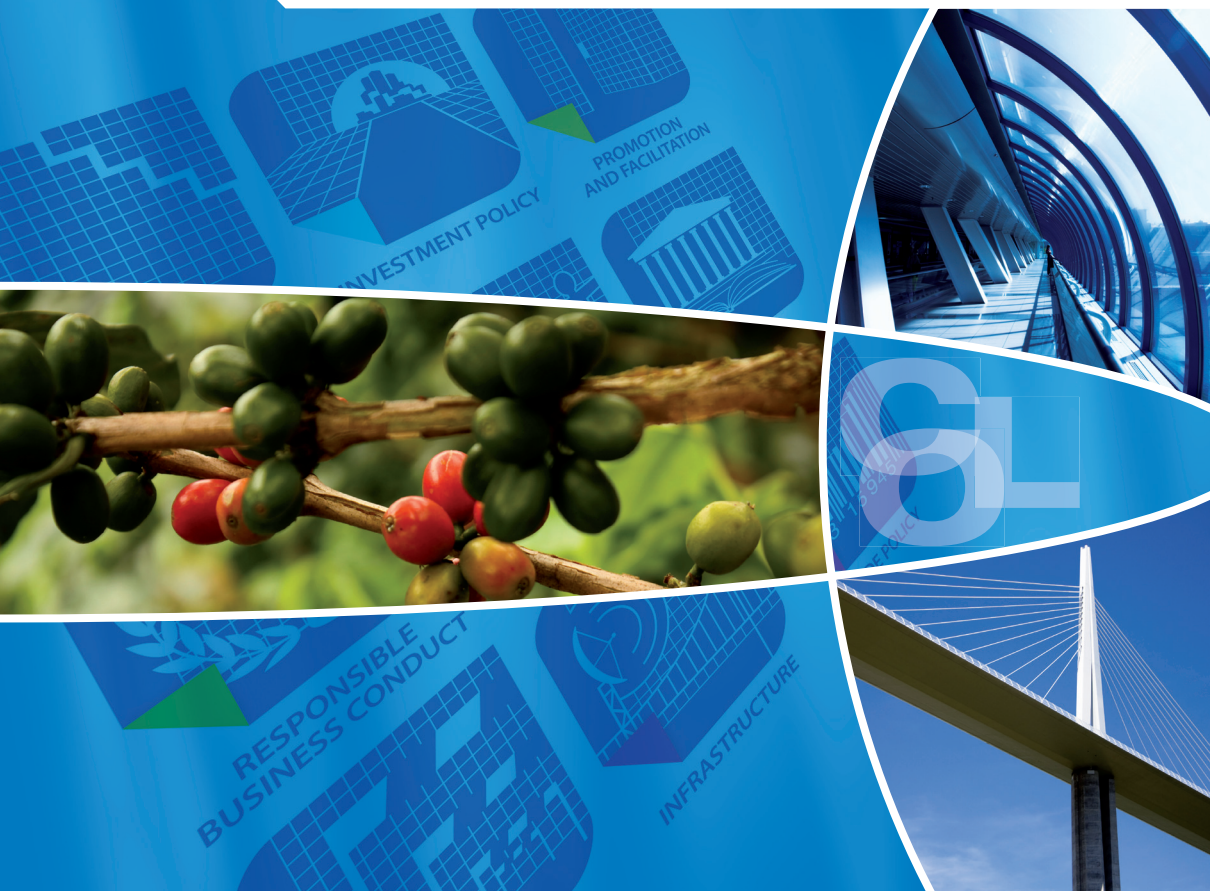




OECD Investment Policy Reviews

COLOMBIA



OECD Investment Policy Reviews: Colombia 2012



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Foreword

In December 2011, Colombia became the 43rd adherent to the OECD Declaration on International Investment and Multinational Enterprises in recognition of the country's progress in fostering investment liberalisation, deepening its international integration and promoting responsible business conduct. Remarkably, economic and political reforms underpinning these developments have enjoyed wide support and consensus within the population and the social partners.

As an adherent to the Declaration, Colombia commits to providing national treatment to foreign investors and promoting responsible business conduct. In turn, it benefits from similar assurance from other adhering governments to treat Colombian investors abroad fairly and to encourage their multinational enterprises operating in Colombia to contribute to economic, social and environmental progress. In accordance with the OECD Guidelines for Multinational Enterprises, an integral part of the OECD Declaration, Colombia has established a National Contact Point charged with promoting principles and practices embodied in the Guidelines, handling related enquiries in the national context and supporting mediation and conciliation procedures. As an adherent, Colombia will participate in the work of the OECD Investment Committee related to the Declaration.

This publication is based on the report supporting the examination by the OECD Investment Committee of Colombia's application for adherence to the OECD Declaration. Representatives of several OECD countries joined the OECD mission in Bogotá in August 2011 to finalise the report. The examination of Colombia's investment policies took place in October 2011 at the OECD headquarters in Paris in the presence of a delegation from Colombia led by Gabriel Duque, Vice-Minister of Foreign Trade.

The report was prepared by Cristina Tébar Less and Blanka Kalinova, Senior Policy Analysts in the Investment Division headed by Pierre Poret (OECD Directorate for Financial and Enterprises Affairs) in close co-operation with the Colombian authorities. It has benefited from the Investment Committee's discussions and comments from members of the OECD Secretariat. The Inter-American Development Bank provided financial support for the process of Colombia's adherence to the Declaration.

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Introduction and Summary

The role of foreign investment in Colombia's economic development

Colombia's efforts towards political stabilisation, improved domestic security and sound macroeconomic policy have enabled the country to boost its economic development, enhance its business climate and make progress in reducing poverty and inequality. This has resulted in the rapid increase of foreign direct investment (FDI) flows, which have also benefited from the commodity price boom. After a temporary decline in 2009-10 due to the world economic crisis, Colombia's FDI inflows are expected to reach a record level in 2011. With USD 85 billion of cumulated FDI by mid-2011, Colombia is one of the largest FDI beneficiaries in Latin America. The United States is the most important investor in the country, followed by Panama and Spain. With over 40% of the FDI stock, the primary sector, including oil and natural gas and mining, continues to absorb the largest part of international investment.

The surge in Colombia's FDI outflows reached almost the same level as its FDI inflows in 2010. This is in line with a more general trend shared with other Latin American countries, which have become an important source of FDI abroad. These developments reflect the growing internationalisation of these countries' enterprises, notably in basic industries, mass consumption goods, and services, such as telecommunications.

Privatisation, which is open without any limitations to foreign investors, has led to a significant increase in the weight of the private sector, which today accounts for 85% of GDP. In some sectors, such as the primary sector and financial services, foreign investor presence is important. According to Colombia's National Development Plan for 2010-14, FDI annual inflows are forecast to amount to over USD 13 billion in 2014. However, rather than simply increasing the amount of FDI, the government's objective is to enhance the qualitative role of FDI in the country's development, notably its contribution to job creation and infrastructure improvement.

Non-discrimination and equal treatment of investors

The principle of non-discrimination and equal treatment of foreign investors is embodied in Colombia's Political Constitution of 1991. National treatment and most-favoured nation status with respect to investment are referred to in recent free trade agreements (FTAs) signed by Colombia or under

negotiation, with Canada, Mexico, Chile, the Northern Triangle countries (Honduras, Guatemala and El Salvador), EFTA countries, the United States, the European Union, South Korea and Panama. The Treaty of the Community of Andean Nations (Bolivia, Colombia, Ecuador and Peru) also provides for national treatment of foreign investment in member countries.

Colombia has a limited number of statutory restrictions on foreign direct investment in the meaning of the OECD investment instruments. As a result, Colombia's score under the FDI Regulatory Restrictiveness Index is below both the OECD average and the average of non-OECD countries for which the Index is available.

Colombia does not apply any trans-sectoral exceptions under the OECD *National Treatment* instrument, which is part of the OECD Declaration on International Investment and Multinational Enterprises. Sectoral limitations on foreign ownership concern television broadcasting, where foreign participation is allowed only up to 40% of ownership, and fisheries, where association with local investors is required. Equity limitations in transport, telecommunications and financial services have been eliminated. Foreign companies have non-discriminatory access to government procurement. Colombia has no exceptions to national treatment with respect to official aids and subsidies or tax obligations. There is no differentiated treatment applied by territorial subdivisions.

Several measures applied by Colombia qualify for notification as measures reported for transparency under the OECD National Treatment instrument. For national security reasons, foreign investment is prohibited in the following areas: land ownership in border areas; manufacturing, possession and use of chemicals, biological and nuclear weapons and trade with these products; and foreign presence in private security and surveillance services. Colombia also imposes some conditions on corporate organisation and key personnel in maritime transport, in newspapers and radio broadcasting. Public monopolies apply in production, import, export, distribution and sale of liquors, and in games of chance and gambling.

The fact that, notwithstanding its regulatory openness, the country has until now absorbed a relatively limited FDI stock expressed as a share of GDP, reflects its recent emergence as an FDI destination, and is partly due to its past political and security problems and investors' perception gap in evaluating its liberalisation achievements. Insufficient infrastructure development is also an important investment impediment in Colombia.

Policies in support of responsible business conduct

The OECD *Guidelines for Multinational Enterprises* (the *Guidelines*), which form part of the Declaration on International Investment and Multinational Enterprises, are recommendations addressed by governments to multinational

enterprises in all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations. The concept of responsible business conduct is relatively new in Colombia. While there is no comprehensive national policy in place regarding corporate responsibility, the government has taken a range of initiatives to improve business conduct in areas covered by the *Guidelines*, consistent with adhering countries' commitment to good public policies. There are no public policies in place targeting responsible business conduct in specific sectors either. However, in light of the importance of the mining sector in the country, the government has undertaken internal consultations to consider the opportunity to adhere to the OECD Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

Business associations and civil society organisations are also developing tools to raise awareness and provide guidance to companies on responsible business conduct. Recent surveys show that an increasing number of companies is taking measures related to corporate responsibility, mainly in the areas of labour and environment.

Following the update in May 2011, the *Guidelines* include new and more developed recommendations on human rights as well as on employment and industrial relations, which are particularly relevant for Colombia. For many years, human rights violations, including at the workplace, have been a major issue in the country. To tackle these weaknesses, the government adopted in 2011 a National Policy on Integrated Human Rights and International Humanitarian Law.

Colombia has ratified 60 ILO Conventions, including the 8 Fundamental Conventions, and three of the four "priority" Conventions. Basic workers' rights, including the rights of joining trade unions and collective bargaining are guaranteed by the 1991 Constitution. Colombia's labour market suffers from significant levels of unemployment and informality. The government enacted in December 2010 the Law on Formalising Labour and Employment Generation with the objective to formalise 250 000 jobs and create 300 000 new formal jobs by 2014. A Decree adopted in April 2010 seeks to improve income conditions for union members, allow for their active participation, and encourage collective bargaining. The Public Safety Act adopted in June 2011 further strengthens protection of workers' right of association.

Environmental protection and sustainable development are high priorities on Colombia's national and foreign relations agendas. Colombia is a Party to all major environmental agreements, including the UN Framework Convention on Climate Change and the Kyoto Protocol, and the Convention on Biological Diversity. All projects with potential environmental impacts, whether promoted by private investors or public entities, are subject to an environmental licence,

which is granted following an environmental impact assessment. Effective implementation suffers from insufficient resources to monitor compliance with licences, but the government is currently strengthening the role and powers of the environmental authorities. The government has also launched voluntary programs to promote improved environmental performance by companies, such as the 2010 Policy for Sustainable Consumption and Production.

Corruption remains a challenge for Colombia, but the government has declared that it is committed to meeting the highest international standards in fighting it. The government enacted the Anti-Corruption Statute in July 2011, which contains preventive, investigative, prosecutorial and punitive measures applicable to both the public and private sectors, including, for the first time, liability of legal persons for corruption offences. Colombia is a Party to the United Nations (UN) Convention and the Inter-American Convention against Corruption (CICC) since 1999, and takes part in the Andean Plan to Fight against Corruption. In January 2011, Colombia requested to become a full participant in the OECD Working Group on Bribery and accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In November 2011, the OECD Council invited Colombia to participate in the Working Group and accede to the Convention.

Consumer rights are recognised in the Constitution and in the 1982 Consumer Protection Statute. In practice, for many years consumer protection has been weak. The 2011 Consumer Protection Statute will strengthen consumer rights, better define producer liability, regulate e-commerce and prevent the use of abusive clauses.

The Constitution establishes free competition as a constitutional right. Colombia has one of the oldest competition laws in Latin America; it is transparent and non-discriminatory. Competition regulation allows sanctioning any undertaking for anticompetitive practices provided it has legally established offices and representatives on Colombian territory.

The government has taken a range of measures to make tax collection more effective and to ease the payment of taxes. For the 2010-14 period, the General Tax and Customs Administration focuses on fostering voluntary tax compliance by, *inter alia*, encouraging the social acceptance of taxation; rendering quality services to taxpayers; promoting and supporting the simplification of the tax system; and promoting the use of formal channels to carry out transactions which are relevant from a tax perspective. In 2003, Colombia passed legislation to limit transfers to tax havens.

As a part of its commitments under the *OECD Guidelines for Multinational Enterprises*, the government will establish Colombia's National Contact Point (NCP) in the Ministry of Trade, Industry and Tourism. The Ministry's focal position within the government and its regular contacts with the business

community, trade unions and civil society organisations is expected to allow the Colombian NCP to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability. The establishment of an advisory body is also planned.

Colombia's policy framework for investment

In addition to legal provisions, a number of policy areas have an important impact on countries' investment climate, such as investment policy, investment promotion and facilitation, trade policy and infrastructure development. The Colombian government has made great progress in improving the country's business environment over the past years, as reflected in the good rankings in the World Bank's 2011 *Doing Business* report. The government is determined to continue its efforts in this area and has included enhancement of the investment framework among the key objectives of the National Development Plan for 2010-14.

In accordance with the Constitutional principle of non-discrimination, foreigners enjoy the same treatment as Colombian citizens, including the right of access to justice. This also applies to investment-related disputes. In order to address the current shortcomings in the dispute settlement system, the government has increased resources for municipal courts, provided training to judges and improved the performance evaluation of court staff. In the last few years, there has been an increased use of alternative dispute settlement mechanisms, and arbitration is becoming more common, for both large and small commercial disputes. This is also due to improvements in arbitration procedures, which are now partly done electronically. Colombia has been party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) since 1997. It is also Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention of International Commercial Arbitration. Colombia has never been involved in an international investor-State dispute.

To address investors' concerns regarding legal and regulatory instability, Colombia has introduced the possibility to conclude legal stability agreements, which guarantee the legal conditions applied at the time of signature of investment projects. Since their inception in 2005, 66 legal stability contracts have been signed for a total of USD 12.7 billion, mainly in manufacturing.

The government has undertaken to respect high standards of intellectual property rights (IPR) protection. It has ratified mayor IPR treaties and in certain areas domestic legislation grants higher levels of copyright protection than those contained in the WTO agreements. In order to comply with its

IPR-related obligations under WTO and free trade agreements, the government has streamlined customs controls. It has also amended the Criminal Code to punish various types of IPR violations, including cybercrime and interception of protected data.

In 2007, the government adopted an international investment agreements agenda, which set up priorities for investment negotiations, taking into account several criteria, such as countries' FDI stock in Colombia and the Colombian FDI stock abroad. Colombia had concluded or signed eight bilateral investment agreements by mid-2011, and is in the process of negotiating one with Turkey. Colombia regularly reviews its model investment agreement to adapt it to the latest developments and to the country's priorities.

Colombia's investment promotion agency, *Proexport*, is in charge of promoting exports, international tourism and foreign investment in Colombia. Its main priorities are to advance the process of internationalisation of the economy, increasing and diversifying foreign trade and FDI. *Proexport* has established a "System to Facilitate and Attract Investment" (SIFAI), which provides details on the impact of barriers to investment in terms of the amount of investment, job creation, etc. The government has put procedures in place to identify and remove unnecessary barriers to investment.

Colombian legislation accords with the instrument on *Conflicting Requirements Imposed on Multinational Enterprises* of the OECD Declaration, which invites adhering countries to co-operate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises. The Colombian authorities note that, so far, the government has not received any complaints from multinational enterprises on conflicting requirements which may arise from Colombian laws and regulations.

The instrument on *International Investment Incentives and Disincentives* of the OECD Declaration recognises that adhering countries may be affected by this type of measure and stresses the need to strengthen international co-operation in this area. Colombia maintains a number of investment incentives, most of them in form of exemptions from income tax and other taxes. All incentives, without exception, are granted to domestic and foreign investors alike.

In recent years, Colombia has intensified its trade diplomacy both in a multilateral context, by actively participating in ongoing international trade negotiations, and in bilateral trade relations, especially with its main trading partners – the United States and the European Union. Recent FTAs cover a large range of trade and investment-related issues, establish strong protection for investment, expand market access for services, and provide for improved transparency and dispute settlement mechanisms. They contain provisions aimed at improving intellectual property rights protection, enhancing

transparency on subsidies and reducing harmful anticompetitive practices. They also refer to sustainable development with mutual guarantees of preserving and promoting high labour and environmental protection standards.

Investment in infrastructure is one of the pillars of Colombia's economic growth and a key element in the country's National Development Plan for 2010-14. The government relies heavily on private participation in infrastructure investment and has taken measures to ensure that key investment principles, such as transparency and procedural fairness, apply to investors bidding for infrastructure contracts. However, private sector participation in infrastructure remains low, compared to other emerging economies, including in Latin America. The government has thus intensified its efforts to mobilise private funding for infrastructure projects by improving the institutional and regulatory framework for private investment, seeking notably to enhance the quality of feasibility studies, increase certainty regarding the pricing and other relevant terms of the projects, and improve standardisation of bidding conditions.

Investment framework in support of green growth

The government is determined to ensure that, in Colombia, economic growth and environmental protection are mutually supportive. To this end, it is strengthening the institutional capacity of environmental authorities, enhancing the framework for investment in support of green growth, and putting in place "green" investment incentives. Biodiversity being one of the main natural assets of Colombia, the government has developed a framework to both protect and derive economic benefits from it. The government is currently developing a Low Carbon Development Strategy, with the objective of, *inter alia*, promoting economic growth in sectors associated with lower greenhouse gas emissions. The Strategy also seeks to draw on international financing options, including market mechanisms to attract resources that facilitate low-carbon development, promote the transfer of clean technologies, and enhance Colombia's competitiveness in a global economy increasingly influenced by carbon-intensity standards. A range of incentives is available to companies that voluntarily make investments to improve their environmental performance.

Chapter 1

The Role of Foreign Direct Investment in Colombia's Economic Development

Colombia's efforts towards political stabilisation and sound macroeconomic policy have enabled the country to boost its economic development and enhance its investment climate. As a result, foreign direct investment (FDI) inflows have increased rapidly, also benefiting from the commodity price boom. After a temporary decline in 2009-10 due to the world economic crisis, Colombia's FDI inflows are expected to reach a record level in 2011. The surge in Colombia's FDI outflows reflects a more general trend shared with other Latin American countries, which have become an important source of FDI abroad, notably within the region.

Privatisation, which is open without any limitations to foreign investors, has led to a significant increase in the weight of the private sector, which today accounts for 85% of GDP. According to the National Development Plan for 2010-14, FDI annual inflows are forecast to exceed USD 13 billion in 2014. However, rather than simply increasing the amount of FDI, the government's objective is to enhance the qualitative role of FDI in the country's development, notably its contribution to job creation and infrastructure improvement.

Recent FDI developments

Colombia's efforts towards political stabilisation, improved domestic security and sound macroeconomic policies have enabled the country to boost economic growth in recent years, with a peak achieved in 2006-07, when real GDP grew on average by more than 7% annually. In relative terms, GDP per capita growth has, however, remained lower than in most Latin American economies (OECD, 2010). The repercussions of the world economic crisis temporarily interrupted the country's growth in 2008-09, but with an increase of 4.3% of GDP in 2010, Colombia came back on the upward track, driven to a large extent by commodity sectors. Based on economic performance in the first half of the year, real GDP is expected to grow by 4.9% in 2011 (IMF, 2011).

The high level of insecurity due, *inter alia*, to armed conflict and terrorism linked to drug traffic, and lack of political stability strongly affected in the past the perception of Colombia by foreign investors, who were reluctant to assume substantial and long-term involvement in the country. Annual foreign direct investment (FDI) inflows therefore remained modest until 2004 (below USD 3 billion annually). They started increasing in 2005 to reach record levels in 2008 (USD 10.6 billion), also benefiting from the commodity price boom. In line with world investment trends, Colombia's annual inflows declined considerably in 2009 (-33%) and slightly in 2010 (-3%). Nevertheless, with almost USD 7 billion of FDI inflows, Colombia was the fourth largest FDI beneficiary in Latin America in 2010 (ECLAC, 2011). Portfolio investment contracted in 2008, but both inflows and outflows have increased since (see Table 1.1 and Figure 1.1).

The expected upturn in international FDI flows in 2011 and, more importantly, the positive investor outlook regarding Colombia's political and economic development and its business climate are expected to attract large amounts of FDI in 2011. According to the preliminary data of the first half of the year, Colombia's inward FDI might exceed in 2011 the 2008 record level.

In mid-2011, Colombia's inward FDI stock amounted to almost USD 85 billion, an increase of 9% compared to the end of the previous year. Recent growth of FDI outflows has resulted in a rapidly increasing outward FDI stock, which reached USD 25 billion in mid-2011.

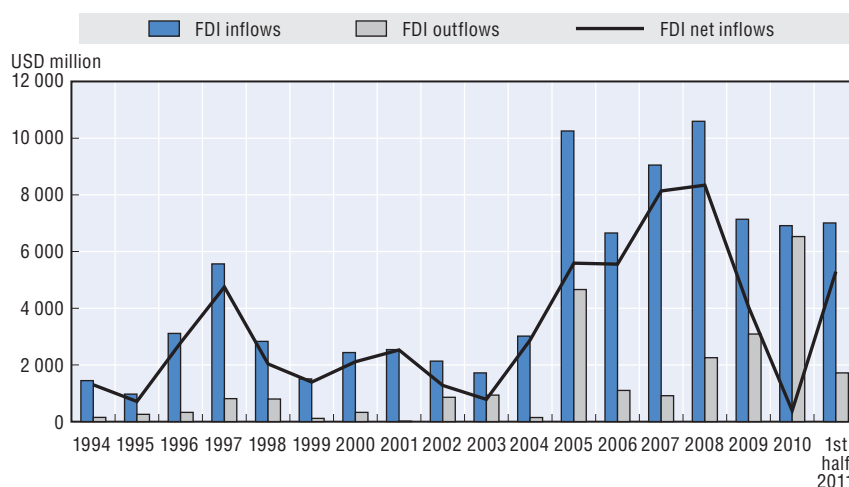
Table 1.1. **Colombia's international investment**
Million USD

	2005	2006	2007	2008	2009	2010	2011 (6 months)
Direct investment inflows	10 252	6 656	9 049	10 596	7 137	6 915	7 008
Portfolio inflows	-53	902	1 884	-1 195	4 668	3 263	2 419*
Direct investment outflows	4 662	1 098	913	2 254	3 088	6 529	1 718
Portfolio outflows	1 689	3 333	993	-188	2 802	1 768	1 529*
FDI stock							
Inward	37 526	44 182	53 230	63 827	70 964	77 879	84 887
Outward	9 394	10 493	11 405	13 659	16 748	23 276	24 994
Memorandum items							
Inward flows as % of gross fixed capital formation	36	19	19	19	13	11	n.a.
Inward stock as % of GDP	26	27	26	26	30	27	n.a.

* 1st quarter 2011.

Source: Central Bank of Colombia, IMF Balance of Payments Statistics.

Figure 1.1. **FDI flows in and from Colombia (1994-mid-2011)**



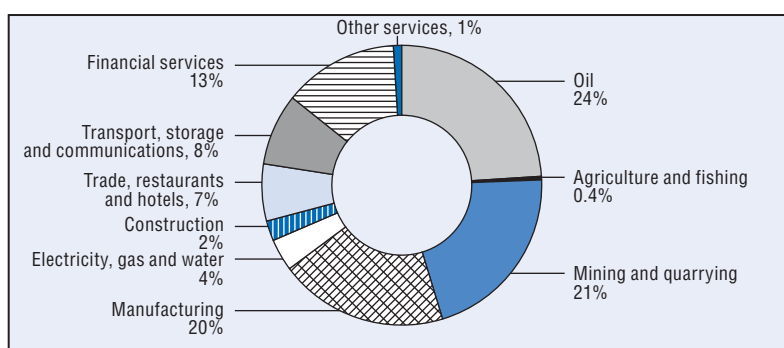
Source: Central Bank of Colombia.

The United States is the most important investor in Colombia, representing 23% of the total FDI stock, followed by Panama (12%) and Spain (11%) (see Annex A). Since 2005, the oil and natural gas and mining and quarrying sectors have attracted most of new investment, increasing their share to respectively 24% and 21% of the FDI inward stock in 2011 (see Figure 1.2), whereas the part of manufacturing and financial services has diminished (from 39% in 2005 to 33% in mid-2011). In general, annual sectoral inflows are

subject to wide fluctuations depending on the conclusion of large deals, such as in manufacturing in 2005, transport and communications in 2005-06 and the financial sector in 2007-08.

During recent years, Colombia's FDI stock has corresponded to some 27% of GDP, and annual inflows have represented between 36% (in 2005) and 11% (in 2010) of the country's gross fixed capital formation (see Table 1.1). In terms of its FDI stock, Colombia is the third major destination for FDI in South America behind Brazil and Chile. With USD 1 811 of FDI stock per capita, Colombia also ranks among the major beneficiaries of FDI in this region after Chile (USD 8 160), Mexico (USD 2 878) and Brazil (USD 2 478).

Figure 1.2. **Colombia's inward FDI position by main sectors (mid-2011)**



Source: Central Bank of Colombia.

The rapid growth of Colombia's outward investment flows in recent years reflects a more general trend shared with other Latin American and Caribbean countries, which, as a region, have become an important source of FDI. The part of the region in developing countries' investment flows increased from 6% in 2000 to 17% in 2010. With a share of 2.3% of GDP, Colombia's outward FDI flows are the second highest in the region after Chile's (4.6%) (ECLAC, 2011). These developments correspond to the growing internationalisation of Latin American firms, especially in basic industries (hydrocarbons, mining, iron and steel), mass consumption goods (food and beverages) and some services (energy, telecommunications). The United States is the first destination of Colombia's outward investment.

Although oil, mining and quarrying still dominate the country's FDI outward stock (34%), the share of other sectors such as manufacturing (25%), financial services (14%) and electricity (12%) have also been increasing. Most Colombian outward investment goes to other Latin American countries, participating in the emergence of the so-called "translatinas", i.e. Latin American multinational enterprises. Colombian major outward investors

include: Interconexión Eléctrica (ISA) and Empresas Públicas de Medellín (EPM) in the electricity sector, Grupo Bancolombia in financial services, Grupo Nutresa in food production and Avianca in airlines (Poveda Garcés, 2011). The Colombian authorities consider that recent developments attest of growing economic vigour and maturity of large domestic firms with a positive impact on the country's exports and employment.

According to the National Development Plan (see Box 1.1), FDI is expected to continue to play an important role in the country's future economic development with annual inflows forecast to exceed USD 13 billion in 2014. However, the government's objective is not simply to increase FDI levels but to enhance the qualitative role of FDI in the country's development, notably its contribution to job creation, especially in the service sector, and to the improvement of infrastructure.

Box 1.1. Private investment targets in Colombia's National Development Plan 2010-14

Colombia's 4-year National Development Plan (NDP) 2010-14 ("Prosperity for All") has been developed by the government in close co-operation with state agencies, local authorities and civil society. Based on the evaluation of the country's priorities and needs, including at the regional level, it identifies the objectives in different relevant areas and sets up the means to achieve them. The NDP estimates total investment needs at USD 317 billion, of which private investment should represent 40%.

Public investment will be channelled above all to the health and education sectors, as well as innovation, for which a specific fund will be created. In contrast, the coal and oil industries' needs should be covered mainly by foreign investment. The NDP also quantifies the investment targets in other sectors, such as mining (USD 49 billion), housing construction (USD 18 billion) and transport infrastructure (USD 8.5 billion).

Source: Colombia, Ministry of Trade, Industry and Tourism; Reuters (2011); *The Economist* (2011).

Foreign investor participation in privatisation programmes

The principle of equal treatment of investors, irrespective of their nationality, applies to privatisation. Under Colombian law, there are no restrictions or limitations to the participation of foreign capital in the sale of shares of State-owned enterprises. The 1999 Privatisation Law regulates the sale of shares and state participation in companies' capital and establishes that any individual or legal person can acquire shares sold by the State, without distinction based on the nationality of investors. The Law also provides that the sale of State-owned shares should be subject to large

publicity and effective competition. According to Colombia's Political Constitution of 1991 (hereafter, *the Constitution*), special treatment is granted to workers of State-owned enterprises: the shares should be first proposed to them under preferential financial conditions¹ (see Chapter 2).

According to the 1999 Privatisation Law, the shares of State-owned enterprises to be privatised can be ordinary, preferential or non-voting preferential. The State does not enjoy or plan to reserve any particular rights, such as "golden shares" with the power of veto, or allowing it to impose decisions contrary to the majority of shareholders. Colombia does not apply any restrictions on the acquisition and sale of the shares of former State-owned enterprises or issued by them either in the primary or the secondary market.

The most important privatisation deals realised in the period 2005-10 include:

- Oil: *Ecopetrol*, the formerly State-owned company is now a publicly traded firm; in 2007, 10% of the State-owned stock was proposed in a highly successful public offering, followed by a second round which ended in August 2011. As a result, 20% of the company is currently privately-owned.
- Gas: the State-owned company *Ecogas* was sold in 2007.
- Power generation: more than 19% of the State-owned stock of *Isagen*, a power generation company, was sold in a successful public offering in 2007.
- Power distribution: following the sale of the State shares in 2003 in local distribution companies in the departments of Caldas and Quindío, the State sold power distribution companies located in the departments of Cundinamarca, Santander and North of Santander in 2009.
- Telecommunications: State-owned *Telecom* was liquidated and *Colombia Telecomunicaciones* created, with a private firm as controlling shareholder in 2003; the State-owned post company *Adpostal* was dismantled in 2005; further privatisation in the sector is planned.

As a result of the privatisation process, the weight of the private sector has increased to represent 85% of Colombia's GDP (see Annex A). Privatisation and significant foreign investment in recent years have also changed considerably the profile of Colombia's financial sector: it consists in majority of private banks (22 out of 23) of which 9 are foreign-owned. Foreign-owned banks represented in May 2011 almost 20% of the country's total bank assets and 19% of total deposits (see Annex A).

Note

1. Constitution, Article 60: "The State will promote access to property in accordance with the law. When the State sells its interest in an enterprise, it will take measures to promote the democratization of the ownership of its shares and will offer its workers and the workers' organizations special terms to make it possible for them to accede to the said proprietary shares..."

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Chapter 2

Colombia and the National Treatment Instrument

The principle of non-discrimination and equal treatment of foreign investors is embodied in Colombia's Constitution. National treatment and most-favoured nation status with respect to investment are referred to in recent free trade agreements signed or negotiated by Colombia.

Colombia does not apply any trans-sectoral exceptions under the OECD National Treatment instrument. Sectoral limitations on foreign ownership concern television broadcasting and fisheries. Several measures applied by Colombia qualify for notification as measures reported for transparency under the OECD National Treatment instrument. For national security reasons, foreign investment is prohibited in the following areas: land ownership in border areas, manufacturing, possession and use of chemicals, biological and nuclear weapons and trade with these products, and foreign presence in private security and surveillance services. Colombia also imposes some conditions on corporate organisation and key personnel in maritime transport, newspapers and radio broadcasting. Public monopolies apply in production, import, export distribution and sale of liquors and for games of chance and gambling.

As a result of Colombia's limited number of statutory restrictions on foreign direct investment in the meaning of the OECD investment instruments, the country's score under the OECD FDI Regulatory Restrictiveness Index is below both the OECD average and the average of non-OECD countries for which the Index is available.

Introduction

This chapter examines Colombia's investment regime in light of the National Treatment instrument, the first element of the OECD Declaration on International Investment and Multinational Enterprises (see Box 2.1). Colombia's framework regarding responsible business conduct as covered by the *Guidelines for Multinational Enterprises*, which are also an integral part of the Declaration, is analysed in Chapter 3. Colombia's policies relating to the other two elements of the Declaration: International Investment Incentives and Disincentives, and Conflicting Requirements, are addressed in more detail in Chapter 4, which looks at various aspects of Colombia's broader investment policy framework.

Box 2.1. The Declaration on International Investment and Multinational Enterprises

Adopted in 1976, the Declaration is a policy commitment by governments to:

- Improve the investment climate.
- Encourage the positive contribution multinational enterprises can make to economic and social progress.
- Minimise and resolve difficulties which may arise from their operations.

The Declaration consists of four elements (each underpinned by a Decision by the OECD Council on follow-up procedures):

- *National Treatment*: A voluntary undertaking by adhering countries to accord to foreign-controlled enterprises on their territories treatment no less favourable than that accorded in like situations to domestic enterprises.
- *The Guidelines for Multinational Enterprises*: Recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from adhering countries. The *Guidelines* were updated in 2011.
- *Conflicting requirements*: Adhering countries agree to co-operate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises.
- *International investment incentives and disincentives*: Adhering countries which may be affected by this type of measures agree to strengthen their co-operation in this area and endeavour to make such measures as transparent as possible.

Note: All 34 OECD countries, and 9 non-OECD countries have subscribed to the Declaration: Argentina (22 April 1997), Brazil (14 November 1997), Colombia (8 December 2011), Egypt (11 July 2007), Latvia (9 January 2004), Lithuania (20 September 2001), Morocco (23 November 2009), Peru (25 July 2008), Romania (20 April 2005)

The National Treatment instrument consists of two elements: a declaration of principle, and a procedural OECD Council Decision adopted in 1991, under which adhering countries commit to notify their exceptions to National Treatment. It also establishes follow-up procedures to deal with such exceptions, designed to encourage the fullest possible application of National Treatment by adhering countries. The Decision comprises an annex which lists exceptions to National Treatment as notified by each adhering country and accepted by the OECD Council. The exceptions are periodically examined by the Investment Committee. For reasons of transparency, adherents to the Declaration also undertake to notify all measures which, without being “exceptions”, have a bearing on National Treatment.¹

The principle of non-discrimination of foreign direct investment in Colombia’s investment regime

Colombia’s Constitution provides for equal treatment of all individuals and prohibits discrimination on the basis of, *inter alia*, nationality.² This general principle applies to foreign investment as confirmed in the two main legal instruments related to foreign investment: the 1991 Law on Foreign Exchange³ and the Decree No. 2080 adopted in 2000 regulating foreign investment in Colombia and investment of Colombian capital abroad.⁴ Article 2 of this Decree states that “foreign investment in Colombia is treated in all respects in the same way as investment by national residents”. At the same time, the Law establishes that foreign investment cannot be granted preferential treatment over national investment.

National treatment and most-favoured status with respect to investment is referred to in the Free Trade Agreement (FTA) between Colombia and the United States.⁵ Similar clauses are contained in Colombia’s FTAs with Canada, Mexico, Chile, the Northern Triangle countries (Honduras, Guatemala and El Salvador), South Korea and Panama, as well as in the FTA signed with EFTA countries (Switzerland, Liechtenstein, Norway and Island), and in the Economic Agreement with the European Union. The Treaty of the Community of Andean Nations (CAN) (see Box 2.2) provides for national treatment of foreign investors in member countries. Guarantees regarding national and most-favoured nation treatment are also provided in bilateral investment treaties (BIT) concluded by Colombia, with Peru, Switzerland, Spain (ratified), China, India, Japan, South Korea and the United Kingdom (signed) as well as with Turkey (currently being negotiated) (see Chapter 4).

Box 2.2. Colombia and the Andean Community

The Andean Community (Comunidad Andina, CAN, called the Andean Pact until 1996) is a customs union, today comprising Bolivia, Colombia, Ecuador and Peru. It dates back to 1969, when five South American countries (Bolivia, Chile, Colombia, Ecuador and Peru) signed the Cartagena Agreement in order to jointly improve their peoples' standard of living through integration and economic and social co-operation. In 1976, Chile withdrew from it. Venezuela was a member between 1973 and 2006.

The Andean countries eliminated customs tariffs in their mutual trade in 1993 to form a free trade area. This gave a strong boost to trade within the Community with a beneficial impact on employment in the region. Trade in services was also liberalised, particularly the different modes of transportation. Work is under way to update the treatment for foreign investment inside the CAN as all member countries maintain deeper investment commitments in other international treaties.

Since 2003, the social content of the integration process has been strengthened with the adoption of the Integral Plan for Social Development. The CAN's current action plan focuses on social issues, environment, external relations, economic development and trade.

In 2005 the Andean Community entered a co-operation agreement with Mercosur, under which the four Mercosur members (Argentina, Brazil, Paraguay and Uruguay) were granted associate membership. Reciprocally, Mercosur granted associate membership to the Andean Community members by virtue of the Economic Complementary Agreements (free trade agreements) signed between the CAN and individual Mercosur members.

Source: www.comunidadandina.org.

Until recently, the Colombian National Economic and Social Policy Council (CONPES)⁶ had the possibility to identify strategic economic sectors in which the government could limit or restrict foreign investment. In line with the country's strategy of economic opening and in accordance with Colombia's international commitments, this prerogative was abolished in 2007. Prior authorisation is now required only in a limited number of sectors, such as financial services, and applies to all investors, irrespective of their nationality.

Colombia does not use any screening mechanism to control the entry of foreign investment. Foreign investment does not require any prior authorisation, except in several specific sectors, such as financial services, mining and hydrocarbons, in which prior authorisation is mandatory for both foreign and domestic investors.

According to the 2000 Decree No. 2080, all foreign investments have to be registered at the Central Bank upon depositing the capital contributions. This registration can be submitted online (World Bank, 2010). Provided that investment meets the current investment provisions, the registration is automatic for all investments, with the exception of those which have to present the exchange declaration within the 12 months following the realisation of the investment. Registration concerns: i) in-kind and/or tangible or intangible contributions; ii) acts or contracts without participation in the capital of the company; iii) stock acquisition by means of the public stock market with resources in national currency from local credit operations; and iv) sums with transfer rights. Once registered, foreign investors enjoy transfer rights under the Colombian exchange regime, such as free transfer abroad of net profits and the product of the liquidation of the investment, whether direct or portfolio. These rights guarantee that the conditions of transfers in force at the date of registry of the foreign investment cannot be changed in a way affecting negatively the investors, except temporarily under specified conditions (when the country's international reserves fall below three months of its imports).

Expropriation

A Constitutional amendment in 1999 eliminated the possibility for the government to expropriate private property for “public purposes” without compensation. Therefore, the Constitution now guarantees in general terms compensation payments in the event of expropriation and gives the right to appeal both against the decision of expropriation and the level of compensation. More explicit guarantees concerning expropriation and compensation are provided in some BITs and in the investment chapters of FTAs. The investment chapter of the FTAs with the United States, the Northern Triangle countries, Canada, Chile, Switzerland and Mexico refer to full remittance of profits and proceeds from partial or total disinvestment, subject to payment of applicable taxes. The government may restrict such remittances in the event of serious balance of payments problems.

The BITs in force with Peru, Spain and Switzerland all contain expropriation and compensation clauses, as well as the treaties signed with China, India, Japan, South Korea and the United Kingdom. Similar provisions are included in the BIT being negotiated with Turkey (see Chapter 4).

Exceptions to the National Treatment instrument notified by Colombia

Colombia's exceptions to national treatment notified under the National Treatment instrument of the OECD Declaration are based on the schedules reported in the annexes to the FTAs already concluded or currently being negotiated by Colombia (see Chapter 4).

Horizontal measures

According to Law No. 226 of 1995 developing Article 60 of the Constitution, when the government decides to sell all or part of its equity to a person other than a Colombian State enterprise or another Colombian government entity, it must first offer its interests to:

- current, retired and former employees (other than former employees dismissed for justified reasons) of the enterprise and of other enterprises owned or controlled by the enterprise;
- associations of employees and former employees of the enterprise;
- employee unions;
- federations and confederations of trade unions;
- employee funds ("*fondos de empleados*");
- pension and severance funds; and
- co-operative entities.

This measure applies irrespective of the nationality of investors. In addition, in the case of the sale of former State-owned enterprises, the government may impose limitations on ownership and the ability of new owners to control new entities. It may also adopt measures relating to the nationality of senior management or members of the board of directors in these enterprises.⁷ However, these last two measures have not been applied in practice. Once State interests have been transferred or sold, there is no control over any subsequent transfer or other disposal of such interests.

Sectoral measures

Colombia applies restrictions on foreign investment in radio and television broadcasting and fisheries. In several other sectors prior authorisation is required for both foreign and domestic investors, including in financial services, hydrocarbons and mining. Special regulations related to screening for regulatory purposes, corporate organisation and the attribution of concessions also apply to foreign and domestic investors alike in public utilities (so-called domestic public services companies (*Empresa de Servicios Públicos – ESP*), which include water, sewage, waste management and services, electricity, gas and fuel distribution, and public telephone services.

Colombia reserves the right to adopt and maintain any measures in the following services to the extent they are social services established or maintained for a public purpose: social re-insertion, income security or insurance, social security,⁸ social welfare, public training and education, health, and child care. In addition, it reserves the right to adopt or maintain any measures in a number of other sectors, notably research and development services; primary, secondary and higher education services; environmental

services established or maintained for a public purpose; health-related and social services; libraries, archives and museums and other cultural industries and activities (including publication, distribution or sale of books, magazines; audio and video recordings); sport and recreational activities; production and exhibition of visual arts, distribution and sale of handicrafts. These measures, which are not applied in a discriminatory manner, impose, for example, a specific type of legal entity in education, or professional requirements in health-related services. In all other sectors, foreign investors are allowed to invest without prior authorisation or specific requirements.

Radio and television broadcasting

Only Colombian nationals or legal persons organised under Colombian law may be granted concessions to provide free-to-air television services. Foreign equity in any enterprise holding a free-to-air television concession is limited to 40%. Regional television may be supplied only by State-owned entities.⁹

Radio broadcasting services may be provided only by Colombian nationals or legal persons organised under Colombian law. In addition, the director of radio information programmes must be a Colombian national.¹⁰ The government is currently preparing a tender for a new television channel, open to both domestic and foreign investors.

Fisheries

Only Colombian nationals may engage in artisanal fishing. Foreign-flagged vessels may obtain a permit and engage in commercial and industrial fishing and related activities in Colombian territorial waters only in association with a Colombian enterprise that owns a permit allowing such association with foreign partners.¹¹ The costs of the permit and fishing licence are higher for foreign-flagged vessels than for Colombian-flagged vessels.¹²

Telecommunications and transport

Colombia has gradually liberalised its telecommunications sector: the monopoly on long distance and international telephony was abolished in November 1998 and the mobile duopoly in 2003; restrictions on foreign ownership (70%) in the capital of telecommunications including local and extended local voice telephony, national and international long-distance telephone and cellular mobile telephone services were eliminated in 2009.

Colombia does not apply any limitations on foreign equity in transport. Previous restrictions on foreign ownership in maritime transport (Commercial Code, Article 1490) and in air transport (Commercial Code, Article 1426; Decree No. 410 of 16 June 1971) were tacitly derogated in virtue of the Constitution. Moreover, Law No. 9 on Foreign Exchange of 1991 and the related

Resolution No. 51 of 1991 implicitly abolished the provision of the Commercial Code according to which foreign capital could not constitute over 40% of a Colombian firm's capital (OECD, 2011). Today for example, the Brazilian company *Sinergy* owns 75% of the Colombian national airline.

In addition, Colombia's courts also confirmed that the provision of the Commercial Code (Article 1458) limiting the ownership of registered commercial vessels to Colombian nationals was not applicable, since it contradicts Articles 13 and 100 of the Constitution. The remaining measures applied in transport relate to corporate organisation and key personnel are reported under transparency measures of the National Treatment instrument (see below).

Financial services

Foreign companies may own 100% of financial institutions in Colombia. All financial companies require prior approval from the Financial Superintendence in accordance with international regulatory principles, including verification of the character, responsibility and qualification of persons participating in the operation as owners, directors or managers. These conditions apply equally to both foreign and domestic financial entities. Foreign banks have to establish a local commercial presence and comply with the same capital and other requirements as local financial institutions, such as registering with the Financial Institutions Guarantee Fund (FOGAFIN).

Foreign banks may establish a subsidiary or representation office in Colombia, but are not allowed to provide financial services through branches. This restriction will be eliminated in July 2013 in line with Law No. 1328 of 2009 authorising credit institutions and insurance companies to provide financial services through branches. Restrictions on branching by non-residents fall outside the provisions of the National Treatment instrument (they are however covered by the OECD Codes of Liberalisation). There is no nationality requirement concerning directors and board members; and foreign personnel are also allowed in administration, legal and technical departments of financial institutions.

Full foreign ownership is also authorised in insurance. For example, companies such as *Liberty*, *Mapfre*, and *MetLife* are foreign-owned and operate under the surveillance of the Financial Superintendence.

Professional and other services

Several categories of services can be provided by foreign nationals only if they are domiciled in Colombia, notably accounting services (for which domiciliation at least three years prior to the registration request and demonstrating accounting experience carried out in the territory of Colombia for a period of not less than one year are required), and travel and tourism services. Only Colombian nationals may be notaries; the approval of new notaries is

subject to an economic needs test. As these measures concern natural persons, they do not qualify for notification under the OECD National Treatment instrument, which covers only established foreign-owned enterprises.

Other measures

Colombia reserves the right to adopt or maintain any measures that accord differential treatment to countries under existing bilateral or plurilateral agreements involving aviation, maritime matters and fisheries. As a member of the Andean Community, Colombia has to follow certain decisions which set out principles to liberalise maritime transport among the Parties. The Treaty of International Civil Law and the Treaty of International Commercial Law (plurilateral agreements among Latin American countries), signed in Montevideo on 12 February 1989, also cover maritime matters.

Colombia has bilateral aviation agreements with Germany, the French Antilles, Argentina, Aruba, Barbados, Belgium, Bolivia, Brazil, Chile, Korea, Costa Rica, Cuba, Curacao, Ecuador, Arab Emirates, Spain, United States, France, Netherlands, Italy, Iceland, Israel, Luxemburg, Mexico, Panama, Paraguay, Peru, Portugal, Qatar, the United Kingdom, Dominican Republic, Singapore, Switzerland, Surinam, Turkey, Uruguay and Venezuela.

Colombia is Party to the Convention on Fishing and Conservation of the Living Resources of the High Seas. Reciprocity conditions may apply under bilateral agreements with Jamaica, Ecuador and other countries.

Reservations granting preferential treatment to some countries apply in cultural industries and activities, including the publication, distribution and sale of books, magazines and periodicals; recordings and distribution of movies, videos and audio recordings; production and exhibition of visual arts; design, production, distribution and sale of handicrafts; and radio, television and cable television-related activities. Agreements concluded by Colombia with some countries contain specific commitments regarding cultural co-operation or co-production in cultural industries and activities. As these measures apply to foreign natural persons and not to established foreign-owned enterprises, they are not taken into account under the OECD National Treatment instrument.

Colombia also reserves the right to adopt or maintain any measure to grant rights or preferences to local communities with respect to the support and development of expressions relating to intangible cultural patrimony.¹³ These measures apply to both domestic and foreign investors.

Government procurement

The Public Procurement Laws adopted in 1993 and in 2007¹⁴ provide for non-discriminatory access of foreign-owned companies to government procurement. The laws and the related implementing regulations contain

various mechanisms to ensure transparency and objectivity in the entire process for government contracting.¹⁵ These provisions cover the pre-contractual, contractual and post-contractual stages, with the purpose of selecting the proposal that best meets the needs of the State. Colombia's signature of the WTO Agreement on Government Procurement would improve transparency and predictability of its current provisions and practices in this area.

Measures at the territorial subdivisions

Only the central government is endowed with the power to adopt measures that might affect national treatment granted to foreign companies. Therefore, notwithstanding the decentralisation process by which the central government bestows more autonomy to the regions, territorial administrative subdivisions (*Departamentos*) do not possess the legal authority to introduce measures that would limit national treatment. As a consequence, Colombia does not report any exceptions to National Treatment at the sub-national level.

Measures notified by Colombia for transparency

Measures based on public order and essential security considerations

Article 100 of the Colombian Constitution refers to the country's internal security, and the possibility to impose special conditions on foreigners if required by specific circumstances related to public order.¹⁶ Such a possibility is also included in the FTAs negotiated by Colombia. According to the Colombian authorities, these provisions have not been used so far. In accordance with the procedural requirements set out in the Constitution and its implementing legislation,¹⁷ such measures should:

- be adopted or maintained only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
- not apply in an arbitrary or unjustifiable manner and not constitute a disguised restriction on investment;
- be necessary and proportional to the objective they seek to achieve.

The Constitution and specific laws define two categories of activities in which foreign ownership is prohibited for national security reasons and can only be carried out by the State:

- manufacturing, possession, use of chemical, biological, or nuclear weapons;¹⁸
- trade of weapons, ammunition, explosives as well as of raw materials, machinery and appliances for their production.¹⁹

Both foreign and domestic investment is prohibited in processing and disposal of toxic, hazardous or radioactive waste not produced in Colombia.²⁰

Based on national security interests, foreigners are not authorised to own land along the Colombian coastlines and in border regions with neighbouring countries, defined as a zone of two kilometres from borders.²¹

Acquisition of real estate by foreigners in the island of the San Andrés and Providencia Archipelago is subject to special procedures aimed to guarantee the rights of the local population, which apply to both national and foreign investors.

For essential security reasons, the shareholders of private security and surveillance services have to be constituted under Colombian law as limited liability companies or private security and surveillance co-operatives, and must be Colombian nationals. Companies established prior to 11 February 1994 in association with foreign investors are not authorised to increase the participation of foreign members.²²

Other measures reported for transparency

Corporate organisation and key personnel

According to Decree No. 2324 of 1984 (Article 99), all vessels with a Colombian registration certificate must have a Colombian captain, officers and no less than 80% of the remaining crew must be Colombian nationals. Maritime and fluvial transportation between two points within the territory of Colombia (cabotage) can be provided only by enterprises organised under Colombian law and using Colombian flag vessels. To obtain a Colombian flag, a vessel must be registered in the matriculation book of ships managed by the port authorities.

In air transport, only legal persons organised under Colombian law may own and maintain control of an airplane registered to supply commercial air services. Special air services within the territory of Colombia must be supplied only by Colombian nationals or legal persons established under Colombian law and domiciled in Colombia.

The director or general manager of a newspaper published in Colombia that focuses on Colombian politics must be a Colombian national. Also, the director of radio information programs must be a Colombian national.

Companies involved in public utility services including water, sewage, refuse disposal, electric power, combustible gas distribution and basic public telephone services, must be organised under the *Empresas de Servicios Públicos* or ESP regime, applicable to domestic public services companies, must be domiciled in Colombia and organised under Colombian law.

A local presence is required for postal services supplied independently from the official postal network for national and international mail, which requires the application and adoption of special procedures for the receipt, collection and personal delivery of mail and other postal objects transported by land and air within the territory of Colombia.

Legal services may be provided only by attorneys licensed under Colombian law. Foreign law firms may operate in Colombia provided that the attorneys rendering legal services are licensed to operate in Colombia. Foreign accounting companies are subject to the same treatment as domestic firms.

A general restriction on the employment of foreign personnel in firms with more than 10 employees, requiring that no more than 10% of the general workforce and 20% of specialists be foreigners, was abolished by the 2010 Law No. 1429 on Formal Job Creation.

Private and mixed (public-private) monopolies

In addition to the above-mentioned state monopolies for production and trade of chemical, nuclear and biological weapons ammunition and explosives controlled by the State for national security reasons, there are two other state monopolies subject to *arbitrio rentístico*.²³ The objective is to ensure fiscal revenues from these activities considered of public interest. The Constitution specifies that indemnification or compensation is compulsory if a new monopoly is established, but such a situation has not occurred so far.²⁴

The production and sale of distilled liquors constitute the state monopoly as *arbitrio rentístico* regulated by Department Assemblies or are subject to taxation by these territorial authorities.²⁵ A Decree of 2005 requires that at least 51% of revenues obtained from the exercise of the monopoly in distilled liquors should be designated to finance the national health and education services.²⁶

The second state monopoly subject to *arbitrio rentístico* concerns games of chance and gambling with the purpose of channelling revenues from such activities to the health sector.²⁷ Public companies owned by the central government and the territorial authorities exploit and administer the *arbitrio rentístico*. ECOSALUD regulates and surveys the monopoly in this area and ensures that the gains are directed to the health sector.²⁸

Concessions

To obtain a concession, a legal person organised under the laws of another country and with its principal domicile in another country, must establish as a branch or other legal form in Colombia.²⁹ In addition to the condition of local incorporation, concessions to supply radio broadcasting and audio-visual production services may be subject to an economic needs test. Colombia also reserves the right to adopt and maintain any measures regarding the number of concessions and the total number of operations for road transport passenger services; passenger and freight rail transport, pipeline transport; auxiliary services to all modes of transport and other transport services.³⁰ These measures apply in a non-discriminatory manner to both domestic and foreign investors.

Enterprises providing public utility (domiciliary) services, in which a locally organised community holds a controlling interest, enjoy a preference for obtaining concessions or licences for the provision of domiciliary public services to that community.³¹ This measure is applied irrespective of the investor's nationality.

Colombia's plans for eliminating existing restrictions

Colombia recently eliminated some restrictions, for example, those concerning the limitation on employment of foreign personnel in firms with more than 10 employees (see above). It has also abolished restrictions regarding the modalities of portfolio investment. Until December 2010, foreign investors were authorised to make portfolio investments in securities in Colombia only through a foreign capital investment fund (*fondo de inversión de capital extranjero*).³² A Decree of 29 December 2010 now establishes that portfolio investment may be made by an administrator, i.e. exchange stock market corporations (*sociedades comisionistas de bolsa*), trust corporations (*sociedades fiduciarias*) or investment management corporations (*sociedades administradoras de inversión*) under the surveillance of the Colombian Superintendence of Finance. At present, the government does not envisage any further changes to the foreign investment regime.

Colombia and the OECD FDI Regulatory Restrictiveness Index

The OECD FDI Regulatory Restrictiveness Index (FDI Index) seeks to gauge the restrictiveness of a country's FDI rules (see Box 2.3). The Index is currently available for 34 OECD countries, 9 countries adhering to the *OECD Declaration on International Investment and Multinational Enterprises* and a number of other countries, including China, Indonesia and Russia. It is used on a stand-alone basis to assess the restrictiveness of FDI policies in reviews of candidates for OECD accession and in OECD Investment Policy Reviews, including reviews of new adherent countries to the *OECD Declaration*.

The FDI Index does not provide a full measure of a country's investment climate as it does not score the actual implementation of formal restrictions nor does it take into account other aspects of the investment regulatory framework, such as the extent of state ownership, and other institutional and informal restrictions which may also impinge on the FDI climate. Nonetheless, FDI rules are a critical determinant of a country's attractiveness to foreign investors, and the FDI Index, used in combination with other indicators measuring various aspects of the FDI climate, contributes to assessing countries' international investment policies and to explaining variations among countries in attracting FDI.

Box 2.3. Calculating the FDI Regulatory Restrictiveness Index

The OECD FDI Restrictiveness Index covers 22 sectors, including agriculture, mining, electricity, manufacturing and main services (transport, construction, distribution, communications, real estate, financial and professional services).

For each sector, the scoring is based on the following elements:

1. the level of foreign equity ownership permitted;
2. the screening and approval procedures applied to inward foreign direct investment;
3. restrictions on key foreign personnel; and
4. other restrictions, such as on land ownership and corporate organisation.

Restrictions are evaluated on a 0 (open) to 1 (closed) scale. The overall restrictiveness index is a weighted average of individual sectoral scores.

The measures taken into account by the index are limited to statutory regulatory restrictions on FDI, as reflected in the countries' lists of exceptions to the National Treatment instrument and measures notified for transparency, without assessing their actual enforcement. The discriminatory nature of measures, i.e. when they apply to foreign investors only, is the central criterion for scoring a measure. State ownership and state monopolies, to the extent they are not discriminatory towards foreigners, are not scored.

For the latest scores, see www.oecd.org/investment/index, for a discussion of the methodology: *OECD Working Paper on International Investment* No. 2010/3.

With a total score of 0.024, Colombia ranks below both the OECD average (0.096) and the average of non-OECD countries (0.138) (Figure 2.1). This score reflects the limited scope of equity restrictions (television broadcasting) and of other restrictions reported as transparency measures, such as requirements regarding corporate organisation and key personnel, but it does not take into account Colombia's measures based on public order and essential security considerations.

Figure 2.2 provides the correlation between the FDI Index scores and FDI stocks expressed as a share of GDP. Countries with more restrictions tend to receive less FDI relative to the size of their economy. The fact that Colombia, despite its moderate FDI Index score still attracts relatively limited FDI, would suggest that it could perform better in attracting FDI under the current investment regime. There are several possible explanations for Colombia's apparent underperformance in this area. First, the effects of investment liberalisation usually show up with a certain time lag, and the recent economic crisis in 2008-09 delayed massive FDI inflows to Colombia. As a result, the country's FDI stock still remains relatively low, since the country has started to

attract FDI only recently due to its past political and security problems, and given the perception gap which may still persist and affect the country's image among some investors. As in other countries, the FDI Index does not take into account various aspects which often prevent countries from attracting FDI commensurate with their potential, for example inadequate infrastructure development, which is probably today the most important obstacle perceived by foreign investors in Colombia (see Chapter 4). Colombia's recent upgrading to investment grade by the main rating agencies is expected to boost the country's investment attractiveness, including for institutional investors interested in large infrastructure projects (EIU, 2011).

Figure 2.1. **2010 FDI Regulatory Restrictiveness Index by country**

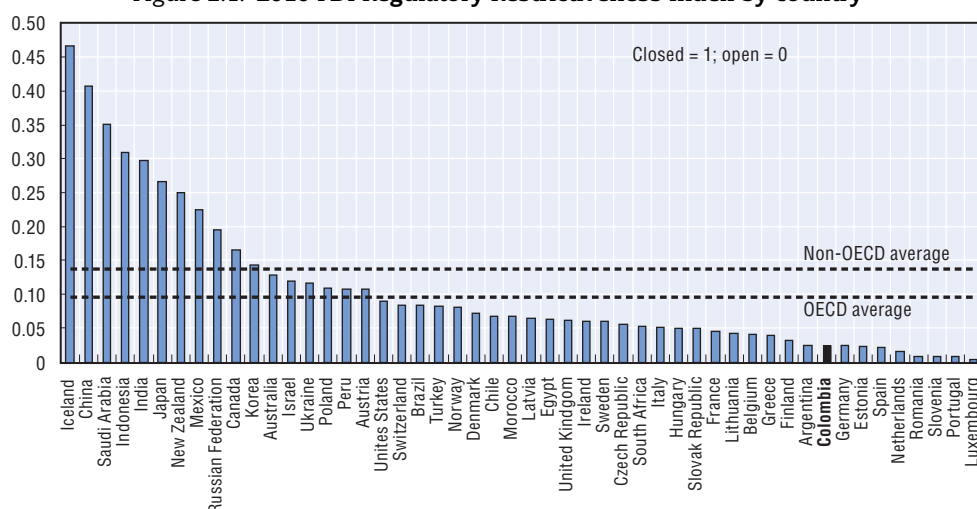
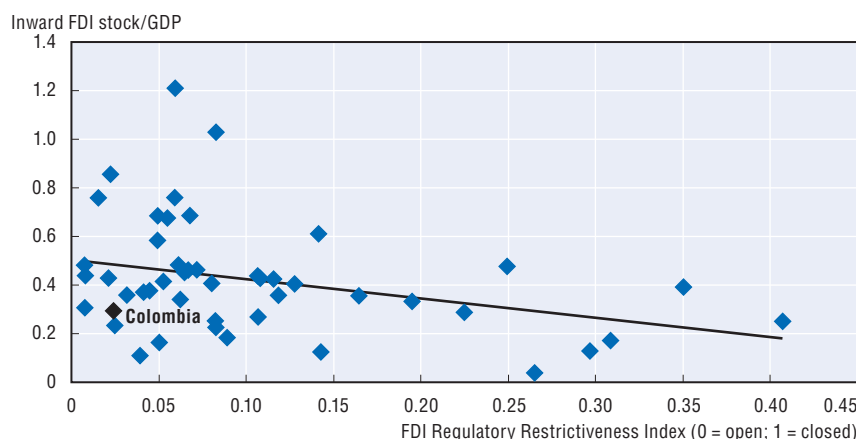


Figure 2.2. **FDI stocks and the FDI Regulatory Restrictiveness Index**



Notes

1. All measures notified by adhering countries are regularly updated and published on the OECD website (OECD, 2010a, b).
2. Constitution of Colombia, Article 13: "All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities and enjoy the same rights, freedoms and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy."
3. Law No. 9 (1991) adopting general procedures by the national government regulating foreign exchange and other related measures.
4. Decree No. 2080 (2000) establishing the general regime of investments of foreign capital in Colombia and of Colombian capital abroad.
5. Colombia-United States FTA, Chapter 10, Article 10.3: "Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment in its territory." Article 10.4: "Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."
6. The CONPES (*Consejo Nacional de Política Económica y Social*) is a government advisory body for economic and social matters headed by the President of the Republic.
7. These measures are included in recent FTAs signed by Colombia, under the list of reservations on investment and cross-border trade in services (non-conforming measures).
8. Colombia's current social security system (*Sistema de Seguridad Social Integral*) consists of the following mandatory systems: pensions (*Sistema General de Pensiones*), health insurance (*Sistema General de Seguridad Social en Salud*), workers' compensation (*Sistema General de Riesgos Profesionales*), and severance pay (*Régimen de Cesantía y Auxilio de Cesantía*).
9. Law No. 14 (1991) regulating television and official broadcasting (Article 37); Law No. 680 (2001) amending Laws No. 14 (1991), No. 182 (1995) and No. 335 (1996) creating private television in Colombia (Articles 13 and 24); Decree No. 0002 (1995) regulating the commercialisation of television channels; Decree No. 023 (1997) of the National Television Commission regulating conditions, requirements, mechanisms and procedures of public biddings for granting concessions for the operation and exploitation of the national channels of private operation (Article 8); Decree No. 024 (1997) establishing television services regulated in the two local-level modalities – lucrative and non-lucrative (Articles 6 and 9); Decree No. 020 (1997) of the National Television Commission regulating conditions, requirements, mechanisms and procedures of public biddings for granting concessions for national channels of public operation (Articles 3 and 4).
10. Law No. 80 (1993) regulating program transmission by broadcasting services (Article 35); Law No. 74 (1966) regulating program transmission by radio-broadcasting services (Article 7).
11. Decree No. 2256 (1991) regulating Law No. 13 (1990) (Articles 27, 28 and 67).

12. National authorised owners pay the equivalent of 60 minimum legal wages for the first vessel and 15 minimum legal wages for each additional vessel, whereas foreign owners pay 75 minimum legal wages for the first vessel and 25 minimum legal wages for each additional vessel. Decree No. 2256 (1991) regulating Law No. 13 (1990) (Articles 27, 28 and 67); Agreement No. 005 (2003), Sections II and VII of Colombia's Institute for Rural Development (INCODER).
13. Resolution No. 0168 (2005) establishing requirements and procedures to evaluate and to declare intangible assets as goods of cultural interest and national character and other related provisions.
14. Law No. 80 (1993) and Law No. 1150 (2007).
15. Despite legal provisions requiring open bidding in public tenders, some foreign investors consider that many tenders still lack transparency, fairness and truly competitive conditions (USTR, 2011a).
16. Constitution, Article 100: "Aliens in Colombia will enjoy the same civil rights as Colombian citizens. Notwithstanding, for reasons of public order, the law may impose special conditions on or nullify the exercise of specific civil rights by aliens. Similarly, aliens will enjoy, in the territory of the Republic, guarantees granted to citizens, except for the limitations established by the Constitution or the law."
17. Constitution, Articles 213 to 215; Law No. 137 (1994) on regulating the situations of emergency in Colombia.
18. Decree No. 2535 (1993) creating norms for weapons, ammunitions and explosives.
19. Constitution, Article 81; Decree No. 2535 (1993) creating norms for weapons, ammunitions and explosives.
20. Constitution, Article 81; Decree No. 2080 (2000), Article 6.
21. Decree No. 1415 (1940) as amended.
22. Decree No. 356 (1994) establishing the statute of private security and vigilance (Articles 8, 12, 23 and 25).
23. The term of *arbitrio rentístico* defined in Article 31 of the Constitution refers to the character of *rentístico* (revenues) in the case a monopoly. The Constitutional Court has stated in its award C-540, 2001: "A *monopolio rentístico* is an instrument that protects exploitation of specific economic activities to enable the State to receive/generate a certain level of income to fulfill its obligations. For the State, the objective of the monopoly is not to exclude the economic activity from the market but to reserve a source of income from exploiting such monopoly. For the Court, when constituting a monopoly, two elements shall be included: first, the character of *arbitrio rentístico* and, second, the objective of public and social interest."
24. Constitution, Article 336: "No monopoly may be established except through *arbitrio rentístico* with the object of public or social interest, and in accordance with the law. The law which establishes a monopoly may not be applied to those individuals who, by virtue of it, must relinquish the pursuit of a legal economic activity without their full indemnification. The organization, administration, control, and exploitation of financial monopolies will be subject to a specific regime, as determined by a law presented by the government. Revenues obtained from monopolies of games of chance will be assigned exclusively to public health services. Revenues obtained from the liquor monopoly will be assigned, on a preferential basis, to health services and education."

25. Law No. 14 (1983) establishing provisions to strengthen the exchequers of the territorial entities and other dispositions.
26. Decree No. 4692 (2005) regulating Articles 61 and 63 of the Law No. 14 (1983) and Article 51 of the Law No. 788 (2002).
27. Law No. 10 (1990) reorganising the Health National System and other provisions; Law No. 643 (2001) establishing the special regime of the financial monopoly of lotteries and gambling.
28. Resolution 1708 (2000) establishing Ecosalud, the Colombian company for health sector resources.
29. Commercial Code of 1971, Articles 469, 471 and 474.
30. See United States-Colombia FTA, Annex II.
31. Law No. 142 (1994) establishing the public domiciliary services regime and other related provisions; Decree No. 410 (1971) Art. 471 and 472.
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Chapter 3

Colombia and the OECD Guidelines for Multinational Enterprises

The concept of responsible business conduct is relatively new in Colombia. While there is no comprehensive national policy in place regarding corporate responsibility, the government has taken a range of initiatives to improve business conduct in areas covered by the OECD Guidelines for Multinational Enterprises, consistent with adhering countries' commitment to good public policies, pursuant to paragraph 9 of the Guidelines' Preface. Business associations and civil society organisations are also developing tools to raise awareness and provide guidance to companies on responsible business conduct. Recent surveys show that an increasing number of companies is taking measures related to corporate responsibility, mainly in the areas of labour and environment.

The OECD *Guidelines for Multinational Enterprises* (the *Guidelines*), which form part of the Declaration on International Investment and Multinational Enterprises, are recommendations addressed by governments to multinational enterprises in all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations. First adopted in 1976, the *Guidelines* have been reviewed several times, most recently in 2011 (see Box 3.1). This chapter provides a) a review of policies put in place in Colombia to promote responsible business conduct, and b) an overview of Colombia's policies and regulatory framework in each of the specific areas covered by the *Guidelines*.¹

Box 3.1. The 2011 update of the OECD Guidelines for MNEs

The OECD *Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. The *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate, and to enhance the contribution to sustainable development made by multinational enterprises.

Following the update in May 2011, the *Guidelines* include new recommendations, notably on human rights, and a general principle on the need to exercise due diligence to avoid or mitigate negative impacts with respect to the management of supply chains and other business relationships.

The *Guidelines* include a set of voluntary recommendations in all major areas of corporate responsibility, namely:

- disclosure;
- human rights;
- employment and industrial relations;
- environment;
- combating bribery, bribe solicitation and extortion;
- consumer interests;
- science and technology;
- competition;
- taxation.

Box 3.1. The 2011 update of the OECD Guidelines for MNEs (cont.)

The *Guidelines* comprise a distinctive implementation mechanism, the National Contact Points (NCP), which are government offices charged with advancing the *Guidelines*, handling enquiries in the national context and supporting mediation and conciliation procedures, called “specific instances”. The updated *Guidelines* also put in place a new, tougher process for complaints and mediation.

Source: OECD, www.oecd.org/daf/investment/guidelines.

General policies for promoting responsible business conduct

According to the *Guidelines*, enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.² Effective implementation of the *Guidelines* and a meaningful contribution of companies to economic, environmental and social progress require governments and business to work in partnership and in a framework of mutual trust, in accordance with their respective rights and duties (see Box 3.2). It is the government’s primary role to provide an adequate regulatory framework in the areas covered by the *Guidelines*, and to provide incentives for companies to comply with this framework and build on it to further develop good business practices.

Box 3.2. Working in partnership to implement the Guidelines for Multinational Enterprises

“The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with the many businesses, trade unions and other non-governmental organisations that are working in their own ways toward the same end.

Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of enterprises, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration.

Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective.

Governments adhering to the *Guidelines* are committed to continuous improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.”

Source: OECD *Guidelines for Multinational Enterprises*, Preface, paragraph 9.

In addition to the recommendations encouraging enterprises to contribute to economic, environmental and social progress, local capacity building and to uphold good corporate governance principles, the updated *Guidelines* address several new issues, notably aspects related to due diligence, supply chains and the role of Internet. In particular, enterprises are invited to carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts on matters covered by the *Guidelines*.³ They should avoid causing such adverse impacts through their own activities and when they are directly linked to their operations, products and services by a business relationship.⁴

The concept of responsible business conduct is relatively new in Colombia. While there is no comprehensive national policy in place regarding corporate responsibility, the government has taken a range of initiatives to improve business conduct in areas covered by the *Guidelines*. Business associations and civil society organisations are also developing tools to raise awareness and provide guidance to companies on responsible business conduct.

The main government institution in charge of promoting responsible business conduct in the country is the Superintendence of Companies (*"Superintendencia de Sociedades"*), an agency under the Ministry of Trade, Industry and Tourism. The Superintendence has the power to supervise and investigate any company or corporation for the purpose of obtaining all information pertaining to its legal, financial, economic and administrative status, with the exception of entities supervised by the Financial Superintendence.⁵ In addition, the Superintendence of Companies acts as an insolvency court. One of the Superintendence's aims is to help make Colombian companies competitive, productive and lasting. It therefore promotes the adoption of corporate governance and corporate social responsibility practices in companies that it supervises.

The Superintendence publishes annual reports on corporate governance and corporate social responsibility, drawing on information submitted by companies.⁶ Based, *inter alia*, on these reports the Superintendence developed the "Colombian Corporate Governance Guide for Closed and Family Companies"⁷ in co-operation with business associations, the Colombian Confederation of Chambers of Commerce (*Confederación Colombiana de Cámaras de Comercio, Confecámaras*) and the Chamber of Commerce of Bogotá. In 2010, the Superintendence also published on its website a corporate responsibility guidebook addressed, in particular, to small and medium-sized enterprises.⁸

In terms of establishing communication channels with companies, the Colombian authorities consider that legislation is an adequate means of communication between the government and the business sector, and that, through its supervisory agencies, the government can help companies implement both binding rules and recommendations and thus improve their

performance. In addition, the Superintendence, the Ministry of Trade, Industry and Tourism, and other government entities carry out training events on regulations and good corporate practices.

A further step to raise awareness about corporate responsibility was the publication in 2008 by the National Standards Organisation (*Instituto Colombiano de Normas Técnicas y Certificación*, ICONTEC), of a technical guide on corporate responsibility.⁹ Key principles include respect for human dignity, legal responsibility, ethic self-regulation, participation, solidarity, holistic human development and continuous improvement.

Investment chapters of recent FTAs, including those with Canada and Panama, incorporate specific provisions on corporate responsibility. For example, the FTA between Canada and Colombia seeks to ensure that companies of both countries operate following internationally recognised principles of corporate social responsibility. The FTA also includes provisions to fight bribery and corruption.

In 2008, the Superintendence adhered to the UN Global Compact, the first public entity in Latin America to do so. By adhering to the Global Compact, the Superintendence aims to align its own initiatives in support of corporate responsibility with the ten principles of the Global Compact in the areas of human rights, labour standards, environment and anticorruption, and thus provide an example to companies. Following its adherence, it has adopted a good governance code, implemented programs for the improvement of personal and professional life quality, and put in place a system of responsible management.

In spite of these efforts, official communication to enterprises about responsible business conduct still seems to be scant. There have been no specific initiatives to promote responsible business by Colombian companies operating abroad. It is important that this aspect be developed, given growing outward investment by Colombian enterprises.

Colombian business associations have also taken steps to promote responsible conduct among their members and the business community in general. For example, the National Association of Colombian Entrepreneurs (*Asociación Nacional de Empresarios de Colombia*, ANDI) has developed a “responsible business toolkit”, which provides practical guidance on a range of issues, including working conditions, environment, supply chains, etc.¹⁰ The ANDI also carries out annual surveys to assess the penetration of corporate social responsibility practices among companies. The latest survey, carried out in 2010, shows that an increasing number of companies is adopting responsible business practices. Among the 242 companies which responded to the survey in 2009, approximately 67% declared they had a CSR policy in place (as compared to 645 in 2008), and 61% had a code of conduct in place. A large majority (87%) of surveyed companies had an environmental management system in place; 47%, anti-bribery policies, and close to 42%, policies on corporate governance.

Another private sector initiative, sponsored by the Inter-American Development Bank (IDB) and carried out by the Colombian Confederation of Chambers of Commerce aims to promote responsible business conduct among small and medium sized enterprises. The program, called “ComprometeRSE” (“engaging in responsible business conduct”)¹¹ aims to promote the integration of responsible business practices among small and medium sized enterprises, in order for them to contribute to sustainable development and enhance their competitiveness.

There are no public policies in place targeting responsible business conduct in specific sectors. However, in light of the importance of the mining sector in the country, the government has undertaken internal consultations to consider the opportunity to adhere to the *OECD Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.¹² The business sector has developed some initiatives to improve business conduct in this sector. For example, the ANDI has promoted an ethics code for mining companies, and several mining companies operating in Colombia promote responsible business conduct in the sector.

Colombia's policies in major areas of responsible business conduct

In addition to general recommendations to improve corporate responsibility and strengthen enterprises' contribution to sustainable development, the *Guidelines* include a set of voluntary recommendations in all the major areas of responsible business conduct. Colombia has policies and regulation in place in all of these areas, or is currently developing them.

Disclosure

“Enterprises should ensure that timely and accurate information is disclosed on all matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the company as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”

Source: *OECD Guidelines for Multinational Enterprises*, Chapter III.

The updated *Guidelines* broaden and reinforce recommendations on enterprises' disclosure policies, in particular with respect to information on board members, related party transactions, subscription to codes of conduct, and internal and independent audit.

At present, in Colombia only large companies are required to disclose corporate information, and this requirement only includes financial information. Other information, e.g. regarding social and environmental issues, is disclosed on a voluntary basis.¹³

As a result, the level and amount of corporate information available to stakeholders is very limited. According to the government, this approach derives from many years of armed conflict and insecurity, where disclosure of information was seen as a security risk for companies. Civil society representatives argue that this has generated a “culture of non-transparency” which is more extended than necessary, and is used by some companies as an argument not to disclose any kind of information beyond what is legally required. Moreover, there is no regulation in place controlling the information companies disclose on a voluntary basis, nor on advertising. As a result, it is difficult for citizens to evaluate the quality and reliability of corporate information. According to the government, the recently enacted legislation on consumer protection (see below) will help address this issue.

The government has envisaged joining the Extractive Industries Transparency Initiative (EITI), a coalition between governments, companies and civil society to strengthen governance and improving transparency and accountability in the extractive sector.¹⁴ However, it has not taken a final decision yet to formalise its adherence.

Human Rights

“States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: respect human rights..., within the context of their own activities, avoid causing or contributing to adverse human rights impacts... seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations... have a policy commitment to respect human rights ...carry out human rights due diligence as appropriate... provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts...”

Source: OECD Guidelines for Multinational Enterprises, Chapter IV.

The updated *Guidelines* include new recommendations on human rights, which were developed in close consultation with the UN Secretary-General Special Representative for Business and Human Rights. They establish that firms should respect human rights in every country in which they operate.

Colombia adhered to the Universal Declaration on Human Rights in 1948. In 1985, it accepted the jurisdiction of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Colombian Constitutional Court has accepted the Universal Declaration on Human Rights to be part of the so-called “Constitutional Block”¹⁵. This “Constitutional Block” refers to those rules and principles which do not appear formally in the Constitution, but are used as parameters of judicial review of laws, and are placed at the constitutional level.

However, in spite of the prominence given to human rights protection in legal texts, in practice, more progress is needed. For many years, human rights violations have been a major issue in Colombia, and continue to be reported by individuals and organisations both at domestic and international levels, including by the UN High Commissioner for Human Rights (2011), and Human Rights Watch (2011). These included violations of human rights at the workplace.¹⁶ According to Human Rights Watch, Colombia still leads the world in killings of trade unionists, mostly attributed to paramilitaries and their successor groups. The US Congress has delayed ratifying the Free Trade Agreement with Colombia for years until there was concrete evidence of sustained results regarding impunity for violence against trade unionists.

The new administration in place since 2010 has established a range of policies and programs in order to improve human rights protection in the country. The National Development Plan (2010-14) addresses human rights in its chapter on Peace Consolidation. Recent actions are the adoption of a National Policy on Integrated Human Rights and International Humanitarian Law and of the Victim’s Law in 2011. In April 2011, the US and Colombian governments announced an Action Plan in which the Colombian government committed to a series of measures in defined time frames to improve the protection of internationally recognised labour rights, the prevention of violence against labour leaders, and the prosecution of the perpetrators of such violence.¹⁷

The National Policy on Integrated Human Rights and International Humanitarian Law seeks to guarantee and promote respect for human rights, in particular, through improvements in a range of areas, including the technical capacity of local authorities; effective dialogue and the participation of civil society; the promotion of education and a “human rights culture”; access to justice and efforts to combat impunity. The 2011 Victims’ Law enacts measures of attention, assistance, and reparation to victims of internal armed conflict and other provisions. Among other measures, the Law provides for care and assistance, land restitution, health, education, housing, and credit measures, physical and psychological rehabilitation and financial compensation. The Victims’ Law also provides for the legal and physical restitution of land to those who have been dispossessed and displaced by the armed conflict. Where restitution is not possible, compensation will be paid.

According to business representatives, for many years, there has been a lack of “human rights culture” in the country, which led to the perception by many that human rights protection was not a specific issue for companies to deal with. With the recent changes in policies and laws, this perception is beginning to change, and companies are starting to integrate human rights issues more prominently into their governance.

Employment and industrial relations

“Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards: respect the right of workers employed by the multinational enterprises to establish or join trade unions..., respect the right of workers to have trade unions and representative organisations recognised for the purpose of collective bargaining and, engage in constructive negotiations...; contribute to the effective abolition of child labour..., contribute to the elimination of all forms of forced or compulsory labour... be guided throughout their operations by the principle of equality of opportunity and treatment in employment... provide training with a view to improving skills levels...”

Source: OECD Guidelines for Multinational Enterprises, Chapter V.

The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work. The *Guidelines*, as a non-binding instrument, have a role to play in promoting observance of these standards and principles among multinational enterprises.¹⁸

Colombia has ratified 60 ILO Conventions, including the 8 Fundamental Conventions, and 3 of the 4 “priority” (or “governance”) Conventions (it has not ratified Convention 122 of 1964, on Employment Policy). Conventions 87 and 88, on the freedom to create unions, are part of the above-mentioned Constitutional Block. A list of ILO Conventions adopted by Colombia is provided in Annex C. Basic workers’ rights, including the rights of joining trade unions and collective bargaining are guaranteed by the 1991 Constitution (Art. 53).

Labour law is regulated by the Labour Code. It covers individual labour law, which regulates the relationship between the employer and individual employees, and collective labour law, which covers the relationship between employers and employees united in associations, including trade unions (Proexport and PWC, 2010).

The General Directorate of Inspection, Supervision and Control at Work is responsible for ensuring compliance with national laws, regulations and agreements on labour, employment and integrated social security in both the public and the private sectors. The public infrastructure to conduct inspection, supervision and control at work is comprised of agencies at both central and regional levels. A Special Committee for the Handling of Conflicts referred to by the ILO (CETCOIT), created in 2000, is responsible for addressing conflicts that arise between the government, employers and employees in matters covered by ILO conventions ratified by Colombia, in relation to issues of freedom of association. The Commission consists of representatives from each sector.

In spite of steady economic growth, unemployment levels in Colombia are high, both by OECD and Latin American standards. Unemployment is also high among the better educated, raising questions regarding the pertinence and quality of the education system. While employment levels have risen strongly over the last years, many of the newly created jobs are of low productivity, barely generating enough income to provide a minimum standard of living to the job-holder (OECD, 2010). To ensure that the labour market regulations are supportive of an adaptable workforce, Law 789 of 2002 on measures to promote job creation and extend social protection developed an employment support fund and protection of the unemployed (FONDE). Its objectives are to provide financial support for the unemployed, improve job placement through training and improving employability of jobseekers, and the creation of new jobs, by allocating credits to micro, small, and medium-sized enterprises.

Another feature of the Colombian labour market is the high level of informality – one of the highest in Latin America, at 50-70% of the labour force (80% among workers with low levels of schooling) (OECD, 2010). A large number of workers are in fact not hired directly by companies but indirectly through intermediary entities (so called “*Cooperativas de Trabajo Asociado*”). As a result, many workers are hired without any social protection or a contractual relationship with the company in which they work.

The government has recently undertaken a range of measures to address unemployment and informality, and to improve enforcement of key labour standards, including the right to join trade unions and to engage in collective bargaining.¹⁹ In December 2010, it enacted Law 1429 on Formalising Labour and Employment Generation. Its key objective is to formalise 250 000 jobs and to create 300 000 formal jobs by 2014. The Law establishes a package of incentives for formalisation (a progressive plan of benefits for the payment of income taxes and payroll taxes to companies with less than 50 workers that are in the process of formalisation), for the employment of people under 28 in rural and urban areas, and the reintegration of women into the labour market. Among other measures, the Law simplifies procedures for hiring and laying off staff,

and authorises employers to provide loans, advances, deductions, withholdings or compensation of workers' wages. In terms of workers' rights protection, Decree 1429 of April 2010 regulates Union Contracts, which seek to improve income conditions for union members, allow for active participation of union members in the development and sustainability of companies, and encourage collective bargaining. The Public Safety Act adopted in June 2011 further strengthens measures to protect workers' right of association. In co-operation with the ILO, the government has consolidated the National Registration System of Child Labor (*Sistema Nacional de Registro de Trabajo Infantil*) which aims to restore the rights of victims of child labour.

The National Development Plan 2010-14 pledges to strengthen inspection, monitoring and control of the labour system, based on a model of preventive care and inspection, aimed at economic activities, businesses and geographic regions with higher levels of risk and rates of labor unrest. The government has recently strengthened the Ministry of Labour's powers and increased the resources to carry out inspections and to control compliance with labour laws. A tripartite agreement of 2006 signed by members of trade unions, producers' guilds and national government representatives that aims to promote decent work and strengthen the defence of fundamental workers' rights and their unions and free enterprise for employers has recently been updated. A concrete outcome of this agreement has been a steep increase in the number of labour inspectors. The ILO is providing technical assistance to Colombia to train these inspectors.

The government is aware that human capital formation has a direct impact on the country's productivity and economic growth and sees the adaptability of the workforce as an important element to support investment. During the last decade, it has endeavored to find a balance between providing social protection for workers and ensuring the necessary flexibility to enable companies to adapt to sudden changes in international trade or technological changes. Programmes for continuous training are also an important element of this policy aiming at supporting an adaptable workforce and creating quality jobs.

One government priority is to improve the country's human capital and to adapt the education system to improve employability and better integrate students, in particular from technical institutes, in the labour market. In 2009, the Ministry of Education established the Labour Observatory for Education (*Observatorio Laboral para la Educación*) which assesses average salary levels depending on levels of education. It also launched a survey among businesses to evaluate their perception of competence level of graduates, and to assess the adequacy of their education with the expectations they meet at work. As a result of these assessments, the government is adjusting the curricula to the needs of the evolving market.

The government has also taken measures to strengthen co-operation between education institutions and the business sector. One focus has been to strengthen research, through the project “University, Business, State”, aimed at better co-operation between education centers and companies to ensure that research fits the actual technological needs of companies in the various regions. The project also seeks to transfer knowledge to the business sector, and to promote internships in companies, so that the latter’s resources and infrastructure are put at the service of research needs, contribute to human capital formation and help advance the national science, technology and innovation system.

The National Training Service (SENA) has put in place various programmes to strengthen workforce capacities and enhance employability, in co-operation with the government at central and regional levels, schools, businesses, and trade unions. One example is the “Specialized Training and the Human Resource Technology Updating Program”, tailored to the needs identified in firms and the productive sectors. This training aims at increasing productivity rates, quality and excellence in work performance. Strategic lines of training include online training for senior management; business training, as well as specific training lines to enhance capacity for applied research and technological development in business, carried out in close (including financial) co-operation with companies.

Environment

“Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives and standards, take due account of the need to protect environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.”

Source: OECD Guidelines for Multinational Enterprises, Chapter VI.

The updated *Guidelines* develop some of the previous recommendations further, for example, the recommendation to enterprises to improve corporate environmental performance both at the level of the enterprise and, where appropriate, also of its supply chain, and to provide accurate information on their products, for example on greenhouse emissions, biodiversity or resource efficiency.

Environmental protection and sustainable development are high priorities on Colombia’s national and foreign relations agendas. Following its participation in the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, and its adherence to the Rio Declaration, the

government created the Ministry of Environment in 1993 (later re-named Ministry of Environment, Housing and Territorial Development). Colombia is Party to all major Multilateral Environmental Agreements (see Annex C).

Environmental legislation is developed under the responsibility of the Ministry of Environment, Housing and Territorial Development. The Regional Autonomous Corporations are the main environmental authorities in the regions. They implement the policies set by the Ministry and support the enforcement of national and regional regulations; grant permits and licences; charge fees; monitor natural resources, and supervise the environmental performance of companies in various sectors.

Under Decree 2820 adopted in 2010, all projects with a potential environmental impact, whether promoted by private investors or public entities, are subject to an environmental license, which is granted following an environmental impact assessment.²⁰ The information to be submitted together with the application for the licence includes: detailed information on the project, area of influence of the project on ecosystems; natural resource needs, emissions, waste generation; an economic assessment of positive and negative environmental impacts; a detailed environmental management plan of the project, as well as plans for monitoring and inspection; emergency plans; plans related to dismantling the activity and related restoration; and contingency plans. In addition, projects that use water from natural sources (surface or groundwater) are required to allocate no less than 1% of the total project investment to action for recovery, preservation, conservation and monitoring of the watershed that supplies the water. According to civil society representatives, the environmental licensing system, though ambitious on paper, suffers from a serious lack of resources to monitor and oversee companies to ensure that they comply with the terms of the licence.

At present, there is little regulation in place to promote the improvement of companies' environmental performance, but the government has launched a few voluntary programs. In 1997, it put in place a National Policy on Cleaner Production, and in 2002, a Strategic Plan on Green Markets. The National Policy for Sustainable Consumption and Production adopted in 2010 further develops these initiatives. It was developed in consultation with stakeholders, including industry, universities, NGOs, and other government bodies, such as the Ministry of Trade, Industry and Tourism and the National Environmental Council, a consultative body composed of representatives from several ministries. The goal of this non-binding policy is "to guide the changing patterns of consumption and production of Colombia's society towards environmental sustainability, contributing to business competitiveness and to the welfare of the population".²¹ The sustainable production and consumption policies have led to a range of initiatives developed by companies, environmental authorities, communities and universities. Examples include cleaner production

agreements, technical assistance for the implementation of preventive measures, cleaner production centers, environmental guidelines, and environmental self-management programs.

In 2005, the Ministry of Environment, Housing and Territorial Development created the Colombian Environmental Label in co-operation with the Ministry of Trade, Industry and Tourism. The label indicates the environmental features of the product, such as sustainable use of natural resources, use of materials that are not harmful to the environment, energy efficient production processes, the use of renewable energy sources; recycling, reuse and biodegradability features; use of recyclable, reusable or biodegradable packaging materials; use of clean or lower impact technologies, etc.

The government has also taken some measures to promote reporting of corporate environmental information. Under the Unified Environmental Registry (*Registro Unico Ambiental*, RUA) system, corporations must report information regarding, *inter alia*, use of raw materials, discharges, energy consumption, air emissions, and generation of waste, including hazardous waste. The Ministry of Environment, Housing and Territorial Development collects and consolidates the information under the Information System on Use of Natural Resources (*Sistema de Informacion de Usos de Recursos*, SIUR). The information provided by individual companies is not disclosed; however, the Ministry makes consolidated information publicly available. The system is being implemented in phases. It is currently binding on manufacturing industries and will soon apply to the oil industry, agriculture, mining and energy sectors. In the future, other sectors will be added.

Combating bribery, bribe solicitation and extortion

“Enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortions.”

Source: OECD Guidelines for Multinational Enterprises, Chapter VII.

The *Guidelines* chapter dealing with bribery has been extended in the 2011 update to cover bribe solicitation and extortion, and third parties, such as agents and other intermediaries, representatives, distributors, consortia, contractors and suppliers. It also includes now the obligations for enterprises to develop and adopt adequate internal controls, ethics and compliance programmes, or measures for preventing and detecting bribery.

Colombia has been a Party to the United Nations Convention against Corruption (UNCC) and the Inter-American Convention against Corruption (CIACC) since 1999. It adhered to the Andean Plan to Fight Corruption in 2007.²²

Under the CICC, member States develop programs and measures to promote society's participation in preventing corruption and increasing transparency in administrative processes. In 2002, members of the CICC instituted the Follow-Up Mechanism for the Implementation of the CICC. The Convention and this mechanism represent the principal co-operation instruments for preventing, detecting, and punishing corruption in the Americas. Colombia has undergone mutual evaluations under the first, second and third rounds of monitoring.²³ To date, through this mechanism, the following government frameworks have been evaluated: rules of conduct for the correct and proper fulfilment of public functions, systems of public declaration, disclosure of assets and liabilities of people who perform public functions, civil society participation in efforts to prevent corruption, and systems to prevent active and passive bribery of domestic public officials and bribery of foreign public officials.

Nevertheless, corruption remains a challenge for Colombia. The WEF's Global Competitiveness Report for 2010-11 (WEF, 2010) cites corruption as the most problematic factor for doing business in Colombia and ranks Colombia 90th (out of 139 countries) in terms of "irregular payments and bribes". Transparency International has recently ranked Colombia 78th, among 178 countries, in its 2010 Corruption Perception Index, a drop of three places from 2009. The current administration is determined to take all necessary measures to improve the situation, and has declared that it is committed to meeting the highest international standards in fighting bribery. In January 2011 Colombia formally requested to accede to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In November 2011, the OECD Council invited Colombia to participate in the Working Group and accede to the Convention.

The Penal Code (Law 599 of 2000) penalises active and passive bribery of domestic public officials and bribery of foreign public officials. Bribes paid by companies are not tax deductible. Jurisdiction over cases of bribery can be exercised extraterritorially in cases of bribery in transnational business transactions.

The Government introduced an Anticorruption Program in 1998 to identify and fight the structural causes of corruption, and to prevent and limit acts of corruption within public and private entities. The program promotes, among others, reporting of alleged corrupt acts, visible contracting, visible audits, and transparency pacts at the sub-national level. Public servants are subject to a disciplinary code which establishes the principles that guide their actions, procedures and their limits. Under the current administration, a public good governance standard code has been signed by all Ministers and Directors of government departments. The right of civil society organisations and the media to scrutinise public official duties is enshrined in the Constitution. Examples of this freedom include: citizens' right to ask for information, accountability

procedures, e-government, and the so-called “Crystal Box Program”, under which citizens can address to the President and Ministers suggestions and questions dealing with corruption.²⁴

The most recent initiative to address bribery is the enactment of the Anti-Corruption Statute (Law 1474) in July 2011, which includes preventive, investigative, prosecutorial and punitive measures applicable in both the public and private sectors (see Box 3.3). The Anti-Corruption Statute amends the Penal Code to strengthen its provisions criminalising bribery of foreign public officials in international business transactions and bringing them in line with the standards set out in the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

**Box 3.3. Colombia’s Anti-Corruption Statute of 2011:
Measures to combat bribery in business transactions**

- Provisions criminalising private corruption, illicit enrichment, and transnational bribery.
- Criminal liability of legal persons; penalties for corporations that have sought to benefit from criminal activities against the public administration through activities carried out, directly or indirectly, by their legal representative or manager.
- Enhanced transparency in the management of private interests through regulation of lobbying or advocacy.
- Dialogue with the private sector on special measures, e.g. codes of conduct.
- “Revolving door” policies banning former public servants from managing private interests after leaving office.
- Strengthened responsibility of auditors, exception to professional secrecy in relation with acts of bribery; penalties for not reporting to the relevant authorities any act of corruption detected through an audit.

Consumer interests

“When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the quality and reliability of the goods and services that they provide.”

Source: *OECD Guidelines for Multinational Enterprises*, Chapter VIII.

The updated *Guidelines* put special emphasis on promoting consumer education by enterprises in areas that relate to their business activities, to help consumers make informed decisions, better understand the economic and social impact of their decisions, and support sustainable consumption.

Consumer rights are recognised in Article 78 of the Constitution and in the 1982 Consumer Protection Law. Government and civil society representatives agree that, in practice, consumer protection policy has been weak: the existing consumer protection system was under-utilised, and consumers had little knowledge of their rights and the procedures to enforce them. The government agency in charge of consumer protection, the Superintendence of Industry and Commerce, had only real presence in the capital, making it very difficult for consumers from other regions to approach the entity. It also lacked the administrative capacity to deal with a range of consumer-related issues, which were the competence of other agencies.

Aware of the importance of consumer protection for social and economic development in the country, the new administration has designed a more sophisticated and state-of-the-art system, aimed at making consumer protection more effective, comprehensive and user friendly. The system is based on a high-tech platform which is accessible through the whole national territory. As a result of these changes, consumer protection has improved, as reflected by the increasing number of consumer claims and complaints, and sanctions imposed on companies. In 2010, the Superintendence initiated over 6 800 administrative procedures related to consumer protection and imposed 2 496 sanctions and fines equivalent to approximately USD 6 million. By mid-2011, it had opened 2 204 investigations and imposed 1 061 sanctions and fines which amount to USD 7 million.

The most recent development is the adoption of a Consumer Protection Statute in 2011.²⁵ The new Statute regulates issues that were insufficiently regulated or unclear in the past, such as the definition of consumer rights, product liability, transparency in advertising, consumer protection in e-commerce, etc. It also introduces a new judicial procedure to simplify and reduce the length of consumer claims (see Box 3.4).

Box 3.4. Colombia's 2011 Consumer Protection Statute: Key features

Objective of the law: To protect, promote and guarantee the effectiveness and development of consumer rights.

Clear definition of consumer rights: Security and indemnity; right to obtain complete, true, transparent, verifiable, comprehensible, precise and suitable information; protection from any abusive clauses in adhesion contracts.

Box 3.4. Colombia's 2011 Consumer Protection Statute: Key features (cont.)

Definition of Legal Guarantee: Producers or providers of goods and services are liable for the quality, suitability, security and performance of all goods and services they offer. A legal guarantee automatically applies in cases where producers and providers do not stipulate one for their products. The guarantee includes the obligation to repair a defective product at no cost, to replace or to reimburse it.

Liability for defective products: Joint liability between producer and vendor; obligation to indemnify physical damages and damages caused to products other than the one that caused the injury.

Information and advertising: Distinction between information and publicity; liability for deceitful advertising and inaccurate information; obligation to provide information regarding quantity, weight or volume; expiry date and other specifications of the product, and usage instructions.

Contractual protection: General conditions of contracts must be interpreted in favour of consumers; abusive clauses are prohibited; clauses that produce an unjustified balance in detriment of consumers' interests are prohibited.

Non-traditional sales: Right of retraction in purchases of time shares, products offered via non-traditional sales methods (such as TV sales or door-to-door sales), and products financed by the vendor.

E-commerce: In e-commerce transactions, consumers paying with e-payment mechanisms have the right to cancel an operation in light of fraud, a non-requested purchase, when the required product does not comply with its specifications, or when the product fails to be delivered or turns out to be defective.

New Procedures: The Superintendence can investigate breaches to consumer rights in almost all areas of commerce; new procedures are introduced to speed up resolution of consumer claims.

Source: Colombia, Superintendence of Industry and Commerce.

Science and technology

"Enterprises should endeavour to ensure that their activities are compatible with the science and technology policies and plans of the countries in which they operate and, as appropriate, contribute to the development of local and national innovative capacity."

Source: OECD Guidelines for Multinational Enterprises, Chapter IX.

This chapter of the *Guidelines* aims to promote, within the limits of economic feasibility, competitiveness concerns and other considerations, the diffusion by multinational enterprises of the fruits of research and development activities within the countries in which they operate, contributing thereby to the innovative capacities of host countries.²⁶

Colombia has undertaken a range of major initiatives in the past two decades to strengthen science, technology and innovation (ST+I) institutions and public policies.²⁷ An important milestone was the adoption of a Science and Technology Law in 1990, which created the Colombian National System of Science, Technology and Innovation. Among its outcomes were better co-ordination of institutions related to science, technology and innovation policies, and a stronger relationship between government, researchers and productive sectors. The system is managed by the Agency for Science and Technology (Colciencias).

In the last five years, a series of developments have underscored the increased relevance of ST+I policy. In 2006, the government established a long-term plan for social and economic policy ("*Visión Colombia 2019*") which identified productivity growth through ST+I as a key strategy to achieve sustained economic growth and a greater level of welfare. The enactment of Law 1286 of 2009 consolidated the country's commitment to ST+I policy. Colciencias is now in charge of formulating, guiding and co-ordinating the implementation of national ST+I policies. The Law also created a fund to increase public, private and international research and development, and philanthropic resources to finance the sector and allow a multi-year execution of ST+I resources. Since it began operations in January of 2010, the fund has mobilised close to USD 180 million.

However, Colombia is still lagging behind other Latin American countries in many ST+I indicators. Total investment in ST+I activities in 2010 amounted to only 0.4% of GDP, with R&D investment reaching only 0.16%,²⁸ significantly lower than in neighbouring Brazil (WEF, 2009). Colombia's low levels of public and private investment in ST+I are reflected in its low ranking in the World Bank's Knowledge Economy Index relative to Latin America and other middle income countries.²⁹

The National Development Plan 2010-14 includes "Innovation" among the main areas of the government's economic and social strategies and as one of the five "locomotives" (or main drivers) of economic growth. The Plan established the goal of achieving an annual investment level in ST+I activities of 0.7% of GDP by 2014.

A further important step was made in June 2011 when the Colombian Congress approved a constitutional reform that assigns 10% of the mining and petroleum royalties to a ST+I Fund that will finance research and innovation projects in strategic areas selected through national and regional agreements. This will generate close to USD 5 billion of funds over the next nine years.

The government is currently designing a comprehensive National Innovation Strategy to foster economic growth through the transformation of productive sectors, based on three pillars: Science & Technology Development; Human Capital, and Firm Innovation and Technological Entrepreneurship. With the assistance of international experts, this strategy seeks to learn from other countries' best practices. Another important line of action has been the improvement of scientific and technological infrastructure in strategic fields, such as biotechnology, geology, natural resources and agriculture. The government has also run a program of tax incentives for firms investing in innovation and science.

At present, however, only 1% of firms in Colombia collaborate with universities, in sharp contrast to countries with innovation-led growth. According to the Colombian authorities, citing a manufacturing innovation survey, only 9% of firms have an R&D unit within their corporate structure and only 1% of employees work in R&D-related activities. As a result, research rarely generates knowledge inputs that directly contribute to increasing the productivity of the economy. To address the current shortcomings, and based on the guidelines laid down by the National Development Plan, Colciencias established an ST+I Strategic Plan. Its main objectives are to strengthen the National System of Science, Technology and Innovation; to develop human capital for research and innovation and to promote knowledge and innovation as an instrument for the country's social and productive transformation, including by strengthening links between universities, firms and society.

Competition

“Enterprises should carry out their activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all jurisdictions in which the activities may have anticompetitive effects.”

Source: OECD Guidelines for Multinational Enterprises, Chapter X.

Colombia's competition law is one of the oldest in Latin America.³⁰ The 1959 Competition Law included the basic legal standard applying to conduct cases (agreements and abuse of dominance) and a system of prior review of mergers and acquisitions. The 1991 Constitution establishes free competition as a constitutional right. Decree 2153 of 1992 elaborated on the types of conduct subject to competition law and refined the legal standards that applied to that conduct. The liberalisation policies in the 1990ies also introduced significant reforms in public services, such as the creation of sectoral regulatory bodies (telecommunications, water and sanitation, electricity

and gas, public services) with a general mandate to strengthen competition and prevent monopolistic practices. A second reform with significant amendments to the Competition Law was approved in 2009. Two of its principal effects were to set up the Superintendence for Industry and Commerce (*Superintendencia de Industria y Comercio, SIC*) under the Ministry of Trade, Industry and Tourism as the sole authority to enforce competition rules in all sectors, and to substantially increase the level of fines for practices in breach of competition law.³¹

The Superintendence can investigate and sanction national and foreign corporations alike, regardless of whether they are financed from public or private sources. As of today, the Superintendence has never sanctioned a national corporation for anticompetitive conduct that could restrict foreign investment. Only one case has been investigated, when a major national producer of dairy products was suspected of the possible obstruction to the entry of a foreign corporation into this market. The case was closed on the basis that there had been no anticompetitive practices. In a few cases the SIC has imposed sanctions on branches or subsidiaries of foreign enterprises (e.g. from Mexico, Denmark and the United States) for anticompetitive practices.

According to the Colombian authorities, Colombian competition law is transparent and non-discriminatory. All Law and Decree projects, as well as modifications to existing regulations, are published for consultation and comments on the agency's website before they are adopted. The SIC issues guidelines about competition matters and prevention of anticompetitive practices and provides information on its webpage about competition protection, and how to file complaints before the SIC.

The Superintendence is also in charge of pre-merger notification proceedings. Any privatisation that implies a merger under Colombian antitrust law is subject to revision and approval by the agency. In 2009 and 2010, the Superintendence studied various proceedings for mergers that have taken place as part of an important privatisation process in the energy sector. In pre-merger proceedings, the Superintendence does not make a specific analysis of the effect of the privatisation on foreign investment, and this is not a special aspect taken into account either when analysing the effect that the merger may have on competition in the market.

Colombia takes an *ex ante* approach to ensure that regulatory measures do not unduly hamper competition. Law 1340 of 2009 establishing procedures for the protection of competition policy introduced the so-called "competition advocacy tool" under which all draft regulatory acts must be submitted to the Superintendence for comments on their possible effects on competition, including any effects on competition regarding foreign investments. The authorities are not bound by the Superintendence's position on the draft;

however, in case they diverge from it, they have to explain in the preamble of the act the reasons for doing so.³² Another important aspect of co-ordination among authorities concerns mergers and acquisition proceedings in the financial sector. Under Law 1340, the agency in charge of such proceedings is the Financial Superintendence; however, all mergers and acquisitions proceedings in the financial market have to be submitted to the Superintendence of Industry and Trade.

Taxation

“It is important that enterprises contribute to the public finance of host countries by making timely payments of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate...”

Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems...”

Source: OECD Guidelines for Multinational Enterprises, Chapter XI.

According to the *Guidelines’* commentary, corporate citizenship in the area of taxation implies that enterprises should comply with both the letter and the spirit of the tax laws and regulations in all countries in which they operate, co-operate with the authorities, and make information that is relevant or required by law available to them.

In Colombia, four different taxes levied by the central government are applicable to enterprises. In addition there are taxes levied at departmental and municipal levels. Box 3.5 provides a summary of these taxes.

Colombia’s tax system has been criticised for its low efficiency, inequality, and an inefficient tax collection system, with high levels of tax evasion. Tax intake is poor, which suggests that few people or companies pay taxes. Some tax distortions affect FDI, notably the high statutory tax rate on business’ income (OECD, 2010).

As part of ongoing regulatory reforms to improve the country’s tax system, the government has taken a range of measures to make tax collection more effective and to ease the payment of taxes. Since 2001, taxpayers expressly designated by the Tax Administration because of the level of their income or of their assets, or because of the nature of the activities they carry out, must file their tax returns electronically. In addition, since 2007, taxpayers having to file their tax returns electronically can also pay their tax liabilities by electronic means. Other taxpayers must file their tax returns and pay their tax liabilities with the banks and financial institutions authorised by the Tax Administration.

Box 3.5. Overview of taxes applicable to enterprises in Colombia

Taxes levied by the central government

Corporate Income Tax (CIT): The CIT is applicable to i) enterprises incorporated (in the case of corporations) or set up (in the case of partnerships) under Colombian law, which are taxed on their worldwide income, and to ii) Colombian registered branches of foreign entities, which are taxed on their Colombian source income. The CIT ordinary rate is 33%, whilst the CIT rate applicable to enterprises that perform activities other than trade activities within Industrial Free Trade Zones, is 15%.

Value Added Tax (VAT): VAT applies to the sale of tangible movable assets which are within the Colombian territory; imports of assets into the Colombian territory; and services rendered within the Colombian territory. Exceptionally, certain services rendered from abroad in favor of Colombian residents are deemed to have been performed within Colombian territory and hence are subject to VAT. The ordinary VAT rate is 16% (although some services and goods are taxed at different rates). Certain goods and services (such as basic foods, medicines, public utilities services, public transportation and public education, among others) are excluded from VAT.

Debit Tax: The Debit Tax (also known as Financial Transactions Tax) is triggered on any financial debit transaction that implies the availability of resources, either i) by means of a withdrawal of resources deposited in checking or savings accounts opened with financial institutions or ii) by means of a debit entry in the accounting records kept by the financial institutions. There are a number of exemptions to the Debit Tax, mainly on transactions carried out by financial institutions and by the Central Bank. This tax will be phased out in 2018.

Main taxes levied by municipalities

Industry and Trade Tax ("ICA"): ICA is a tax levied by municipalities on gross income obtained from the performance of economic activities (namely, manufacturing, trade or service activities) within the territory of municipalities, regardless of whether such activities are carried out permanently or occasionally. The ICA rates vary depending on the municipality and on the activity subject to tax, and range between 0.3% and 1.36%. ICA actually paid is fully deductible from the CIT.

Real Estate Property Tax: This levy taxes the ownership or possession of real estate property, and is assessed either on the cadastral value of the property or on its self-assessed mercantile value, depending on the municipality. The tax rates also vary depending on the municipality and on the use of the property, and range between 0.4% and 1.2%. The Real Estate Property Tax actually paid is fully deductible from the CIT.

Source: Colombia, General Tax and Customs Administration.

For the 2010-14 period, the General Tax and Customs Administration (*Dirección de Impuestos y Aduanas Nacionales*; DIAN) decided, as one of its main strategies, to focus on fostering voluntary tax compliance, by, *inter alia*, improving the services rendered by the Tax Administration to taxpayers. This includes fostering the social acceptance of taxation; rendering quality services to taxpayers; promoting and supporting the simplification of the tax system; and promoting the use of formal channels to carry out transactions which are relevant from a tax perspective.

The government also seeks to prevent tax avoidance and evasion. Unlike other jurisdictions, Colombian tax law does not provide for general tax-avoidance rules; rather, it has adopted a limited number of anti-avoidance provisions, whose main purpose is to address specific situations concerning the shift of income to foreign jurisdictions (especially tax havens), the excess funding of legal entities by means of loans granted by their related parties, and the transfer of assets for less than their fair market value.

In 2003, Colombia adopted a transfer pricing regime applicable to cross-border transactions between parties of multinational enterprise groups, which follow the *OECD Transfer Pricing Guidelines* and related recommendations.³³ Colombia also passed legislation on tax havens in 2003. Payments made by Colombian taxpayers to individuals or entities which are residents of jurisdictions that have been classified as tax havens by the Colombian Government cannot be deducted for the purposes of the Colombian corporate income tax (CIT), unless they have been subject to Colombian withholding tax. Transactions with entities or individuals who are residents of tax haven jurisdictions are deemed to have been carried out between related parties and therefore are subject to the transfer pricing regime.³⁴

Colombia has double taxation agreements with the Andean Community countries (Peru, Bolivia and Ecuador), Chile and Spain. In addition, it has signed double taxation agreements with Canada, Mexico, Switzerland, Korea and India, which are pending entry into force. Double taxation treaties are also being negotiated with Belgium, Brazil, the Czech Republic, Germany, France, Japan, Israel, Italy, the Netherlands, Portugal, the United Arab Emirates, and the United States. These treaties have been structured following the *OECD Model Tax Convention*. In addition to their potential to encourage foreign investment by reducing the overall tax burden and avoiding double taxation, they guarantee legal stability and provide important means for the exchange of fiscal information to avoid and control tax evasion.³⁵

Establishment of a National Contact Point

“Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling requirement and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances... The business community, worker organisations, other non-governmental organisations and other interested parties shall be informed of the availability of such facilities.

Adhering countries shall make available human and financial resources to their National contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.”

Source: Implementation Procedures of the OECD Guidelines.

As a result of the 2011 update and amendments to the OECD Council Decision concerning National Contact Points (NCP) and related Procedural Guidance, the role of NCPs has been reinforced, notably as regards their contribution to the resolution of issues that arise relating to the implementation of the *Guidelines*.

The 2011 Procedural Guidance is also more explicit as regards institutional arrangements, and emphasises that the NCP should be able to operate in an impartial manner, while maintaining an adequate level of accountability to the adhering government. Whereas the scope of information and promotion activities of NCPs and the modalities of their reporting to the Investment Committee remain broadly unchanged, the section on Implementation in Specific Instances has been amended, notably by including a reference to the resolution of issues in specific instances “in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*”. Furthermore, Procedural Guidance now also specifies the content of a report when the parties reach agreement or a statement when no agreement is reached or when a Party is unwilling to participate in the procedure.

Colombia’s National Contact Point

Colombia is planning to set up its NCP at the Ministry of Trade, Industry and Tourism (“the Ministry”). The Ministry has led the process of adherence to the *Declaration on International Investment and Multinational Enterprises*, and is fully aware of the commitments acquired by Colombia as a result of this adherence. The Ministry has two main Divisions with competence in the areas covered by the *Guidelines*. One is the Vice-ministry of Business Development, which deals with the relations between the government and private enterprises,

including supporting the creation of new enterprises and promoting global production chains. This Vice-ministry is currently leading a new approach to Corporate Social Responsibility and is thus acquiring a privileged position among national and foreign companies in Colombia to deal with issues related to the guidelines. The other area is the Vice-ministry of Trade, which is in charge of the negotiation of international trade and investment treaties and has built an institutional mechanism of dialogue with other governmental institutions, business groups, trade unions and NGOs. These activities have allowed the Ministry to establish contacts with key stakeholders and to familiarise itself with their interests and concerns. In addition, the Ministry deals with foreign investment and business development and is thus familiar with the policies and needs in these areas. In the government's view, the combined experience and resources of both Vice-ministries create the appropriate conditions to establish a robust, transparent and easily accessible NCP.

Advisory body: With the purpose of ensuring impartiality, accessibility and transparency, the government plans to establish an advisory body to the NCP, comprising representatives of trade unions, the business community and NGOs.

Human and financial resources: The Ministry will make available the necessary human resources to ensure a proper functioning of the NCP. It will also provide the necessary budget so that the NCP can effectively fulfil its responsibilities, such as undertaking promotional activities, handling enquiries and contributing to resolving issues related to the implementation of the *Guidelines*.

Information and Promotion: The Colombian NCP will disseminate the *Guidelines* through the Ministry's website in English and Spanish. Furthermore, it will raise awareness of the *Guidelines* among public entities, the business community, trade unions and NGOs.

Implementation and Specific Instances: The Ministry will design a strong mechanism to ensure a clear and open dialogue between the actors involved in any dispute related to implementation of the *Guidelines*. Such mechanism will follow the steps contained in the *Procedural Guidance* of the *Guidelines*.

Notes

1. This chapter quotes extracts of the *Guidelines*. The full text of the *Guidelines*, including commentaries is available at www.oecd.org/daf/investment/guidelines.
2. *Guidelines*, Chapter II, General Policies.
3. Due diligence is understood as the "process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems". See Commentaries on Chapter II, General Policies, OECD *Guidelines*, 2011.

4. The term “business relationship” includes relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services. See Commentaries on Chapter II, General Policies, *OECD Guidelines* 2011.
5. www.supersociedades.gov.co/ss/drvisapi.dll?Mlval=sec&dir=420. At present, around 24 000 companies (7% of companies incorporated in Colombia) are under supervision by the Superintendence.
6. Reports by the Superintendence of Companies on CSR and corporate governance www.supersociedades.gov.co/ss/drvisapi.dll?Mlval=sec&dir=393.
7. *Guía Colombiana de Gobierno Corporativo para Sociedades Cerradas y de Familia* http://camara.ccb.org.co/documentos/4878_guiagobcorporparteI.pdf.
8. Publications on corporate social responsibility on the Superintendence of Companies’ website: www.supersociedades.gov.co/ss/drvisapi.dll?Mlval=sec&dir=394.
9. ICONTEC, *Guía Técnica Colombiana No. 180 sobre Responsabilidad Social Empresarial*, www.icontec.org.co/index.php?section=367.
10. www.andi.com.co/cajadeherramientasrse.
11. www.comprometerse.org.co.
12. www.oecd.org/document/36/0,3746,en_2649_34887_44307940_1_1_1_1,00.html.
13. Information on environmental disclosure is provided in the section on Environment.
14. <http://eiti.org>.
15. Decisions by the Constitutional Court C-191 of 1998, C-400 of 1998 and C-567 of 2000, among others. Jurisprudence on the “Constitutional Block” can also be found in Constitutional Court, Decisions T-783 of 2003, C-802 of 2002, C-617 of 2008, C-036 of 2005, C-067 of 2003, C-1490 of 2000, C-401 of 2005, C-988 of 2004, C-750 of 2008 and C-028 of 2006 among others. According to Article 93 of the Constitution and jurisprudence developed by the Constitutional Court, any international treaty on human rights ratified by the government, which contains rights that cannot be limited in states of emergency, has a supra-Constitutional status and does not require further regulation in order to be directly applicable in the Colombian legal system; i.e., any citizen can ask a judge to protect his right included in the treaty, without the need to invoke any internal law or regulation.
16. ILO Committee of Experts on the application of Conventions and Recommendations, report submitted to the 99th session of the ILO, cited by UNHRC (2011).
17. www.ustr.gov/uscolombiatpa/labor.
18. *OECD Guidelines for Multinational Enterprises*, Commentary to Chapter V.
19. In Colombia, only about 6% of workers are members of trade unions (down from 20% in the 1970s).
20. In addition to legislation on environmental licensing, there is specific legislation dealing with contingency plans for oil spills (Decree 321 of 1999); harmful substances; and management of hazardous and non-hazardous wastes (Decree 4741 of 2005).
21. www.minambiente.gov.co/documentos/normativa/ambiente/politica/polit_nal_produccion_consumo_sostenible.pdf.

22. Participating countries in the Andean Plan to Fight Corruption are: Bolivia, Colombia, Peru, Ecuador, Venezuela, and Chile as an associate member. Each year the Executive Committee establishes an agenda or plan that includes the priorities to be implemented by the member countries. The 2011 agenda includes items such as experience sharing on citizen participation and social control in the area of transparency and the fight against corruption; asset recovery and repatriation; common formats for requests of international judicial assistance; and promoting co-operation between the judicial police of the Andean countries.
23. The reports were adopted by the MESICIC member countries on 18 July 2003, 7 December 2007 and 25 March 2010, respectively, www.oas.org/juridico/english/col.htm.
24. www.urnadecristal.gov.co/.
25. The Statute was passed through Congress in August 2011; one final procedure is pending before its full adoption.
26. *OECD Guidelines for Multinational Enterprises*, commentary to Chapter IX.
27. This section is based on the World Bank Report Project Appraisal Document (2009), as summarised by the Colombian authorities, on a proposed loan to Colombia for the strengthening of the national system of science, technology and innovation program.
28. Colombian Observatory of Science and Technology (2009).
29. This Index evaluates whether the environment is conducive for knowledge to be used effectively for economic development.
30. This overview is based on IDB and OECD (2009).
31. www.sic.gov.co/index.php?idcategoria=1.
32. Decree 2897 of 2010 regulates the application of the competition advocacy tool. In this Decree, the government established the authorities that would have to inform their regulatory projects, which include most governmental agencies, except a few agencies with special constitutional powers. The decree also established the regulation projects that must undergo the revision of the Superintendence.
33. OECD Transfer Pricing Guidelines, www.oecd.org/document/34/0,3746,en_2649_33753_1915490_1_1_1_1,00.html.
34. The Colombian Government has not issued the list of tax haven jurisdictions yet, so the tax-avoidance provisions that refer to them have not been applied.
35. www.mondaq.com/article.asp?articleid=74586.

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Chapter 4

Colombia's Policy Framework for Investment

In addition to legal provisions, a number of policy areas have an important impact on the investment climate, such as investment policy, investment promotion and facilitation, trade policy and infrastructure development. The Colombian government has made great progress in improving the country's business environment over the past years, as reflected in the good rankings in the World Bank's 2011 Doing Business report. The government is determined to continue its efforts in this area and has included enhancement of the investment framework among the key objectives of the National Development Plan for 2010-14. Colombian legislation does not impose conflicting requirements on multinational enterprises established in the country and accords with the Conflicting Requirements instrument of the OECD Declaration on International Investment and Multinational Enterprises.

This chapter examines Colombia's investment policy framework in light of the *OECD Policy Framework for Investment* (PFI) (Box 4.1). It does not address all the policy areas covered by the PFI, but focuses on Colombia's policies on investment, investment promotion and facilitation, trade and infrastructure. Other areas of Colombia's investment policy framework, such as human resource development, competition, taxation, responsible business conduct, etc., are described in Chapter 3.

Box 4.1. **The OECD Policy Framework for Investment**

The objective of the *OECD Policy Framework for Investment* (PFI) is to mobilise private investment in support of stable economic growth and sustainable development, contributing in this way to the prosperity of countries and their citizens and to combating poverty. The PFI was developed within the OECD by the representatives of nearly 60 countries, and poses a list of key questions that should be examined by governments seeking to create a favourable investment climate.

The PFI is not prescriptive. It is a flexible instrument that allows countries to evaluate their progress and identify priorities for action in ten policy areas: i) investment policy, ii) investment promotion and facilitation, iii) trade policy, iv) competition policy, v) tax policy, vi) corporate governance, vii) policies for promoting responsible business conduct, viii) human resource development, ix) infrastructure and financial sector development, and x) public governance. Three principles apply throughout the framework: policy coherence, transparency in policy formulation and implementation of policies, and regular evaluation of the impact of existing and proposed policies.

By encouraging a structured process for formulating and implementing policies at all levels of government, the PFI can be used in various ways, including for self-evaluations, peer reviews, regional co-operation, and multilateral discussions.

A User's Toolkit has been developed to offer practical guidance on how to implement the PFI. It highlights how the core principles of the PFI influence investment, how the various chapters of the PFI relate to one another, and how the PFI can assist in an on-going and iterative process of reform and in fostering public/private dialogue.

Source: OECD, www.oecd.org/daf/investment/pfi and www.oecd.org/investment/pfitoolkit.

Investment policy

The Colombian government has made great progress in improving the country's business environment over the past years, as reflected in the good rankings in the World Bank's 2011 *Doing Business* report.¹ These efforts have resulted in steadily increasing flows of FDI, as described in Chapter 1. The government is determined to continue improving its investment policy framework and to provide the private sector with efficient but simple business regulation, and has included enhancement of the investment framework among the key objectives of the National Development Plan for 2010-14. The National Development Plan envisages further reforms of Colombia's business environment, to continue strengthening the country's competitiveness. This includes reducing administrative burdens and time lags linked to creating and closing down a company. Other planned reforms are: reducing costs and formalities to pay social contributions and taxes; improving co-ordination among agencies in charge of trade procedures to reduce current time-consuming and costly procedures; boosting electronic commerce, which is currently underdeveloped, and reviewing the system of company classification according to size, which has become obsolete.

In addition, the National Development Plan proposes solutions to address current divergences in the way business-related regulations are applied in the different regions, for example, by creating new centres to assist in the creation of companies, simplifying permit procedures; and monitoring reforms of the business environment at the regional level. Further shortcomings that the government considers necessary to address to render Colombia's investment framework more solid and attractive are an insufficient intellectual property rights culture, and a slow and cumbersome dispute settlement system.

Transparency and accessibility of the legislative and regulatory framework

The Constitution establishes the administration's obligation to serve the general interest, *inter alia*, by application of the principle of transparency.² This is reflected in the government's duty to publish and notify regulations in order to make them available, at any time, to the general public. The Constitution also establishes a model of democracy in which participation is considered a key principle and a fundamental right. This principle is reflected in legislation that promotes citizen participation in public decisions.

The government is aware of the importance of a transparent and accessible legal framework and of participatory processes in policy design. Over the years, it has developed and strengthened the obligation of ensuring clear and transparent rules of fair play and fairness in its regulations, laws and administrative procedures. Law 134 of 1994 on public participation mechanisms, in particular, proposes tools that can be used for authorities to ensure citizen participation in

sector decisions and improves the regulatory framework for citizen participation. Decree 1345 of 2010 providing guidelines on regulating techniques establishes that, when required by the Constitution or by law, public entities must publish on their webpage any draft decree or executive resolution for information and comments by the public. For example, the Superintendence of Finance and the Directorate of Taxes and National Customs publish on their webpage all draft external circulars and decrees for comments from interested parties.

All draft laws are published for information in the Congress' official bulletin as well as on its webpage. Legal and regulatory texts are published by "La Imprenta Nacional", a semi-public corporation. Its functions are to edit, print, and disseminate texts of laws, regulations, procedures, administrative rulings of general application and jurisprudence. Laws become applicable as of the date of their publication in the official journal (*Diario Oficial*), or at the date indicated in the relevant text.

Information on investment-related regulation is published on the website of Colombia's investment promotion agency, *Proexport*.³ Texts of financial regulations are available on the Central Bank's webpage.⁴ The various government agencies publish on their websites and through other means the texts of regulation in their respective areas of competence. For example, the Ministry of Trade, Industry and Tourism issues a newsletter and publishes key legal texts on its webpage.⁵

Transparency is a fundamental principle in Free Trade Agreements (FTAs) negotiated by Colombia, e.g. with the United States and Canada. The principle is reflected, not only in the specific chapter on transparency, but throughout the agreement. The transparency chapter in FTAs generally includes a provision that regulates the publication and disclosure of information, as well as notifications and provisions of information. These obligations are key provisions of the free trade agreements: they create the obligation for the Parties to ensure that their laws, regulations, procedures, and administrative rulings of general application on any matter covered by the agreement, are promptly published or made available to the public in an effective way.

The government has a website where producers located in Colombia and overseas can access information related to technical regulations and conformity assessment procedures in force.⁶ The website also provides information regarding drafts of technical regulations. The documents are available for comments during at least 60 (but usually 90) days. On request of a stakeholder, additional time can be granted.

At present, Colombia does not carry out assessments of the likely impacts of regulations on trade or investment in advance of their adoption. However, the government is aware of the importance of regulatory impact assessment and considers this to be a good regulatory practice. Under the

co-ordination of the Ministry of Trade, Industry and Tourism, the government is developing guidance for improving good regulatory practices regarding regulatory impact assessment. Ministries and regulatory agencies are also encouraged to conduct risk assessments and to improve regulatory practices.

Reducing administrative barriers to investment

Under the OECD Declaration on International Investment, adhering countries are to co-operate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises. Colombian legislation does not impose conflicting requirements on multinational enterprises established in the country and accords with the Conflicting Requirements instrument of the Declaration. The Colombian authorities note that, so far, the government has not received any complaints from multinational enterprises on conflicting requirements which may arise from Colombian laws and regulations.

One of the areas in which the government intends to focus its efforts to improve the investment policy framework is in simplifying procedures and removing unnecessary administrative burdens to investors. The government has put in place an “anti-burden policy”, aimed at simplifying procedures and barriers for a range of public services, and to improve communication between government entities and citizens.⁷ The programme also manages the “Single Information System of Procedures and Services” (*Sistema Único de Información de Trámites y Servicios*).⁸ This web portal provides information on procedures of national and territorial entities, and proposes initiatives to streamline procedures and tracks their impact.

Law 962 of 2005 establishes mechanisms to reduce public administration procedures. The use of electronic means to improve the delivery of services by the State has advanced significantly in recent years. Colombia has also put in place an e-government (Online Government) Program, which is implemented by the Ministry of Information and Communications. In 2007, about 70 electronic procedures were available; by 2011 this figure increased to nearly 700. All these procedures and electronic services are posted on the government's website.⁹

The program is currently recognised as one of the leading e-government programs in Latin America.¹⁰ The policy and regulatory framework for e-government is based on Decree 1151 of 2008 establishing general guidelines for Colombia's Online Government Program. Further progress in implementation of e-Government is one of the objectives of the current National Development Plan. E-government is a fundamental part of the government's “Good Governance Policy” (*Política de Buen Gobierno*) and has become an important component of the “Live Digitally Plan” (*Vive Digital*), a policy platform to promote widespread use of information and communication technologies in Colombia.¹¹

The Online Government Program has facilitated the implementation of electronic services to citizens, business and public servants themselves. In 2010, it defined a new scope, taking into account the country's development objectives, including topics such as open data, reduction of paper use in public administrations, information security, accessibility and usability, and strengthening citizen engagement and service delivery through multiple channels, such as mobile devices and digital terrestrial television.

The Online Government Program has also contributed to removing procedural barriers and facilitated private sector development, as it has streamlined processes, reduced response times and allowed for more effective control over the quality of information made publicly available. Among the nearly 700 transactions and services that can now be performed online, a large number regard investors. Box 4.2 provides examples of e-services of special interest for investors. Other electronic procedures, such as the granting of environmental licenses or housing subsidies are in the process of implementation.

Box 4.2. Public online services of interest for investors

One stop shops: There are 16 cross-agency services and virtual one-stop shops where citizens and entrepreneurs can make multiple transactions through a single entry.

An e-regulations webpage (<http://colombia.eregulations.org>) provides information to investors on establishment and other procedures.

International Trade Single Window (www.vuce.gov.co): This solution interconnects 18 entities; 100% of international trade procedures can be made electronically. 5 380 companies operate via digital signature whereas 42 100 registered users operate through brokers. As of March 2011, over 3 million authorisations have been granted; the average approval time is 8 hours.

Online Judicial Records (www.certificadojudicial.gov.co): 4.8 million certificates have been generated on-line, which represents 73% of total certificates issued. As of May 2011, this has reduced processing time from 2 hours to 10 minutes, and costs to users by USD 105 million.

Online Tax Records (www.contraloriagen.gov.co): This procedure has been reduced from 3 hours to 5 minutes, with savings of USD 1.5 per user for each certificate.

Box 4.2. Public online services of interest for investors (cont.)

Payment of Social Security Contributions: Over 10 million people make their contributions online by using this solution which was implemented through a public-private partnership. Thanks to it, a 20-employees company can save nearly USD 80 every month. On average, USD 1.5 billion is collected every month in payments (May 2011 data).

Phytosanitary products import documents (www.ica.gov.co): The timespan to obtain this kind of document has been reduced from 30 to 6 days.

Certificate of free sale (www.invima.gov.co): This procedure has been reduced from 30 days to immediate issue.

Consultation of patents (www.sic.gov.co): Responses to consultations are available immediately; the service is available 7 days/24 hours.

E-Procurement System (www.contratos.gov.co): The volume of public procurement operations published online represents about 8% of the country's Gross Domestic Product.

Source: Colombia, Ministry of Trade, Industry and Tourism.

Property rights registration for land and other forms of property

Property rights and contractual obligations relating to the transfer and acquisition of such rights are regulated by the Civil and Commercial Codes. Land ownership is freely transferable.

Property rights acquisition is open to foreign investors with the exception of real property in border regions, national coasts, or islands of Colombia (see Chapter 2 describing exceptions to National Treatment). Another exception, which applies to foreign and domestic investors alike, is the government's right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities and ethnic groups.

Registration of land ownership titles and related rights date back to the 18th century and has been continuously improved. The key element of the registration system is the *Folio de Matrícula Inmobiliaria*, a document which gathers the whole legal history of each property. It is designed to be a safe and reliable document to determine the current legal state of a property. The *Folios* are managed by Registration Offices located in each major municipality. Each *Folio* is identified through an indicative code managed by the respective Registration Office, followed by a unique number granted to every property. Since 1992, the Registration Offices have been evolving from manuscript to magnetic expedition of the *Folio*. As of December 2010, 96% of registered property in Colombia is accounted for with a magnetic *Folio*. The government's objective is to reach 100%

by end 2011, with the upgrade of the remaining Registration Offices. Time necessary for property registration has been substantially shortened and now takes approximately 5 days, down from 23 in 2005 (UNCTAD, 2006, World Bank, 2011). The costs and procedures for registering real property in Colombia are the same for both national and foreigners.

Intellectual Property Rights

Protection of IPR rights is a key element of a healthy investment environment, and the Colombian government has undertaken to respect high standards of protection both at regional and multilateral levels. These commitments have been made part of national legislation. Colombia is a Party to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and to the World Intellectual Property Organization (WIPO) Convention and a range of agreements administered under the latter's auspices (Table 4.1).

Table 4.1. Colombia's participation in IPR-related treaties

Berne Convention for the Protection of Literary and Artistic Works	Party since 1988
Paris Convention for the Protection of Industrial Property	1996
Patent Cooperation Treaty	2001
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Phonograms Convention)	1994
Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations	1976
International Union for the Protection of New Varieties of Plants (UPOV Convention)	1996
WIPO Copyright Treaty	2002
WIPO Performances and Phonograms Treaty	2002

Source: Based on WIPO, www.wipo.int/treaties/en.

Three treaties (the Budapest Agreement on International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the Treaty on the Law of Trademarks and the Madrid Protocol Concerning the International Registration of Trademarks) are in the process of ratification.

At domestic level, Colombian legislation grants higher levels of copyright protection in certain areas than those provided under the WTO agreements. For example, while the TRIPS Agreement provides for a minimum of 20 years protection to broadcasting organisations, the Andean Community Decision 351, which applies in Colombia, recognises a term of 50 years. Law 23 of 1982 provides that copyright terms of protection will extend 80 years after the death of the author. Regarding industrial property, Colombia has adopted Andean Community Decision 486, which offers a higher protection to intellectual property rights than the basic principles contained in the TRIPS Agreement.

The National Copyright Directorate, established under the Ministry of Domestic Affairs and Justice, is in charge of designing, and executing the government's policies on copyrights and related rights. It manages the National Copyright Registry, which records all types of works in the artistic and literary fields, such as acts and contracts related to the transfer or change of owner. It also actively participates in all bilateral and multilateral commercial negotiation processes involving issues on copyrights and related rights.

In order to comply with its IPR-related obligations under WTO and free trade agreements, the government has strengthened customs controls. It has also amended the Criminal Code to punish various IPR-related crimes such as cybercrimes, the unlawful obstruction of computer systems and telecommunications networks, and the interception of computer data. These amendments reflect the commitment made under the WIPO Performances and Phonograms Treaty. Colombian criminal law also punishes the violation of moral rights, authors' economic rights, and other frauds.¹²

Notwithstanding the government efforts to improve the legal and institutional framework for IPR protection, implementation problems persist, as reflected by the fact that Colombia has been on the US Special 301 "Watch List" every year since 1991 (IIPA, 2009).

The government acknowledges the shortcomings of Colombia's IPR protection system and the lack of an adequate "IPR culture", and has undertaken a range of initiatives aimed at strengthening enforcement of IPRs with a view, *inter alia*, to enhance the investment framework. In July 2008, under the co-ordination of the National Council of Economic and Social Policy (CONPES), it approved the basis for an action plan to develop an intellectual property system that contributes to enhancing national productivity and competitiveness.¹³ Since the adoption of the plan the government has made progress in strengthening the capacities and available resources of copyright and industrial property authorities.

The government has developed programs to raise citizens' awareness on IPR protection, as well as specific training for enforcement authorities, including judges, prosecutors, the police, investigators and customs authorities. It has also undertaken a range of actions to fight infringements of copyrights and related rights. These actions were part of a co-ordinated strategy by enforcement authorities, including judges, prosecutors, police and customs authorities. One outcome of these actions is Colombia's being listed in 2010 the country with the lowest rate of piracy of computer programs in the region (BSA, 2011).

The National Development Plan 2010-14 sets out a series of strategies to co-ordinate the activities for achieving an adequate level of protection, use and promotion of intellectual property rights. One strategy is aimed at institutional co-ordination, amendment of legislation, and providing procedures, technology transfer, and support for SMEs and innovative entrepreneurs to protect their creations. Another strategy seeks to promote a culture of respect for intellectual property rights, and the use and protection of creations and inventions. So far, implementation of the Plan has focused on training judicial officials on industrial property, copyrights and protection of new varieties of plants, as well as on genetic resources and traditional knowledge. Some pieces of legislation have been amended in order to facilitate the transfer of intellectual property from employees to employers, and, where public funding is involved, from public entities to universities and investigation centres.

In 2010, the government established the National Administrative System of Intellectual Property and created the Inter-sectoral Commission of Intellectual Property (CIPI).¹⁴ The purpose of this initiative is to co-ordinate and guide the common policies of various government entities, in order to achieve an adequate level of protection, use and promotion of intellectual property rights. Further efforts include training courses on IPR protection. These courses are given, *inter alia*, to companies, by the investment promotion agency, *Proexport*. The Ministry of Trade, Industry and Tourism has provided training and guidance on matters within its jurisdiction to other public employees, including judges and prosecutors, on crimes against copyrights, industrial property and telecommunications. The Ministry also participated in a congress to train judges and prosecutors, organized by the OEPM (Spanish Office for Patents and Trademarks), WIPO (World Intellectual Property Organization) and EPO (European Patent Office). Other efforts include the publication and distribution among enforcement officers of a booklet on copyright and related rights protection. Since mid-2010, the government has published a digital newsletter dealing with enforcement of copyright and related rights.¹⁵

Contract enforcement and dispute resolution mechanisms

The Colombian legal system is based on civil law tradition. It makes a distinction between civil and commercial law, although, for the purposes of dispute resolution before local courts, the forum is the same (the parties are called to start procedures before civil judges and civil courts).¹⁶

There are no special courts dealing with corporations. However, in practice, the Superintendence of Companies (*Superintendencia de Sociedades*) is involved in the settlement of most of the corporate disputes in Colombia.¹⁷ Around 90% of corporations that were incorporated by 2011 are Simplified Stock Companies

(*Sociedades por Acciones Simplificada SAS*), and, according to Law 1258 of 2008 regulating this type of companies, all corporate disputes that arise within SAS are to be settled by the Superintendence of Companies.¹⁸ Therefore, for this type of companies, the Superintendence of Companies works *de facto* as a commercial court.

In accordance with the Constitutional principle of non-discrimination, the right of access to justice is the same for foreigners and Colombian citizens. This also applies to investment-related disputes. However, as recognised by the government itself, investors have little incentive to settle their disputes before national courts, due, *inter alia*, to long delays before obtaining a decision. As pointed out by the World Bank's *Doing Business* report, it takes over three years to have a simple commercial dispute settled in Colombia (NDP and World Bank, 2011). As a result of these deficiencies, Colombia ranks well below other countries in the region in terms of arbitrating commercial disputes in the Investing across Borders Index (IFC, 2011). In order to address the current shortcomings of the judicial system the government started in 2010 a range of reforms, *inter alia*, through Law 1395 of 2010 introducing major reforms to the Colombian Civil Procedure, summarised in Box 4.3.

Box 4.3. Reforms to render the domestic dispute settlement system more attractive for investors

- Creation of new municipal courts and increasing the number of staff (judges and clerks) in order to reduce the backlog of unresolved cases.
- Re-distribution of competences (separating enforcement and ordinary procedures) between municipal courts to improve efficiencies.
- Creation of support services to courts to separate administrative from judicial functions.
- Establishment of a new performance evaluation system for staff, including non-monetary compensation, personalised improvements plans, and sanctions for non-satisfactory performance.
- Improvements in training programs for judges.
- Regulatory changes to accelerate the resolution of cases, including: a one-year term for courts to adjudicate cases; possibility of using a notary for extrajudicial evidence on counterpart citations; more efficient methods to submit expert reports; presumption that documents are authentic without the need to have them certified by a notary; introduction of oral, more expeditious court procedures.

Source: Colombia, Ministry of Trade, Industry and Tourism.

In addition to the regular court system, under Law 640 of 2001 modifying procedures relative to conciliation, investors have recourse to conciliation, mediation or arbitration subject to mutual agreement of the parties. Conciliation can be extrajudicial or take place within a judicial proceeding, and it can be requested at any step of the procedure until the final decision. These extra-judicial dispute settlement procedures are also available for disputes involving State entities. One example is the case of some large companies from Panama operating in the banking sector, which have relied on alternative dispute resolution.

In the last years, there has been an increased use of alternative dispute settlement mechanisms. Arbitration, for example, is becoming increasingly common, both in large and small commercial disputes. Similarly, the number of centers available for arbitration and conciliation has also been steadily growing throughout the country. The leading body for arbitration in Colombia (and in Latin America) is the Center for Arbitration and Conciliation (CAC) of the Chamber of Commerce of Bogotá, which has been in operation for almost 30 years. In 2002, the CAC managed 201 cases, and this number has kept growing to reach 290 in 2010, of which about 25% involve the State or a State agency.

The CAC has recently created a special line for micro, small and medium-sized enterprises, with specific rules of procedure. In 2009, it handled 50 cases, and in 2010, 67 cases. The CAC has put in place a virtual arbitration system (e-arbitration), which is unique in Latin America. It allows the parties to submit documents from any part of the world and the arbitral tribunal to take a decision without the presence of the parties. Since its creation in 2009, nine cases have been resolved through e-arbitration. The increase in the number of cases and level of sophistication of arbitration methods, as well as continuous training and capacity development have contributed to the extended recourse to alternative dispute settlement, both between investors, and between investors and the State.

Expropriation procedures

Article 58 of the Constitution guarantees private property rights and strictly limits the power of the State in cases of expropriation. The Constitution determines that expropriation is only possible pursuant to a judicial decision and prior indemnification as defined by the legislator, and only for reasons of public necessity or social interest. As defined by the Constitutional Court, expropriation requires the participation of the legislature, the executive and the judiciary. The legislature defines the public purpose or social interest reason that would justify an expropriation; the executive determines the existence of such reasons of public purposes or social interest and initiates the

expropriation procedure; the judiciary verifies the fulfilment of the legal and constitutional requirements, guarantees the respect of the expropriated party's rights, establishes the level of compensation and has the power to decide whether the expropriation process proceeds or not.¹⁹

To determine whether or not there is a public or social interest basis for expropriation, both the general interest and private rights must be considered. In 2001 the Constitutional court established that “the existence of a general interest must be verified case by case”; and even where a real general interest exists which motivates a particular action from the State, the rule that says that the general interest prevails over the private interest is not absolute, nor subject to immediate application.²⁰ The Constitutional Court further stated that public authorities always have the duty to respect private property rights. In cases where such rights must be limited or restricted in order to comply with the essential objectives of the State, the public authorities must observe the law and applicable legal procedures.²¹

All BITs to which Colombia is a Party provide that compensation in case of expropriation must be prompt, adequate and effective. The Constitutional Court has established in several cases that compensation in cases of expropriation must be prior and fair, and compensate the particular interest.²²

Investors subject to expropriation have recourse to administrative and judicial action. Administrative remedies include a “reconsideration appeal” which is submitted to the administrative authority or public official who made the decision or issued the administrative act in question, for the act to be revoked amended or clarified; and a “recourse of appeal”, which is submitted to the entity above the one that took the decision. In case judicial remedies are sought, the competent court in expropriation cases is the Supreme Court for contentious administrative procedures.

International promotion and protection agreements

In 2007, the government adopted an International Investment Agreements agenda, which includes 20 countries as priorities for investment negotiations, taking into account several criteria, such as the FDI stock in Colombia, FDI inflows, Colombian FDI stock abroad, per-country FDI outflows to the rest of the world, and GDP per capita as a function of countries with greater potential to transfer knowledge and technology while investing abroad.

Colombia has signed or is currently negotiating bilateral investment agreements (BITs) with nine countries: Peru, Spain and Switzerland, which are already in force, China, India and the United Kingdom, which are in the ratification process. A BIT with South Korea was signed in 2010; however, in light of current FTA negotiations between the two countries, the BIT is going to

be replaced by a more in-depth investment chapter in the FTA. A BIT with Japan was signed in September 2011. A BIT with Turkey is under negotiation, and an FTA, which does not include an investment chapter, is being negotiated in parallel (Table 4.2).

Table 4.2. Bilateral Investment Treaties signed by Colombia

Country	Current status	Date of signature	Entry into force
China	Signed	22 November 2007	
India	Signed	10 November 2009	
Japan	Signed	12 September 2012	
Peru	In force	11 December 2007	30 December 2010
Spain	In force	31 March 2005	22 November 2007
South Korea	Signed	6 July 2010	
Switzerland	In force	17 May 2006	6 October 2009
United Kingdom	Signed	17 March 2010	
Turkey	Under negotiation		

Colombia has also signed a number of free trade agreements which include investment provisions: the FTAs with Mexico, Chile and Central America (covering Guatemala, El Salvador and Honduras), all of them in force. The FTAs with the United States, the European Union, Canada and the EFTA countries include comprehensive investment chapters.

As part of its policy to improve conditions for foreign investment, the government also tries to enhance investment promotion and protection, and to maintain the necessary coherence with public policy and domestic laws. Such improvements have been made through regular revision of the Colombian BIT model. Colombia revised its BIT model in 2008, *inter alia*, to take account of key developments regarding the international investment regime over the years, to add clarifications, and to eliminate issues that are not longer needed in the BIT model. Following the latest revision in 2011, the BIT model now includes a provision on environmental and labour laws, along the lines of provisions in investment chapters in a range of FTAs signed by Colombia. The main features of the current BIT model are set out in Box 4.4.

Colombia has also reviewed some of its existing BITs to further develop the investment relations with partner countries that express an interest in doing so, for either political or commercial reasons. For example, in 2007, Colombia and Peru decided to re-open discussions under the BIT negotiated in 2003, in order to provide for stronger protection to investment through a pre-establishment model.

Box 4.4. Colombia's BIT model – main provisions

Definition of investment: In the previous model, investment was defined broadly and in an open-ended manner. The new model replaces this open asset-based definition by a comprehensive, definition of investment, adding the qualification of the characteristics of an investment, such as “the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk for the investor”. This approach is complemented by explicit exclusions of several kinds of assets, not included under the definition of investment, such as public debt operations and claims for money arising only from commercial contracts for the sale and purchase of goods and services, and credits granted in relation with a commercial transaction.

Scope: The BIT applies to both existing investments at the time the agreement enters into force, and to investments made thereafter. The Colombian BIT model takes a post-establishment approach; a pre-establishment approach is taken on an exceptional, case-by-case basis (e.g. a broader Agreement which includes commercial clauses: either a Free Trade Agreement of an Economic Partnership Agreement).

Minimum Standard of Treatment: The model includes provisions related to the “minimum standard of treatment of aliens”, which includes “fair and equitable treatment” in accordance with customary international law, and grants “full protection and security” in its territory to investments of investors of the contracting party. In line with the principle of non-discrimination, this protection does not imply better treatment than that accorded to nationals of the contracting party.

Equal treatment of investments: The BIT includes National Treatment and Most-Favoured Nation provisions.

Free transfers: Foreign investors can freely make transfers of investments, payments pursuant to foreign loans, funds yielded from the settlement of disputes and compensations, proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment, and salaries and remunerations received by employees hired overseas in connection with an investment. The provisions on free transfers apply within the limits of the powers of the Central Bank. Colombia maintains its Central Bank's and governmental powers and attributions to adopt measures to ensure currency stability. The Colombian economic authorities may regulate capital flows in circumstances threatening macroeconomic stability, through general and non-discriminatory measures.

Box 4.4. Colombia's BIT model – main provisions (cont.)

Expropriation and compensation: Investments will not be subject of nationalisation or direct or indirect expropriation except for reasons of public purpose or social interest, in accordance with due process of law, in a non-discriminatory manner, and accompanied by a prompt, adequate and effective compensation.

Right to regulate: The new BIT model addresses a broader set of explicit issues to preserve the host country's powers related to regulation. The new model now includes specific language on the protection of health, safety, the environment, and the promotion of internationally recognised labour rights, generally aimed at clarifying that the investment protection and liberalisation objectives of investment agreements cannot be pursued at the expense of these other key public policy objectives.

Environmental and labour measures: Each Party retains the right to adopt, maintain or enforce measures that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental and labour law of the Party, provided that such measures are proportional to the objectives sought. The Parties further recognise that it is inappropriate to encourage investment by relaxing domestic labour or environmental measures; accordingly, a Party should not waive or otherwise derogate from such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment, if such derogation or waiver diminishes its labour and environmental standards.

Dispute settlement: Parties may resort to arbitration, to a local court or to an administrative tribunal. To encourage amicable solutions, the BIT model highlights the possibility to use alternative dispute settlement, such as mutual agreement, *ad hoc* or institutional mediation or conciliation before or during the arbitral proceeding. Detailed provisions on investor-state dispute settlement are included in order to provide for a more predictable and orderly conduct at the different stages of the ICSID process.

Source: Colombia, Ministry of Trade, Industry and Tourism.

Colombia has never been involved in an international investor-State dispute. However, the government is aware that, with an increasing number of FTAs and BITs entering into force, it faces greater risks of being involved in disputes with investors. It has thus taken a range of measures to limit such risks.²³ These include raising awareness of State entities and agencies about the commitments acquired by Colombia under international investment agreements and the consequences of their infringement. For example, from 2008 to 2010, workshops on the prevention and management of international investment disputes were organised in ten different cities

(Bogotá, Cali, Medellín, Barranquilla, Pasto, Manizales, Santa Marta, Cartagena, Bucaramanga and Arauca), in which over 300 State employees participated. The Ministry of Trade, Industry and Tourism has also issued a handbook on international investment dispute prevention for State entities and agencies at all levels of government.

Document CONPES 3684 of 2010 establishes the government's policy for the prevention and management of international investment disputes. Following the document's recommendation, the government is planning to set up a body for the prevention and management of international investment disputes, of which the Ministries of Trade, Finance, Foreign Affairs and Justice, among others will be part. The CONPES document further recommends to maintain a very strong training policy to prevent international investment disputes, and to assign sufficient economic resources for the adequate management of such disputes.

International arbitration instruments

Colombia has been a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Others States (ICSID) since August 1997. It is also Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the Inter-American Convention of International Commercial Arbitration.

Except for disputes arbitrated under ICSID, which are enforceable without judicial review, enforcement of international awards is not automatic, and requires review by a national court. The procedure to recognise and enforce foreign arbitral awards is carried out by the Supreme Court of Justice, which establishes requirements that deviate from the New York Convention and the Inter-American Convention. This procedure is very lengthy and can take up to 5 years.

In July 2011, a bill of Law on international arbitration was submitted to Congress to improve the current system. This bill is based on the UNCITRAL arbitration model law, and provides that for the recognition and the enforcement of the awards, only the requirements of the New York Convention will apply.

Legal stability contracts

To address investors' concerns regarding the lack of legal stability and the proliferation of regulations affecting investments (UNCTAD, 2006), the Colombian government introduced in 2005 the possibility for foreign and Colombian investors making new investments or extending existing ones, to sign a legal stability contract with the State, guaranteeing that specified provisions will apply during the negotiated period (see Box 4.5).

Box 4.5. Legal stability contracts

Law No. 963 of 2005 provides for the possibility for investors to conclude so-called “legal stability contracts” with the State with a guarantee that legal conditions applied at the time of the signature will remain in effect. Under these contracts, the government guarantees investors that, if during the life of the contract, legislation is passed which adversely affects any of the rules identified in the agreement as having been “a determining factor in making the investment”, the investors will be entitled to continue operating under the prior rule until the end of the contract.

Legal stability contracts cover periods between three and twenty years, depending on the nature of the project and the amount of the investment. The contracts concern investment in manufacturing, agriculture, tourism, mining, petroleum, telecommunications, construction, electricity production and transmission, port and railroad development and other activities approved by a special committee.

To apply for a legal stability agreement, the investor must make new investments or increase existing ones so that the total investment reaches at least the equivalent of USD 1.93 million (calculated at a foreign exchange rate of COP 2000 per USD). The investor must pay the government a premium equal to 1% of the amount of the investment made every year. In certain circumstances (*e.g.* during non-productive periods), the amount of such premium can be reduced to 0.5% of the investment made during such period.

A certain number of regulations are excluded from the scope of stability contracts:

- rules regarding the social security system;
- the obligation to report and pay taxes levied by the government under a state of emergency;
- indirect taxes (*i.e.* VAT or the tax on banking transactions);
- prudential regulations of the financial system;
- environmental regulations;
- the Central Bank's exchange regime.

Source: Proexport and PriceWaterhouseCoopers (2010).

Since their inception in 2005, the government has signed 66 legal stability contracts for investment projects worth USD 12.7 billion. Almost half of the contracts have been signed for investment in manufacturing, though in terms of the value, the largest projects concern mining and quarrying, and electricity, gas and water supply (see Table 4.3).

There are currently discussions on the possibility to adjust some modalities of the current arrangements, notably with respect to the investment threshold opening the possibility to conclude legal stability contracts, which is seen by some investors as being too high. Legal stability agreements, which exist in other countries in the region (e.g. Chile, Panama and Peru), are increasingly regarded with some scepticism, as they reduce the level playing field, can increase risks of corruption, and reduce the effectiveness of macroeconomic policy. A clear, uniform and stable investment framework would be a better and more sustainable way to provide investors with the necessary regulatory guarantees.

Table 4.3. **Legal stability contracts 2006-10**

Year	Economic sector	Number of contracts	Investment (USD million)
2006	Manufacturing industry	1	25.3
2007	Wholesale and retail trade	2	165.1
	Manufacturing industry	3	30.0
2008	Real estate, leasing and business activities	2	556.3
	Wholesale and retail trade	1	49.2
	Construction	1	38.0
	Mining and quarrying	1	9.8
	Hotels and restaurants	3	91.3
	Manufacturing industry	8	927.7
	Other community, social, and personal services	1	27.7
	Electricity, gas and water supply	2	1 253.2
	Transport, storage and communications	1	300.0
2009	Wholesale and retail trade	2	84.0
	Construction	1	78.0
	Manufacturing industry	12	241.2
	Financial intermediation	4	622.4
	Social and health services	1	0.0
	Electricity, gas and water supply	1	38.8
	Transport, storage and communications	1	603.1
2010	Real estate, leasing and business activities	1	20.6
	Wholesale and retail trade	2	46.3
	Mining and quarrying exploitation	1	2 762.5
	Manufacturing industry	9	243.0
	Financial intermediation	1	797.5
	Electricity, gas and water supply	2	2 655.2
	Transport, storage and communications	2	1 066.0
Total		66	12 731.9

Source: Colombia, Ministry of Trade, Industry and Tourism.

Investment promotion and facilitation

Investment promotion strategy

As described in Chapter 2, Colombia's investment regime is open to FDI, with very few exceptions. In addition to investment liberalisation, the government has undertaken to further improve the business environment in order to boost investment in specific areas. Following an analysis of the internal market and an assessment of the development needs, and in co-operation with the business sector, the government created the "Productive Transformation Program", led by the Ministry of Trade, Industry and Tourism. This program aims to develop world-class, value-added sectors and to boost innovation, thus contributing to job creation and economic growth (see Box 4.5).

Investment promotion agency

Colombia's investment promotion agency, *Proexport*, was created in 1993 with the aim of promoting Colombia's non-traditional exports. It is funded by the government from the national budget. Its goals are set in accordance with those of the Ministry of Trade, Industry and Tourism. In 2004, the government extended *Proexport*'s mandate to undertake investment promotion and facilitation to support foreign investment. More recently, in response to Colombia's growing FDI outflows and reflecting the government's positive assessment of these developments, *Proexport*'s role has been further expanded to implement new policy aimed at encouraging Colombia's investment abroad.

Proexport is currently in charge of promoting exports, international tourism and foreign investment in Colombia and abroad. It offers support and assistance to investors, through services and instruments directed at the generation, development and execution of business opportunities. *Proexport* has seven regional offices. In addition, it has signed an agreement with the Regional Promotional Agencies ("*Convenio de Cooperación Regional*"), to ensure that policies, such as the promotion of FDI and the improvement of the regulatory investment framework, are also applied throughout the regions.

Proexport has an Advisory Board composed of 5 members. Two of them are government officials appointed by the President. The Board studies and defines the investment promotion activities to be carried out by *Proexport*. The government thus has a strong influence over the work carried out by the agency.

Proexport's investment promotion performance is measured quarterly. One indicator is the number of projects and the amounts invested by foreign investors with the assistance of the agency. In 2009, 65 projects, with an estimated amount of USD 1.05 billion were assisted by *Proexport*, in 2010, 64 projects, with an estimated amount of USD 1.33 billion.

Box 4.6. Colombia's Productive Transformation Program

The starting point for this program was the government's goal to render its industry (largely based on commodities) more competitive, by shifting from intensive industries in natural resources and low-cost labour towards capital and technology-intensive sectors requiring a highly qualified workforce. To achieve this, it put in place the Productive Transformation Program in 2008, a novel public-private partnership aimed at accelerating growth of value-added sectors.

The Productive Transformation Program starts from the premise that increasing the country's competitiveness requires joint work between the private and public sectors, and includes two strategies: i) to stimulate the development of new and emerging sectors in which Colombia already has some incipient base and which are characterised by a high growth potential and ii) to stimulate the production of "more and better of the good things", under world class standards.

The methodology underpinning the Productive Transformation Program was elaborated by the Ministry of Trade, Industry and Tourism based on examples of successful processes in different countries, and in close co-operation with the private sector. The sectors were also chosen in co-operation with the private sector. The preconditions were that subsidies would not be granted, so any improvement in competitiveness would have to occur under market conditions. In exchange, the government would i) educate and train the workforce in pertinent skills; ii) improve the regulatory environment drawing on best practice, iii) strengthen and help promote the domestic industry, including by attracting FDI; and iv) develop the required infrastructure, e.g. in transport and telecommunications.

The first sectors chosen were outsourcing and off-shoring, software, cosmetics, personal-care products, health tourism, textiles and clothing, electricity, auto parts, printing and graphic arts. Recent developments under the Program include:

- The adoption by Colombia of International Financial Reporting Standards (IFRSs) in 2009; this should help position Colombia as a provider of financial and accounting services.
- A 2010 decree modulating the requirements for VAT exemption on services exports. This decree will increase the competitiveness of service providers; especially in the IT and business process outsourcing and offshoring sectors.
- A 2009 "Memorandum of Understanding" on industrial co-operation with Korea. Co-operation plans are mainly related to auto parts, textiles and electric energy sectors.
- Participation in training courses in quality control offered by Japan. These courses were especially designed for the 8 sectors of the Productive Transformation Program.

Source: Colombia, Ministry of Trade, Industry and Tourism; McKinsey (2011).

In line with the policies contained in the National Development Plan, Proexport's priorities are to advance internationalisation of the economy, increasing and diversifying foreign trade in goods and services and foreign direct investment flows, and to consolidate Colombia as a tourism destination.

Among its objectives for 2011 are to ensure that 1625 companies carry out foreign sales of USD 1.25 billion; and to attract FDI of USD 1 billion, leading to creating 12 000 direct jobs in the country.

Proexport is a member of the World Economic Forum and partnered with it to organise the WEF on Latin America 2010. As a member of WAIPA (World Association of Investment Promotion Agencies) it takes an active part in the conferences and workshops organised by the latter.

In 2006, *Proexport* obtained an award by WAIPA and MIGA on “*Meeting Investor Information Needs*”. In the World Bank’s 2009 “Global Investment Promotion Benchmarking”, which assesses the quality of the information and services provided by investment promotion agencies worldwide, *Proexport* was ranked 16th among 181 national agencies and 5th among non-OECD countries (World Bank, 2009).

Streamlining administrative procedures

Proexport’s mission is not only to help attract new foreign investors to Colombia but also to support the activity of established investors. On the basis of, *inter alia*, feedback from actual and potential investors, *Proexport* works on improving the legal environment by promoting reforms to regulations identified as obstacles, or encouraging changes in practices by State agencies. The government also usually seeks its advice and comments on legislation and reforms on investment incentives and invites it to participate in the drafting of regulations having an impact on investment (e.g. on forestry development regulation, research and development).

Aware that improving the legal investment environment requires the joint intervention of several government entities and the adoption of regulatory decisions at the highest level to solve obstacles to investment, *Proexport* promoted in 2009 the creation of a “System to facilitate and attract investment” (*Sistema de Facilitación y Atracción de Inversión*, SIFAI). This body, composed of representatives from *Proexport* and other government agencies is tasked with identifying and centralising information on measures and reforms needed to improve the legal framework for investment. SIFAI has a database, managed by *Proexport*, which includes details on the impact of specific obstacles in terms of the amount of investment, job creation, etc. Once the data is introduced in the system, *Proexport* suggests to a Technical Committee the reforms that should be prioritised. Recent reforms include the removal, in 2010, of administrative barriers hampering the extension of Free Trade Zones and a new regulation in 2009 facilitating construction of industrial buildings in rural areas. Of the barriers identified within the framework of SIFAI, during 2009-10, five legal obstacles to investment were removed. Currently, 23 obstacles have been identified in the database, and 7 of

them were classified as priorities for 2010-11. These include market distortions due to fix freight fees, a surcharge for electric use by industries; limited access to land ownership; excessive withholding tax for software, and double taxation for logistic operations.

Dialogue with investors

Proexport has put particular emphasis on having permanent and close contact with potential and established investors, through a strategy of publications and events. In 2010, *Proexport* produced a comprehensive guide on "Doing business and investing in Colombia". Other communication tools include a quarterly newsletter addressed to all companies that have been assisted by *Proexport* and to any interested persons subscribing to its web-page. It includes news and successful investment cases in the country, current legal subjects and articles on the perception of Colombia as an investment destination. *Proexport* also participates in international investment promotion events, and organises business gatherings or one-to-one meetings between investors and potential partners, and information seminars in Colombia and abroad for potential and already established investors. It also organises seminars with established investors to address specific issues, such as legal obstacles to investment, to receive their feedback and to discuss possible solutions.

Over the last decade, *Proexport* has developed joint ventures with a range of foreign investment promotion entities, *e.g.* the CBI (the Netherlands), CESO (Canada), SES (Germany). *Proexport* has also conducted a consulting advisory project with International Development Ireland in 2007, to assist in the design of Colombia's FDI promotion strategy and in the structuring of *Proexport's* FDI Division. In the framework of the Latin American Pacific Arc Forum (ARCO) – Promotion and Protection of Investment Work Group, led by the Ministry of Trade, Industry and Tourism, *Proexport* has participated and interacted with other promotion agencies of the group exchanging experiences to strengthen its promotion capacity.

Investment incentives and disincentives

The instrument on International Investment Incentives and Disincentives, which also forms part of the OECD Declaration on International Investment, and was further developed in a 1984 Decision by the OECD Council, recognises that adhering countries' interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another adhering country which provide significant official incentives and disincentives to international direct investment. It stresses the need to strengthen international co-operation in this area and encourages countries to make such measures as transparent as possible so that their scale and purpose can be easily determined. Moreover, this instrument provides for consultations and

review procedures to make co-operation between adhering countries more effective.²⁴ The OECD Checklist for Foreign Direct Investment Incentive Policies provides policy makers with a tool against which to assess the usefulness and relevance of FDI incentive policies (OECD, 2003).

Colombia maintains a number of investment incentives, most of them in the form of exemptions from income tax and other taxes. All incentives, without exception, are granted to domestic and foreign investors alike. The main incentives include the following:

- Income Tax exemption for new software and pharmaceutical products with high content of local scientific research developed in Colombia. This exemption is scheduled to last until 31 December 2012.
- To support the tourism sector, an income tax exemption for a 30-year period is granted for services provided in hotels built or remodelled and expanded between 2003 and 2018. There is also a 20-year exemption for ecotourism services, and VAT exemption over tourism packages provided to foreigners.
- VAT exemption is granted for export of services on the condition that the service is provided from Colombia (Mode 1 under the GATS), is used outside Colombia and supplied to an enterprise that does not have any activity or business in the country.
- Another incentive scheme is the “Plan Vallejo” program, which includes exemptions from duties and deferment of sales tax for different kinds of export and import operations. There is one scheme for imports of raw materials and inputs; applicable to exports of companies operating in specific areas (human health, air transportation of passengers, research and development, consulting and management, architecture and design, engineering, special design services, value-added telecommunications and software exports); and one scheme for capital goods, spare parts and intermediate goods.

In addition to tax exemptions for investment in certain sectors, other investment incentive packages are in place. The DPHTE for its acronym in Spanish (*Depósitos Privados Habilitados para Transformación y Ensamble*) is intended to provide support for the transfer of new technologies, the expansion of markets, and the development of the national automotive and auto parts industry. The most important benefits are exemptions from customs duties for raw materials, spare parts and other materials.

To promote trade, investment and the creation of employment in the country, there are Single Enterprise Free-Trade Zones and Permanent Free-Trade Zones, with special tax and customs benefits. Free-Trade Zones offer a 15% income tax rate for all users of the zone; exemption from customs taxes

(VAT and tariffs) for imports of goods, while they remain in the Free-Trade Zone. There are currently 11 free-trade zones, with varying requirements to benefit from tax exemptions (minimum amount of investment, jobs created, etc.).

In addition, a range of incentives exist to promote investment in environmental technologies, production of biofuels and ecotourism services (see Chapter 5).

One important tool to continuously assess the effectiveness of investment incentives and to enhance transparency is to regularly assess such incentives, including their impact on the national budget as compared to the benefits to the economy. Colombia does not systematically assess tax measures, including exemptions and other investment incentives, but it has assessed the impacts of some incentives.²⁵ In recent years, one of the major investment incentives in the country has been the income tax deduction for fixed capital investment, which benefits both foreign and domestic investors. In December 2010, the Congress approved modifications to the Tax Statute, including the elimination of this tax incentive, which had significant costs for the public finances (0.8% of GDP in 2009).

Incentives for SMEs

Micro, small and medium-sized enterprises (MSMEs) are very important actors in Colombia's economy: 90% of companies belong to this group, which contributes close to 40% to GDP, and employs over 81% of the labour force (50.7% in micro-enterprises, 30.5% in SMEs).²⁶

According to the Colombian authorities, MSMEs face a range of barriers to attract investment, in particular foreign investment, and to become better integrated into larger companies, including MNEs' supply chains. One important barrier is the high level of informality (due, *inter alia* to the high costs and procedures required for formalisation), which prevents them from entering into contracts within the formal economy, accessing credit, participating in business associations, etc. In addition, many MSMEs lack the necessary knowledge about international safety and environmental and social responsibility standards; which in turn is a barrier for fully participating in international supply chains. More generally, they are not familiar with the opportunities of engaging with foreign investors. In turn, foreign investors often have little access to MSMEs and are not aware of their skills and potential.

Better integrating MSMEs into the increasingly globalised economy has been a priority for the government, which has taken a number of measures to help them overcome these barriers. Recent measures include facilitating access to financing, programs to encourage formalisation; promoting applied research and technological development; training to assist access to new technologies, improving language skills; promoting access to internet

(currently used by only 7% of MSMEs) and electronic commerce; removing unnecessary barriers to exports, promoting access of MSMEs to public purchases; and assistance in formalising employees.²⁷

Trade policy

Colombia's external trade represents a relatively modest share of world trade (less than 1% of world exports and imports) (WTO, 2010). With the increase of both exports and imports in 2010, the external trade turnover now corresponds to 27% of GDP. The country's major trading partners are the United States (37% of the turnover in 2010), followed by the EU (14%) and China (8%). With more than 60% of the total, primary goods (agricultural and mining products) dominate Colombia's exports. Attracting FDI in export-oriented manufacturing production and services thus remains an important goal of Colombia's trade and investment policies.

In recent years, Colombia has intensified its trade diplomacy both in the multilateral context, by actively participating in ongoing WTO negotiations, and in bilateral trade relations, especially with its main trading partners, the United States and the European Union. Even in the context of the world economic crisis of 2008-09, which affected it strongly, Colombia has endeavoured to maintain an open trade regime with limited recourse to subsidies and trade defence measures. The country's efforts in trade facilitation have led to significant results, as shown by Colombia's ranking for "trading across borders" within the World Bank *Doing Business* indicators, which has improved (99th out of 183 economies in 2011). However, further progress is needed to encourage trade and attract investors in export-oriented industries (World Bank, 2011a).

International trade agreements

Colombia is an original WTO member since April 1995 and its notifications and commitments within various WTO agreements, such as on telecommunications, financial services and intellectual property rights protection have enhanced the transparency and predictability of its trade policy (WTO, 2007). The tariff regime has been gradually liberalised, most recently, by lowering customs duties on some 4 000 tariff lines, which has resulted in the reduction of Colombia's average tariff from the previous 12.2% to 8.25% (USTR, 2011a). Customs duties on most consumer goods do not exceed 15%, whereas those applied on capital goods and agricultural products amount on average to 5% and 10% respectively. Although prior consultations on changes in trade policy are not required by law, the authorities consult with interested parties when planned modifications might affect business.

The Colombian Higher Council for Foreign Trade (*Consejo Superior de Comercio Exterior*) advises the government in designing the country's foreign trade policy, including foreign trade issues, competitiveness and foreign investment.²⁸ In line with its trade policy priority to expand trade and investment with strategic partners, the Colombian authorities have focused on negotiating free trade agreements with countries having a high potential for increasing mutual trade and investment, especially in export-oriented and high technology products (see Table 4.4).

Table 4.4. **Trade agreements concluded by Colombia**

Country	Current status	Date of signature	Entry into force	Type/Status
Andean Community (CAN). Current members: Bolivia, Colombia, Ecuador, Peru	In force	12 May 1987	25 May 1988	Customs Union
Chile*	In force	27 November 2006	8 May 2009	Free Trade and Economic Integration Agreement
Canada*	In force	21 November 2008	15 August 2011	FTA
Central America Northern Triangle* (Guatemala, Salvador and Honduras)	In force	9 August 2007	Guatemala: 12 November 2009 El Salvador: February 2010 Honduras: 27 March 2010	FTA
EFTA* (Switzerland, Norway, Iceland and Liechtenstein)	Signed/In force	25 November 2008 (with all State Partners)	Switzerland and Liechtenstein: 26 November 2009	FTA
European Union*	Negotiation concluded	–	–	FTA
Latin American Integration Association (LAIA)		12 August 1980	18 March 1981	Partial scope agreement
Mexico*	In force	11 June 1994	1 January 1995	Free Trade and Economic Integration
United States*	Signed	22 November 2006	–	Free Trade and Economic Integration Agreement
South Korea*	Under negotiation	–	–	FTA

* These trade agreements include an investment chapter. Under the FTAs with EFTA countries and the European Union, investment protection is granted solely to pre-establishment, leaving open the possibility for the Parties to regulate post-establishment issues by means of BITs.

Source: Colombia, Ministry of Trade, Industry and Tourism; WTO, www.wto.org.

As a result of FTAs concluded with a number of Latin American countries, Colombia enjoys preferential access to these regional markets, including in Mercosur countries (Brazil, Argentina, Paraguay and Uruguay), given that the Andean Community, to which Colombia has belonged since 1969, concluded a free trade agreement with Mercosur in 2005. In addition to trade agreements signed with the United States and the European Union, Colombia is currently

negotiating free trade agreements with South Korea and Panama and envisages initiating negotiations with Japan, Singapore, Australia and the Dominican Republic.

The United States-Colombia Trade Promotion Agreement signed in November 2006 was ratified by the United States Congress and signed into law by the President in October 2011. Its ratification by the United States had been delayed due, *inter alia*, to concerns about labour rights issues. In June 2011, the American and Colombian authorities confirmed that Colombia meets its commitments under the Action Plan Related to Labour Rights designed to improve the protection of internationally recognised labour rights, the prevention of violence against labour leaders and the prosecution of the perpetrators of such violence (USTR, 2011b). After entry into force of the Agreement, 80% of US exports of consumer and industrial goods will be imported duty-free and remaining tariffs phased out over ten years. The Agreement also establishes strong protection of investment and intellectual property rights and expanded market access for services, and provides for improved transparency and dispute settlement mechanisms (USTR, 2011a).

In April 2011, the European Union and the representatives of Peru and Colombia initialled a Free Trade Agreement, which, once implemented, will reduce partner countries' tariff and non-tariff barriers and improve their mutual market access for public procurement, services and investment. The Agreement also contains provisions aimed at improving intellectual property rights protection, enhancing transparency on subsidies, and reducing harmful anticompetitive practices. It refers to sustainable development with mutual guarantees of preserving and promoting high labour and environmental protection standards. To ensure the implementation of these provisions, the Agreement introduces an arbitration system and an engagement process with civil society, allowing for transparency and public accountability of public initiatives with a possible impact on labour and the environment (European Commission, 2011).

The growing number of FTAs concluded by Colombia offers considerable business opportunities, but also entails significant institutional and regulatory challenges for the country, including, for example, an increasing risk of disputes related to the new areas covered by the FTAs. Several technical assistance programmes have recently been put in place in the country with the support of the IDB and the IFC, to enhance the ability of the private sector to seize new trade and investment possibilities resulting from the FTAs. These organisations also support the government in its trade facilitation efforts, such as in developing certificates of origin and easing inspections and other cross-border trade procedures.

Streamlining cross-border trade measures

The authorities have adopted a global approach encompassing simplification of customs procedures and border controls, as well as improvement of various trade-related services. The National Tax and Customs Administration (DIAN) has introduced the Single Model for Automated Revenue, Service and Control (MUISCA) to simplify tax, customs and exchange procedures. A number of other new services have been put in place, such as the Single Tax Register (RUT), virtual tax declarations, electronic payments, and improved access to information on tax and customs procedures. The simplification of export procedures and introduction of new technologies, including inspection equipment and security systems, have reduced compliance costs and the time required for all trade operators. For example, carriers and freight agents are now able to send in advance, via internet, information on the merchandise arriving at Colombian ports, pay electronically customs duties and handle automatically procedures for international cargo transfers.

With technical assistance from the IFC, Colombia has put in place the Single Window for Foreign Trade (VUCE) which has brought together 19 technical control government agencies, and allows for import and export licences to be issued online. In addition, integrated risk management is being implemented for the four technical control government agencies responsible for physical and documentary cargo inspections in all Colombian seaports, airports and border crossings. The government intends to purchase and install high-quality scanners to be used by all technical control agencies with the aim of reducing cargo manipulation and the risk of corruption.

The global approach and sustained reforms in the area of trade facilitation have yielded significant results. According to the World Bank (2011), the main achievement in 2008 was time reduction for handling activities in Colombian ports and terminals, thanks to the extension of port operating hours and the adoption of more selective customs inspections. In 2009, better banking services and the implementation of e-payments, electronic data interchange and co-ordination inspections in customs reduced the process time for exports by 10 days and for imports by 5 days. In 2010, the implementation of an electronic declaration system considerably eased customs clearance procedures. Notwithstanding recent progress, international comparisons indicate that there is still room for improvement: according to the World Economic Forum's Enabling Trade Index, which takes into account market access, border administration, transport and communication infrastructure as well as the business environment, Colombia's rank in 2010 (91th out of 125 countries) was lower than that of some other Latin American countries, including Chile (18), Uruguay (50) or Peru (63) (WEF, 2010a).

Infrastructure development

The level of investment in infrastructure in Colombia remains low compared to other emerging economies. In particular, transport infrastructure services (roads, railways and ports) remain sub-standard in many respects compared to international practice, while utility services (water and domestic electricity supply) have improved. In telecommunications infrastructure, major progress has been made, but gaps remain, and access to advanced telecommunications facilities is still limited and unequal (OECD, 2010). Among the reforms needed is improving the effectiveness of public policies in infrastructure, in particular at the planning and monitoring stages of the infrastructure cycle (Nieto-Parra, S. et al., 2011).

Not surprisingly, investment in infrastructure is one of the pillars of Colombia's economic growth and a key element in the National Development Plan (NDP). The NDP includes a multi-year Investment Plan, identifying the available resources for implementation over the four year period. The Plan is the main tool for determining the country's investment needs in infrastructure. To monitor the objectives and policies established in the NDP, the National Planning Department uses the Unified System of Public Investment (SUIP), an information system that keeps track of the life cycle of the country's public investment projects, from their formulation to budget programming, execution and monitoring.

The government is currently working on the design of a complementary methodology to the SUIP, in order to evaluate the benefits of implementing infrastructure projects under a Public Private Partnership (PPP) scheme. The evaluation will take into account the benefits the project would generate under a PPP scheme compared to its performance under a traditional public works system. It also includes calculating project costs under each scheme, adjusted for risk evaluation, and will allow the government to select the most convenient scheme under which to execute the project, thus contributing to the efficient allocation of public expenditure, and allowing for expenditure control within a rigorous framework of fiscal discipline. It is expected that this assessment will be available at the end of 2011.

Private participation in infrastructure investment

The government relies heavily on private participation in infrastructure investment, and has taken measures to ensure that key investment principles, such as transparency and procedural fairness, apply to investors bidding for infrastructure contracts. However, private sector participation in infrastructure remains low, compared to other emerging economies, including in Latin America (e.g. Argentina, Brazil, Mexico), and similar to Chile and Peru (OECD,

2010). This is also reflected in the WEF's 2007 Infrastructure Private Attractiveness Index (IPAI) for Latin America, where Colombia, in spite of an overall good ranking (3rd among 12 countries), has a weak score (8th) in terms of its track record on private investment in infrastructure. On the other hand, the report also recognises the readiness of Colombia's government to deal with, and facilitate private investments in infrastructure, to be among the main drivers of the country's good performance. In this report, Colombia ranks first in Latin America in the development and quality of the PPP regulatory framework. It also tops rankings in the region for efficiency of the license-granting process, ease of purchasing land, transparency of the privatisation process, and openness of public services to private capital.

An indication of the government's reliance on private participation in infrastructure development is the estimated share between public and private investment in infrastructure projects under the *National Development Plan* (see Table 4.5). Box 4.6 describes private participation in the water sector.

Table 4.5. Percentage of estimated public and private participation in infrastructure projects in 2011-14

Sector	Public	Private
Transport	58	42
Mining and Energy	9	91
Water	78	22
Telecommunications	17	83

Source: National Development Plan.

Box 4.7. Private participation in water infrastructure

Colombia started opening the water infrastructure sector to private participation in the early 1990s. The issuing of the first tariff methodologies by the Water Regulation Commission in 1995 stimulated private sector involvement: from 1996 to 1998, and operators with private sector participation emerged in 37 municipalities.

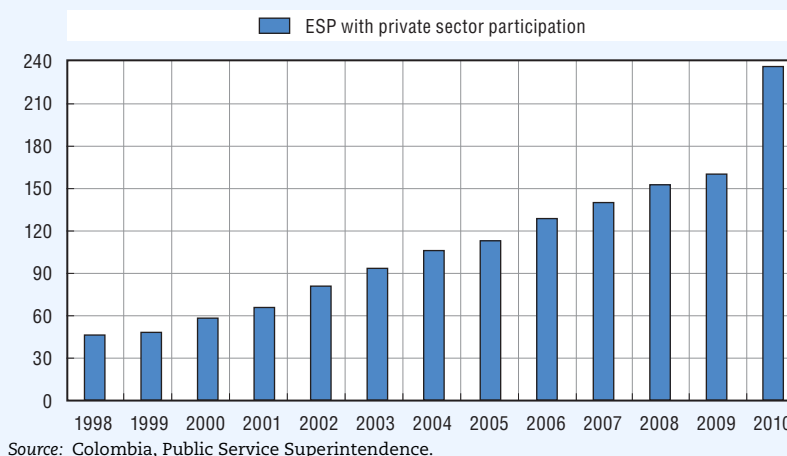
Colombia has supported the coexistence of different institutional arrangements of public-private actors for service provision. This is due, *inter alia*, to the flexibility of the framework established in Law 142 of 1994 for private sector participation under the principle of free entry to the market, as well as local competition surrounding the provision of services, leading to different market and competition dynamics.

Box 4.7. Private participation in water infrastructure (cont.)

While few new water utility contracts with international investment are currently being signed in Latin America, private domestic investment continues to be involved in many countries. In Colombia, many new deals involve public-private partnerships (e.g. in Cartagena) which have been adapted to the local culture and context. Colombia's innovative approach includes contracting small local entrepreneurs, opting for contracts jointly controlled by the municipality, international and private local shareholders and involving cross-subsidy programs for the poor.

Other forms of private sector participation include: *operation agreements*, where the responsibility of financing investments is not allocated to the operator but to the public authority; *operation agreements for a private company to manage and operate specific activities* in the process of service provision, having as a special characteristic that the contracting party is a State-owned company (as opposed to municipality-owned); *concession agreements*, where the operator has the responsibility of managing and financing investments and of taking the operating and commercial risks.

Currently, there are 620 Public Service Companies (ESP) registered in Colombia, 38% of which have some degree of private sector participation. According to the government, most of the ESPs with private sector involvement operate the water and sanitation systems efficiently. In large cities and some municipalities, they have helped to improve coverage and quality. The biggest proportion of companies with private sector participation is in the larger municipalities: 60% of them operate in cities with more than 100 000 inhabitants.



Box 4.7. Private participation in water infrastructure (cont.)

According to the National Development Plan, in 2011-14, Colombia's infrastructure needs in the water sector will require estimated investments of USD 9.5 billion, of which USD 7.4 billion should be covered from public funds. These resources will serve to finance Regional Water and Sanitation Plans, rural programs, intra-domiciliary connections, municipal wastewater discharges and to repair damages caused by the 2010 winter floods. Water and sanitation utilities will invest USD 2.1 billion between 2011 and 2014 to build, maintain, repair and operate water pipes and sewage systems.

Source: Colombia, Ministry of Environment, Housing and Territorial Development; OECD (2009).

Public contracting is governed by Law 80 of 1993 on Government Procurement and complementary Law 1150 of 2007, and by a range of decrees and documents by CONPES, which together form the General Contracting Statute of the Public Administration. In addition, in the absence of any specific rule, civil and commercial laws apply (Proexport and PWC, 2010). Foreign applicants in tenders enjoy the same treatment as domestic ones (see Chapter 2).

The principle of transparency for the conduct of public administration in Colombia is enshrined in the State's contracting system. The public procurement laws, as well as their implementing regulations provide for a range of mechanisms to ensure transparency and objectivity in the entire process. For example, Law 80 sets out a number of provisions to ensure transparency and objectivity in the entire bidding process, including: a public, open and transparent bidding process; public questions and answers hearings; and the obligation to issue clear and adequate public information during the bidding process. In addition, private investors (both domestic and foreign) in infrastructure have access to legal stability contracts, aimed at ensuring security and stability of contracting conditions.

The current regulatory framework for private participation in infrastructure projects is perceived by investors to be excessively complex and subject to numerous procedures. This perception is confirmed by recent analysis. According to EIU (2010), the many different regulations governing public contracts, combined with different contracting powers at different levels of government result in a complex framework, which has been seen as leading to public-private partnership projects not being fully and properly overseen. Public officials in charge of approving infrastructure projects, including those involving private investors, can incur very extensive liabilities related to the projects. This, combined with increasingly tight internal control systems, can result in long delays in approvals related to infrastructure contracts to be granted.

According to OECD (2010), private participation in infrastructure in Colombia could be enhanced by improving the regulatory framework for private-public partnerships; strengthening the design, planning and technical specifications of infrastructure projects and improving infrastructure delivery (through analysis of demand identification, pre-feasibility analysis, and value for money); introducing penalties for non-compliance, and enhancing governance and public institutions dealing with the different stages of infrastructure projects. These recommendations are in line with the OECD *Principles for Private Participation in Infrastructure*.²⁹ Furthermore, the government should continue its efforts to mobilise private funding for infrastructure projects, e.g. from institutional investors. To this effect, shortcomings such as the low quality of feasibility studies, uncertainty regarding the pricing and other relevant terms of the projects, leading, *inter alia*, to frequent and costly contracts re-negotiations, and insufficient standardisation of bidding conditions would need to be addressed.³⁰

Aware of the need to improve the conditions for private investment in infrastructure projects, the government is revising and overhauling the current public-private contracting framework to address its main deficiencies. In 2010, the government issued a "Process and Procedures Handbook", which provides guidelines for public entities engaged in developing PPP infrastructure projects. A Public-Private Partnerships Law is expected to be approved in 2012. It is envisaged that the new law will create an independent infrastructure agency that will be in charge, *inter alia*, of PPPs. Further improvements will include better structuring and design of projects; streamlined procedures, approval and control requirements; simpler, standardised model contracts adapted to sectors, where necessary; a better allocation of roles and responsibilities between partners, and stricter rules on compliance with contract terms.

An important element will be the introduction of new, sustainable financial mechanisms and requiring investors to ensure financing of the project by tapping into capital markets (rather than having the government finance the costs, as is currently the case). The aim will be to have the private partner secure financing over the long term, covering not only construction, but also maintenance and operation of infrastructure. Settlement of disputes between private investors and public agencies will also be improved, by introducing mediation procedures to address technical issues in order to reduce the need of lengthy arbitration.

Notes

1. The World Bank's *Doing Business* report of 2011 measures the business friendliness of 183 economies, taking into account specific areas, such as the investment climate. Its primary concerns are the regulatory and administrative reforms made in a country, and their effect on enterprises and investors. In 2011, Colombia ranked 39th (down from 38th in 2010). The *Doing Business* report also establishes a ranking among reforming countries. Colombia was placed among the top 10 positive reforming countries for three years in a row (2007-09), and has been ranked the top positive reformer for Latin America and the Caribbean over 2006-10.
2. Constitution, Article 209: "The administrative function must serve the general interest and have as its basis the principles of equality, morality, efficiency, economy, speed, impartiality, and publicity through the decentralization, delegation, and de-concentration of functions."
3. www.proexport.com.co/invierta.
4. www.banrep.gov.co/reglamentacion/novedades_reg.htm.
5. www.mincomercio.gov.co.
6. <https://servicios.vuce.gov.co/puntocon/>.
7. http://web.certicamara.com/media/15270/avances_de_la_politica_de_racionalizacion_de_tramites.pdf.
8. www.gobiernoenlinea.gov.co.
9. *Idem*.
10. According to the United Nations E-Government Survey 2010, Colombia currently ranks first in Latin America and the Caribbean in the E-Government index and 31st in the world. It is also number one in the e-services sub-index in Latin America and 9th worldwide. In addition, Colombia is the leader in Latin America in the e-participation sub index. www2.unpan.org/egovkb/global_reports/10report.htm.
11. See www.dnp.gov.co/PND/PND20102014.aspx and www.vivedigital.gov.co.
12. Penal Code, Articles 270-272.
13. Document CONPES 3533: "Basis of An Action Plan for the Adjustment of the IPR System to National Competitiveness and Productivity 2008-10."
14. Decree 1162 of 2010 organising the National Administrative System of Intellectual Property and creating the Inter-sectoral Commission of Intellectual Property (CIP).
15. www.derechodeautor.gov.co.
16. The Civil Code was first enacted in 1873 following the model of the French Napoleonic Code of 1804; the Commercial Code of 1971 follows the Italian model.
17. The Superintendence of Companies is described in Chapter 3.
18. Key features of an SAS are: responsibility is limited to shareholders' contribution in share capital; it can be incorporated by one or more individuals, has a flexible organisation, may or may not have a board of directors; articles of incorporation do not need to be notarised or legalised; it has an unlimited duration, the company's objects do not need to be specified; there is no minimum amount of capital to be paid at the incorporation of the company, and its capital can be paid within 2 years.
19. Constitutional Court, case C-1074 of 2002.

20. Constitutional Court cases C-053 of 2001, C-043 of 2002 and T-428 of 1992
21. Constitutional Court, case C-864 of 2004.
22. Constitutional Court, case C-1074 of 2002.
23. The Inter-American Development Bank is assisting the government in these efforts.
24. www.oecd.org/document/29/0,3746,en_2649_34887_2387293_1_1_1_1,00.html.
25. www.dian.gov.co/dian/.
26. Details about the role of MSMEs in Colombia's economy are available at <http://anif.com/encuesta-pyme>.
27. Further details about programmes to assist MSMEs are available at <http://web.presidencia.gov.co/>, www.mincomercio.gov.co/, www.dnp.gov.co/.
28. The Council is composed of the President of the Republic (who chairs the Council), the Ministers of Trade, Industry and Tourism; Foreign Affairs; Finance and Public Credit; Agriculture and Rural Development; Mining and Energy; Transport; and Environment, Housing and Territorial Development; the Director of the National Planning Department, and the General Manager of the Central Bank.
29. www.oecd.org/daf/investment/ppp.
30. Since the first road concession contract in 1994, there have been 403 contract changes, with fiscal costs of USD 5.5 billion. Fiscal costs from renegotiations represent 170% of the initial value of the renegotiated contracts and almost 60% of these costs were budgeted in future fiscal funds. In addition, renegotiations have increased the initial maturity of contracts by an average of 40%. (Bitrán, E., S. Nieto-Parra, and J.S. Robledo, 2011).

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Chapter 5

Investment Framework in Support of Green Growth

The government of Colombia is determined to ensure that economic growth and environmental protection are mutually supportive. To this end, it is strengthening the institutional capacity of environmental authorities, enhancing the framework for investment in support of green growth, and putting in place “green” investment incentives. Biodiversity being one of the main natural assets of Colombia, the government has developed a framework to both protect and derive economic benefits from it. The government is currently developing a Low Carbon Development Strategy, with the objective of, inter alia, promoting economic growth in sectors associated with lower greenhouse gas emissions. The Strategy also seeks to draw on international financing options, including market mechanisms to attract resources that facilitate low-carbon development; promote the transfer of clean technologies; and enhance Colombia’s competitiveness in a global economy increasingly influenced by carbon-intensity standards. A range of incentives is available to companies that voluntarily make investments to improve their environmental performance.

The OECD defines Green Growth as “fostering economic growth and development, while ensuring that natural assets continue to provide the resources and environmental services on which countries’ well-being relies. To do this, it must catalyse investment and innovation which will underpin sustained growth and give rise to new economic opportunities” (OECD, 2011).¹ Investment for green growth includes, *inter alia*, investments in infrastructure, such as water sanitation and distribution, transport, and housing, renewable energies, energy efficiency, and natural resource conservation.

A solid investment framework will, in principle, also provide a good basis for green investment. However, a good investment framework will not necessarily contribute to direct investment in green (or less polluting) activities and operations unless certain elements are also given, i) a strong government commitment, both at international and national levels, to support green growth and promote private investment to support achievement of these goals; ii) policies and regulations that guide investors towards greener investment; iii) the country’s institutional capacity to design, implement and monitor green investment policies; iv) incentives for green investment; v) policies supporting private participation in green infrastructure projects; and vi) policies promoting green business conduct. This chapter describes Colombia’s investment framework in these areas, except policies to promote green business conduct, which are discussed in Chapter 3.

Investment in support of green growth in Colombia – overview

The government has only recently begun to focus on those aspects of the policy framework that need to be strengthened to also attract investment in support of green growth objectives. Encouraging developments in this area include the prominence given to environmental considerations in the National Development Plan 2010-14; the inclusion of environmental provisions in most trade agreements and in investment agreements currently under negotiation; the preparation of an ambitious Low Carbon Development Strategy aimed at ensuring low-carbon economic growth; programs to increase investment in renewable energy; the strong role taken by Colombia in international discussions on developing financial mechanisms for climate change; the existence of incentives and financial mechanisms to promote investment in low carbon technologies and biodiversity conservation; reforms to improve co-ordination among ministries and to strengthen the role of

environmental authorities in horizontal policy processes; and ongoing reforms to improve the framework for private participation in “green” infrastructure.

The development of Colombia’s green investment framework also faces a number of challenges. The government needs to allocate sufficient resources to ensure that progress “made on paper” is carried through in practice, for example, to ensure the long-term effectiveness of the environmental licensing system for new investments. In developing and implementing green growth objectives, the government will also need to provide regulatory certainty to investors and ensure that economic and environmental objectives are aligned. The government will also need to make more efforts to encourage companies, both domestic and foreign, to adopt responsible environmental practices, in line with the *OECD Guidelines for Multinational Enterprises*, and to contribute to the country’s green growth objectives. Investment incentives should be targeted to promote improved environmental performance beyond legal requirements, and their effectiveness should be regularly assessed.

Colombia’s commitment to green growth

Colombia does not have a formal “green growth agenda” in place, nor has it developed a specific strategy to attract green investment. However, the current government is determined to ensure that economic growth and environmental policies mutually reinforce each other. To this end, it will strengthen the institutional capacity of environmental authorities – one step being the creation of a new Ministry of Environment and Sustainable Development in September 2011 with increased power and resources. Further steps will include better co-ordination among Ministries, with the creation of an environmental roundtable (“*Mesa Ambiental*”) in which all Ministries will be represented, charged with assessing the environmental impact of public development projects and ensuring that the cost of environmental degradation, which currently is estimated at 3.7% of GDP per year (NDP, citing World Bank data) is reduced by at least 50% by 2014. Furthermore, the government is determined to ensure that economic growth objectives are achieved without increasing the level of the country’s greenhouse gas (GHG) emissions.

Colombia has defined key areas for economic development in a range of policy documents, including its National Development Plan (NDP) for 2010-14, and in many of these priority areas environmental considerations play an important role. The five priority development sectors (called “growth locomotives”) set out in the NDP include agriculture, housing and “friendly cities”, transport infrastructure, mining and energy production, and innovation. The NDP points out that these areas will need to be developed taking into

account environmental sustainability criteria. The NDP also mentions a range of priorities in the areas of environmental sustainability and risk prevention: biodiversity and ecosystem services; integrated water resource management; sectoral and urban environmental management; climate change, vulnerability reduction, adaptation and low carbon development; and good environmental governance.

For the purposes of this analysis, some of the above priorities, including the growth locomotives on transport and energy, and the key areas for sustainability – including biodiversity protection and low carbon development – can be seen as constituting elements of Colombia’s “informal” green growth agenda. It would be beyond the scope of this paper to analyse the investment potential and the adequacy of the policy framework for green investment in each of the above areas. This chapter will therefore only provide an overview of the key elements of a policy framework conducive to green investment in place and will give examples of investment measures in support of green growth in specific areas.

Investment levels required to achieve green growth objectives

Prior to the establishment of goals in the NDP, the government carries out a financial exercise in order to assess the costs of the activities to be included, as well as the expected resources that will be available. The NDP 2010-14 includes an investment plan, which makes a distinction between public and private funding. However, there is no specific indication of the costs linked to ensuring sustainability in achieving the objectives of the growth locomotives or other targets, nor the related investment needs (public or private, domestic or foreign).²

Some of Colombia’s green growth priorities have a large potential for private investment. Interestingly, while for the accomplishment of the “growth locomotives” (e.g. housing, transport infrastructure, mining and energy production) the government counts on raising a significant share of private funds (189 722 billion Colombian pesos (COP) out of a total estimate of COP 234 397 billion for the period 2011-14) (see Table 4.3 in Chapter 4), all the objectives under the key areas for sustainability are to be funded entirely from public sources.

Regulatory and policy framework for green investment

Investors regard uncertain regulatory frameworks as a risk when considering investment options. The current evolving international framework for climate change and other environmental objectives may generate substantial policy uncertainty and financial risk. Investing in new (e.g. low-carbon) technologies and infrastructure may require important

changes in business models and involve investment decisions that lock-in specific technology and infrastructure for the long term. A country's regulatory and policy framework that supports green investment is therefore of crucial importance for investors. Such framework includes the country's position under relevant multilateral environmental agreements, the inclusion of environmental considerations in multilateral and bilateral trade and investment agreements, and the adoption of national plans and regulations that support the country's green growth objectives.

International commitments in support of green growth objectives

Colombia is a Party to all major international environmental agreements (see Annex C). As a country rich in biodiversity, developments under the Convention on Biological Diversity (CBD) are of particular importance. Over the last years, discussions among the Parties on issues such as business' contribution to conserving biodiversity and the need to attract innovative funding – including private investment – to finance biodiversity conservation have gained importance (Box 5.1).

Box 5.1. Private investment and biodiversity conservation

Following their assessment that the objectives under the Convention on Biological Diversity had not been achieved due partly to insufficient funding, the Parties adopted a range of decisions in order to mobilise new funds for biodiversity conservation and to raise revenues from biodiversity resources.

In 2009, the Parties adopted a “*Strategy for Resource Mobilisation*”, which includes recommendations to raise private sector funds. Goal 2 of the strategy is to “Strengthen national capacity for resource utilisation and mobilise domestic financial resources for the Convention's three objectives”, which includes establishing enabling conditions for private sector involvement, including the financial sector. Goal 4 is to “Explore new and innovative financial mechanisms at all levels”, which includes, *inter alia*, promoting schemes for payment for ecosystem services, biodiversity offset mechanisms, exploring opportunities presented by environmental fiscal reforms including innovative taxation models and fiscal incentives; and opportunities presented by promising innovative financial mechanisms, such as markets for green products, business-biodiversity partnerships and new forms of charity, and to integrate biological diversity and its associated ecosystem services in the development of new and innovative sources of international development finance.

Box 5.1. Private investment and biodiversity conservation (cont.)

The fair and equitable sharing of the benefits arising out of the utilisation of genetic resources is one of the three objectives of the Convention on Biological Diversity. In 2010, the Parties adopted the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (known as the Nagoya Protocol on Access and Benefit-sharing).

Source: CBD (www.cbd.int/).

Colombia is a Party to the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. Under the 2009 Copenhagen Accord, Colombia made preliminary commitments to increase the use of renewable energies for electricity production to 77%, reduce deforestation of the Amazon forest on its territory to 0 by 2020, and to increase the share of bioethanol in the fuel mix by 20% by 2020. It also proposed a range of mitigation actions, including reforestation, subject to financing through carbon market mechanisms.³ Colombia is part of the so-called Cartagena Group/Dialogue for Progressive Action, an informal grouping, open to all countries that aim for ambitious and comprehensive outcomes in the UNFCCC and that are committed domestically to becoming or remaining “low carbon”.

Colombia recently ratified the 2006 International Convention on Tropical Timber and introduced it into national legislation through a law adopted in June 2011. According to the Colombian authorities, this constitutes an important step towards strengthening forestry management in the country and ensuring that forestry resources are exploited within a legal framework.⁴

Environmental protection in trade and investment agreements

None of the bilateral investment treaties signed by Colombia (see a list in Chapter 4) includes provisions related to the environment or promotion of investment in support of green growth. However, Colombia’s new BIT model, which is being used in current negotiations with Turkey, contains a provision relating to the environment (Box 4.4). Colombia is thus joining the small, but increasing, number of countries which include this type of provision in their investment agreements.⁵

On the other hand, environmental issues figure prominently in a number of Free Trade Agreements signed by Colombia or under negotiation, including the trade agreements with the United States, Canada, Chile and the European Union. Negotiations of environmental FTA chapters are underway with Panama, Korea and Turkey.

The FTAs with Canada, the European Union and the United States include co-operation agreements that accompany the main trade agreement to provide for bilateral co-operation in different priority areas regarding environmental protection, such as: risk management; integrated management of water resources; biodiversity conservation; sustainable use of natural resources; restoration of degraded ecosystems; promotion of production and trade in environmentally friendly goods and services; prevention, management and control of water, air and soil pollution, including energy and alternative technologies; integrated solid waste management; integrated management of chemical pollutants and hazardous waste; promotion and strengthening of knowledge management and environmental information; environmental education; forest management; and the use and development of clean technologies.

The provisions on environmental protection in these trade agreements generally include three elements: the Parties' obligation to comply with environmental regulations and improve levels of protection; a co-operative mechanism that contributes to the full implementation of such obligations; and provisions on biodiversity. References to biodiversity are also included in the chapters on intellectual property. Table 5.1 provides an overview of these provisions.

Table 5.1. FTAs negotiated by Colombia which include environmental provisions

Country	Status	Main contents
United States	Approved by Colombia's Congress, pending ratification by the United States	Biodiversity issues are not included in the chapter on Intellectual Property but a letter on Biodiversity and Traditional Knowledge is attached to the agreement. An Environmental Cooperation Agreement was also negotiated to establish an autonomous framework for co-operation activities, not subject to dispute settlement mechanisms of the FTA.
Chile	In force	The chapter contains the three central elements of environmental protection and favours a co-operative approach.
Canada	Negotiated and signed; pending ratification by the Canadian Parliament	The agreement includes commitments to comply with national legislation; a separate Environmental Agreement develops these commitments. It offers a strong framework of co-operation and broad provisions on biodiversity, <i>e.g.</i> on the exchange of information to fight biopiracy.

Table 5.1. **FTAs negotiated by Colombia which include environmental provisions** (cont.)

Country	Status	Main contents
EU	Negotiated and signed. Ratification procedures have not started yet either in Colombia or in the EU	The agreement recognises that conservation and sustainable use of biodiversity and its components are a key element of sustainable development. It includes language on promoting economic development incentive programmes and processes for the conservation of biodiversity. There is also reference to Protected Areas as an essential tool for the conservation and sustainable use of biodiversity, and on monitoring national commitments of the Parties on the matter; and on the importance of traditional knowledge and biodiversity to cultural, economic and social development, and the fair and equitable sharing of benefits arising from the use of traditional knowledge and genetic resources. On climate change, the Parties signalled their resolve to enhance efforts in this field, including through the promotion of national policies and suitable international initiatives to mitigate and to adapt to climate change, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities, and their social and economic conditions. The Parties also agreed to promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for climate change mitigation and adaptation. On forestry, text was agreed on the promotion of trade in forest products originating from sustainable forest management.
Panama	Negotiations complete, signature pending	The chapter contains the three central elements, and provides for co-operation on biodiversity and access to genetic resources.
South Korea	Under Negotiation	The draft text includes an environmental chapter.

Source: Colombia, Ministry of Environment, Housing and Territorial Development.

National plans and policies in support of green investment

Biodiversity conservation

Biodiversity is an important natural asset for Colombia (Box 5.2). The government has developed a framework to both protect and derive economic benefits from it, including its 1996 National Biodiversity Policy. A new National Policy for Integrated Management of Biodiversity and Ecosystem Services is currently under discussion. The new policy will offer potential for innovation related to biodiversity conservation, regulate ecosystem services and explore new financing options for biodiversity conservation, including by encouraging companies to incorporate biodiversity conservation activities as an integral part of their productive activities.

An important instrument to promote biodiversity-related investment is the CONPES document 3697 setting out a policy “for the commercial development of biotechnology based on the sustainable use of biodiversity”. Its main objective is to create economic, technical, institutional and legal conditions to attract public and private resources for development of companies and products based on sustainably used biodiversity, specifically from biological

Box 5.2. **Economic benefits from biodiversity in Colombia and key challenges**

Colombia possesses a unique variety of ecological, climatic, biological and ecosystem components. It is listed as one of the world's "megadiverse" countries. With only 0.7% of the surface of the planet, it harbours approximately 10% of the world's species. It also has one of the world's most diverse ecosystems and is ranked among the world's richest countries in water resources. This varied richness provides a unique opportunity to implement sustainable development initiatives.

There are few figures available on economic benefits generated from biodiversity in Colombia. These include revenues of USD 23 million in 2007 from sales of aromatic and medicinal plants and USD 6.2 million per year from sales of ornamental fish. Ecotourism activities represent 2.2% of GDP and 380 000 direct jobs.

Some of the main threats to the conservation of biological diversity include population migration due to internal conflicts, agricultural development, habitat degradation and fragmentation, growth of invasive species, general pollution dynamics and climate change. A considerable part of the country's natural ecosystems has been transformed for agriculture, primarily in the Andean and Caribbean regions. It has been estimated that almost 60% of forest in the Andean Region and approximately 90% of the dry forests in the Caribbean region and the inter-Andean valleys have disappeared.

A major challenge to biodiversity conservation is the continued development of the resource extraction sector in Colombia, mining, oil and gas being among the most important growth sectors of the economy and the first destinations of FDI.

Source: Colombia, Ministry of Environment, *Housing and Territorial Development*, Etter, A. et al. (2008).

and genetic resources and their derivatives. The policy also recommends: improving institutional capacity for the commercial development of biotechnology; designing a package of economic instruments to attract public and private investors to develop products based on sustainable use of biodiversity resources; and reviewing and improving the legal framework on access to genetic resources, especially related to biotechnological and phytotherapeutic products.

The 2001 National Forestry Development Plan (*Plan Nacional de Desarrollo Forestal*, PNDF – Document CONPES 3125) aims to strengthen the national forest policy. The PNDF offers a strategic view of national forest management for the next 25 years, beyond the duration of government mandates. It is based on the participation of actors involved in the management of forest resources and ecosystems; implementing strategies and programmes related to zoning,

conservation, and restoration of ecosystems; management and use of forest ecosystems and the adoption of a value chain view in the process of commercial reforestation, industrial development and trade of forest products. It also describes the institutional and financial resources required for its implementation, for example, so-called “forestry incentives certificates”, aimed at stimulating private investment in reforestation projects (see Table 5.2 on green incentives below).

GHG emission reduction

GHG emissions in Colombia are relatively low (0.37% of total emissions), partly because the largest source of energy used for electricity generation is hydropower (see Box 5.3). The government is currently developing a Low Carbon Development Strategy, with the objective, according to the Colombian authorities, “to promote economic growth in Colombian sectors with low emissions associated with greenhouse gases and avoid the ‘carbonisation’ of the Colombian economy”.⁶ The Strategy also seeks to draw on international financing options, including market mechanisms, to attract resources to facilitate low-carbon development in productive sectors; promote the transfer of technology; prevent future non-tariff and border barriers to exports; and to enhance Colombia’s competitiveness in a global economy increasingly influenced by carbon-intensity standards. The government plans to formulate low carbon strategies for six sectors (industry, agriculture, mining, energy, waste and transport) by 2013.

A high priority for Colombia is adaptation to climate change. Awareness of the country’s high vulnerability to climate change has risen, as the country has been severely hit by climate-change related extreme weather events, notably during the 2010-11 La Niña period. The National Development Plan 2010-14 highlights the need for industry to put in place sectoral adaptation plans. These plans are yet to be developed.

The government adopted in 2001 Law 697 regulating the promotion of a rational and efficient use of energy, and adopted a range of measures to mobilise investment in energy efficient technologies. These initiatives failed to engage the private sector, owing partly to a lack of sectoral and financial sector experience, insufficient information about best practices in other countries and the perception of high risk (CTE, 2010). In June 2010, the Ministry of Mining adopted the Indicative Action Plan 2010-15 to develop the “Programme of Rational and Efficient Use of Energy and Other Forms of Non-Conventional Energy” (PROURE). The Programme aims to contribute to ensuring a full and timely energy supply, support the competitiveness of the Colombian economy, protect consumers and promote the use of non-conventional energy in a sustainable way, consistent with environmental and natural resource protection objectives. One goal is to increase the non-conventional energy sources’ share in the total energy mix up to

Box 5.3. Colombia's GHG emissions and potential for reduction

Colombia emitted 180 Mt CO₂e in 2004, with emissions coming from agriculture (38%), energy (37%), land use and forestry (14%), waste (6%) and industrial processes (5%). Colombia ranks 40th in the world and 6th in Latin America in terms of total GHG emissions (48th and 5th, respectively, in terms of emissions from the energy sector).

Hydropower has an average share of 78% in Colombia's total electricity production. Other renewable energy sources participate only marginally in the country's energy mix. Wind accounts for less than 1% of energy production. Some biomass generation plants have been successfully implemented, but at a small scale. The remaining sources, which account for nearly 20% of electricity generation, are thermal (natural gas and coal) and, to a lesser extent, diesel (especially in regions which are not connected to the national grid). GHG emissions from the power sector account for 8.5% of total emissions.

Energy consumption is divided as follows: transport (38%); industry (27%); households (22%); agriculture and mining (5%); and the commercial and household sectors (5%).

As Colombia's economy keeps growing, GHG emissions will increase, particularly since new energy sources will be coal-based (Colombia has abundant coal reserves and has to diversify away from hydropower due to its high vulnerability to floods and water shortages, linked to El Niño events).

According to the Clean Technology Fund (CTF), the two areas with the greatest potential for emission reductions which have been identified as ready for the scaling up of investment, are the transport sector and energy-efficiency. The CTF estimates the potential for emission reductions in transport at around 56 Mt CO₂e over the 20-year lifetime of the programme (2030). Addressing the efficiency potential in electricity and thermal end-use across all sectors of the economy would lead to combined emission reductions of 228 Mt CO₂e over 20 years.

Source: Colombia, Second National Communication to the UNFCCC (2004), Clean Technology Fund (2010).

5%, composed of 4% use of biomass and biofuels for heat and transport applications and the remaining 1% for electricity.⁷ The Programme has received financial support from the World Bank and the Inter-American Development Bank under the Clean Technology Fund (see Box 5.5).

Technical standards, such as energy efficiency standards for electric appliances and vehicles, and codes, such as building codes, are recognised as useful tools to promote improved environmental performance and encourage

investments.⁸ Colombia has not made use of the full potential of these tools, and only a few environmental standards and codes are in place. One example is regulation (Laws 693 of 2001 and 788 of 2002) establishing the compulsory content of biofuels in gasoline, which has boosted investment in biofuel production. The government is currently working on the technical regulation of energy for social housing and on defining the specifications to certify sustainable buildings under the Colombian Environmental Label. It is also developing a Green Building Code that aims to improve energy efficiency in buildings and could lead to increased investment in relevant technologies (Box 5.4). The housing sector is one of the country's five economic locomotives under the National Development Plan.

Box 5.4. **Colombia's future Green Building Code**

Colombia is currently developing a Green Building Code, with the assistance of the IFC, to mitigate the environmental impact of the construction sector. This sector grew at a rate of 16% in 2009, 33% in 2010, and 70% between July 2010 to July 2011, building approximately 4 million square meters a year. The government has set a target of 1 million houses, primarily affordable housing, to be built over the next four years.

The objective of developing a Green Building Code is to reduce GHG emissions at the national level by 11% in the construction sector in the next 5 years after project completion, by promoting energy efficiency and water conservation in the use of new buildings.

The Green Building Code is expected to be enacted at the end of 2013. The project has three components:

1. To create national regulations that set the standards and incentives for developers to "build green" across the country. As most of the projected construction growth in the next 15 years will be focused on low income housing, the project will include a capacity building component to provide support to the private sector (developers) building low income housing to introduce green building practices to this type of projects, such as passive design and low cost technology, amongst other practices available for large projects to take advantage of economies of scale.
2. To strengthen the local technical capacities in the private sector (e.g. national and regional developers) in areas such as passive design, green materials and constructive systems.
3. To design and implement an advocacy strategy on green building issues: Training activities will be held to promote competition on green building and disseminate information about incentives.

Source: IFC, internal note (2011).

Other elements of Colombia's green investment framework

Investment principles and protectionist measures

As described in Chapter 1, Colombia applies key investment principles, such as non-discrimination and transparency. This also applies to green investment, where no restriction to foreign investment exists.

So far, none of the measures taken by Colombia in support of green growth has been seen as being protectionist or discriminating against foreign investors.

Intellectual property rights to facilitate transfer of green technologies and know-how

The government is aware of the importance of granting adequate protection to intellectual property rights (IPRs) in order to attract investments that will improve the country's technological capacity to deal with environmental challenges and help, *inter alia*, to support the transition to a low carbon economy.⁹ It also acknowledges the importance of efficient IPR protection to enable the country to allow for adequate benefit sharing of assets, such as genetic resources and their derivatives, and traditional knowledge. In accordance with Andean Decisions 391 of 1996 (Common Regime on Access to Genetic Resources) and 486 of 2000 (Common Regime on Industrial Property), intellectual property rights granted on creations or inventions developed from the use of biological and genetic resources and their derived products or the associated traditional knowledge of indigenous and local communities may be conditioned on compliance with legislation on access and benefit sharing. For example, with respect to patent applications on inventions developed from biological or genetic resources, Colombia requires disclosure of the origin and proof that the resources were obtained legally.

On the other hand, Colombia has indicated that, as a developing country, it considers it should benefit from measures facilitating the transfer of clean technologies from developed countries. Thus, in the context of Multilateral Environmental Agreements, Colombia has defended the need to address treatment of barriers to access to environmental technology, *e.g.* for adaptation and mitigation to climate change, in a way that takes into consideration the needs, priorities and capacities of developing countries, and effectively materialises commitment to technology transfer. Colombia has been participating in the Global Technology Needs Assessment project for climate change (TNA) led by UNEP, which aims to identify and analyse technology needs in Colombia in order to prioritise technologies that can contribute to mitigation and adaptation goals. The project also aims to identify and to propose strategies in order to create enabling frameworks for the development and transfer of technologies. The TNA project includes improvement and strengthening of the national framework for investment in R&D for climate change adaptation and mitigation technologies.

Removing administrative barriers to investment

As described in Chapter 4, the government has made significant efforts to reduce administrative procedures related to private, including foreign, investment. These efforts also apply to procedures under the Ministry of Environment, Housing and Territorial Development, which has developed a Window for Environmental Procedures (*Ventanilla Integral de Trámites Ambientales en Línea*, VITAL): a single, centralised national system that channels users' requests and applications to the relevant environmental authority.¹⁰ Another mechanism is the Information System of Environmental Licensing (SILA), which provides on-line information during the licensing process. These measures have helped to reduce the time required for obtaining an environmental licence from an average of 130 weeks to under 18 weeks. This was achieved despite the important increase in the number of applications for environmental licences from about 4 500 in 2005 to more than 37 000 in 2010.

Institutional capacity to design and implement green investment policies

The multi-dimensional and cross-sectoral nature of climate change and other environmental concerns requires strong coherence across policy areas and between different government levels and agencies. In addition to a mix of policy instruments to support green growth and reduce the environmental impacts of development and investment activities, governments should lower the cost and increase the efficiency of the various forms of administration that affect investment. Support to green investment also requires adequate human resources for designing and implementing innovative policies aimed at leveraging private funds.

Inter-ministerial co-operation in the design of green investment policies

According to some sources, in Colombia, co-ordination among Ministries in developing and implementing policies and regulations has not also proceeded smoothly in the past.¹¹ A lack of clarity in the scope of competences of various authorities has also sometimes affected investors. A mining company, for example, obtained the right from the mining authorities to explore and eventually exploit minerals in an area, but the subsequent environmental licence, which is a legal requirement in order to ensure the appropriate environmental management and control of mining activities, was not granted on the basis that the proposed project was incompatible with the ecosystem's and environmental services' conservation requirements.

In recent years, the government has worked to enhance co-operation between ministries in order to better co-ordinate environmental, economic and investment policies and to increase regulatory certainty for investors. As a

result of the above conflict, for example, the Ministries of Mining and of Environment, Housing and Territorial Development worked together to elaborate a list of protected areas in which all mining activity was banned, thus reducing conflicting decisions and increasing certainty for potential investors.

The key institution charged with ensuring coherence among policies is the Council for Economic and Social Policies (CONPES), the highest national planning body advising the government on economic, social and environmental aspects. The CONPES co-ordinates and directs the agencies responsible for economic and social policies through the study and approval of general policy documents. These documents harmonise economic, social, environmental and investment aspects to ensure that strategies and action plans are comprehensive and contribute to the sustainable development of the country.¹² For example, the design of a Low Carbon Development Strategy currently under way is based on CONPES document 3700 of 2011 on climate change. All ministries are involved in the design of the policy which will include, among its key elements, mechanisms to attract international funding and the transfer of technologies needed to adapt to climate change.

The National Development Plan also recognises the importance of co-operation between ministries. It provides for Strategic Environmental Assessments to be carried out across the development of the so-called “growth locomotives” and provides for the creation of “environmental units” within most ministries, in order to ensure that environmental issues are effectively taken into account in the development of sectoral and economic policies. The decision, in September 2011, to create a separate Ministry of Environment and Sustainable Development, with new attributions and powers in developing horizontal projects, will further strengthen inter-ministerial co-operation.

Other co-ordination mechanisms include so-called “environmental agendas” between the Ministry of Environment, Housing and Territorial Development and other ministries, outlining areas of common interest. Since November 2007, seven inter-ministerial environmental agendas have been signed between the Ministry of Environment, Housing and Territorial Development and the Ministries of Agriculture and Rural Development; National Defence; National Education; Transport; Social Protection; Trade, Industry and Tourism; Mining and Energy. Among the main subjects of common interest are biodiversity protection; integrated water management; cleaner production and consumption; climate change; hazardous waste management; and air protection.

A Committee, composed of representatives from the Ministries of Environment, Housing and Territorial Development; Transport; Finance and Public Credit; Trade, Industry and Tourism, and the National Planning Department, was charged with assessing the need to reduce the tariff on natural

gas, electric and hybrid light vehicles. The Ministry of the Environment also participated in the design of tax incentives to promote investments in environmental technologies and in the development of a system of green soft-loans for small and medium enterprises by the National Development Bank (Bancóldex).¹³

Involvement of stakeholders in the design and the implementation of green investment policies

The country's legal and constitutional framework enables citizens' participation in the design of policies, through both formal and informal mechanisms. The government has put a range of mechanisms in place to consult with stakeholders, including enterprises, on the development of environment and investment policies. One mechanism is the National Environmental Council composed of representatives from government, business associations, academia, NGOs and ethnic minorities, among others. Its main function is to advise on the adoption of environmental policies and on measures to harmonise environmental regulations and decisions with the implementation of development projects. Another consultation body is the Technical Advisory Council of Policy and Environmental Regulations composed of representatives of public and private universities and stakeholders from the manufacturing, agriculture, mining and hydrocarbons sectors.

Investment incentives

Incentives to promote green investment

Colombia has few economic instruments in place to discourage environmentally damaging activities and to encourage improved environmental performance. Among the first category, there is a fee for water use and discharge of effluents. Colombia does not have a carbon tax in place. It does not take part in any GHG emissions trading scheme, nor intends to do so in the near future. The authorities argue that the sources of the country's GHG emissions are not the most suitable ones for cap and trade schemes since they come mainly from the transport and agricultural sectors.

On the other hand, Colombia grants a range of incentives (tax benefits, such as exclusions, exemptions and discounts, as well as grants or subsidies) to companies that voluntarily make investments in activities that are beneficial for the environment. All incentives are available to foreign and domestic investors alike. These benefits are summarised in Table 5.2. The Ministry of Environment is also currently working on regulations to grant tax incentives (VAT exemption and income tax deductions) for investments in equipment and monitoring systems to promote energy efficiency (motors, cleaner vehicles) and non-conventional energy sources, such as biomass, wind, solar, geothermal.

Table 5.2. **Green investment incentives in Colombia**

Purpose of the incentive	Type of benefit	Beneficiaries
Environmental protection in general	Exemption from sales tax	Imports of machinery or equipment intended for recycling and waste processing, purification, wastewater treatment, air emissions, solid waste or basic sanitation and equipment for environmental monitoring and control.
	Exemption from sales tax	Purchase of equipment for installing and operating systems to control and monitor compliance with environmental regulations and standards.
	Income tax deduction	Investments in environmental control and improvement; the deduction cannot exceed 20% of net income. Investments made at the request of an environmental authority to mitigate environmental impacts of an activity under an environmental permit cannot be deducted
Biodiversity conservation	Income tax exemption (until 2022)	Revenues from ecotourism services.
Reforestation ¹	Deduction from income tax	Reforestation activities (articles 83, 157, 173 y 253 Tax Statute).
	Forestry Incentive Certificate	The purpose is to promote investment in new plantations for conservation purposes; 50% of the cost for foreign species, 75% for native species.
Low carbon development	Exemption from sales tax	Imports of machinery and equipment for the development of projects or activities that are exporters of certified carbon emission reductions
	VAT exemption	Purchase of technologies to reduce GHG emissions. This incentive only applies to projects registered under the UNFCCC or proven to be negotiated in the voluntary carbon markets.
	Income tax exemption (until 2018)	Revenues generated by sales of electricity produced from wind resources, biomass or agricultural residues, up to a period of 15 years. At least 50% of the resources obtained by the sale of these certificates must be invested in social welfare work.
Production of biofuel	Tariff reduction (from 15% to 5%)	Imports of natural gas, electric and hybrid buses and trucks.
	Exemption from global Surcharge Tax and/or Value Added Tax	Production of biofuel to be sold in the domestic market.
	VAT exemption (until 2015)	New oil palm plantations.
	Income tax reduction; exemption from capital goods tariffs for projects with export potential	Production of agro-industrial biofuels (applies only to free trade zones).

1. An incentive is also in place for forestry conservations, but its application is currently suspended due to lack of resources.

Source: Colombia, Ministry of Environment, Housing and Territorial Development.

There is no mechanism in place to systematically assess the impact or success of incentives and subsidies in achieving environmental objectives, but some information is available regarding certain incentives. For example, according to the authorities, in the period 2002 to July 2011 the government granted incentives for an amount of COP 327 billion for the purchase of equipment and machines for environmental pollution prevention and control and environmental monitoring, which generated investments in the order of COP 1.8 billion.

A 2005 study by ECLAC evaluated the application of tax benefits for environmental management and investments in Colombia. It highlighted the difficulties in implementing these benefits, due, *inter alia*, to a very significant lack of intergovernmental co-ordination, and the fact that the incentives were granted without any monitoring of the actual environmental benefits resulting from the investments. On the other hand, the study considered that the incentives served to recognise the efforts by investors to comply with applicable environmental laws. In light of the conclusions and recommendations of the study, the Ministry of Environment has improved the procedures and mechanisms to certify private environmental investments. According to the authorities, recent analysis has shown that the VAT exemption for environmental investments has had a positive and statistically significant impact in the manufacturing sector, in particular as regards limiting air and water pollution.

There is no mechanism in place to systematically assess the potential negative environmental effects of investment incentives, and only anecdotal evidence is available on incentives that seem to conflict with the government's green growth objectives. According to the government, there is evidence that in at least one case an investment incentive has had perverse effects. The 2001 Mining Code promoted mining activity and provided tax exemptions on investments in mining, which resulted in the rapid growth of the sector, generating conflicts with land use and ecosystem protection in several regions.¹⁴ The Low Carbon Development Strategy currently being developed will include an analysis of measures which are in conflict with the objectives of the strategy.

Financial incentives

The government has taken some initial steps to strengthen financial support to investments in low carbon activities. For example, *Bancóldex*, the National Development Bank, has recently put in place a system of "soft" green loans, open to all companies, but especially targeting SMEs, to provide support for investment aimed at preventing and mitigating environmental damages and monitoring environmental performance.¹⁵ *Bancóldex* also has a programme in place with the city of Bogotá to support micro, small and medium enterprises in improving their environmental performance.

A special environmental credit line, co-ordinated by the National Centre for Cleaner Production and Environmental Technologies, is also in place to support cleaner production projects, including investment in cleaner technologies. Depending on the level of environmental improvement achieved, up to 25% of the initial investment is reimbursed. According to the government, this system has had excellent results and additional funds were re-injected, with the support of the Swiss government.

Colombia has been very successful in leveraging funds under the Clean Development Mechanism established under the Kyoto Protocol. It has a portfolio of 154 approved projects, with a total annual emissions reduction potential (CO₂ ton/year) of ca. 21 million (Table 5.3).

Table 5.3. **Colombia and the Clean Development Mechanism**

Total of CDM projects in the national portfolio	154
Annual emission reduction potential (CO ₂ tons/year)	20 935 440
Nationally approved projects	66
Projects registered with the UNFCCC	32
Projects involving sale of emission reduction certificates (ERCs)	10

Source: Colombia, Ministry of Environment, Housing and Territorial Development

The government has also benefitted from funding mechanisms put in place by national and international donors, such as a USD 90 million facility by the Inter-American Development Bank to support loans to energy efficiency, cleaner production and renewable energy projects (see Box 5.5).

Box 5.5. **Multilateral financial support for low carbon development**

The *Clean Technology Fund* (CTF) is one of the two funds established under the Clean Investment Fund. The CTF seeks to fill a gap in the international architecture for development finance available at more concessional rates than standard terms used by the Multilateral Development Banks (MDBs) and at a scale necessary to help provide incentives to developing countries to integrate nationally appropriate mitigation actions into sustainable development plans and investment decisions. Through the CTF, countries, the MDBs, and other partners agree upon country investment plans for programmes that contribute to the demonstration, deployment and transfer of low carbon technologies with significant potential for greenhouse gas emissions savings.

Box 5.5. Multilateral financial support for low carbon development (cont.)

The CTF Colombia Investment Plan proposes funding to the country in two sectors: urban transport and energy efficiency. The Investment Plan was developed in co-operation with the IBRD, the IDB and the IFC, to support the low carbon objectives contained in Colombia's National Development Plan.

In June 2011, the IDB approved a USD 90 million facility to support on-lending to energy efficiency, cleaner production and renewable energy projects through Colombian financial institutions. The facility's first utilisation is a transaction with *Bancolombia* in collaboration with the IFC and the CTF. The approved project with *Bancolombia* marks the first ever "green" risk sharing guarantee, not only in Colombia, but also in the region of Latin America. The project will support *Bancolombia*'s programme of loans to small and medium enterprises and corporations that seek to adhere to higher environmental standards. Further technical assistance to *Bancolombia* will support internal capacity building, energy efficiency audits and knowledge creation.

Source: IDB, www.idb.org; Clean Technology Fund (2010).

The National Development Plan highlights the win-win opportunity to access international funds, in particular for forest conservation under the REDD+ mechanisms. The government is taking an active part in international initiatives related to developing financing mechanisms and leveraging funds for climate action. For example, it participates in the Forest Carbon Partnership Facility (FCPF) process to develop criteria to establish a market platform to pay for emission reductions in the forestry sector.¹⁶

Colombia also participates in the Partnership for Market Readiness (PMR), a World Bank initiative to build capacity in developing countries to develop new market-based instruments to fight climate change. It is one of the eight pilot countries that each received an initial grant of USD 350 000 in July 2011 to help design, pilot and eventually implement market-based instruments for GHG mitigation.¹⁷

Other incentives

The government considers that, as a large purchaser of goods and services, it has an important role to play in promoting greener production and consumption, and has introduced in the NDP the target to increase green procurement at the national and regional levels by 10%. As part of this process, which draws on UNEP's project on strengthening capacity for sustainable public procurement in developing countries, the government (through CONPES,

in co-operation with the Ministry of Environment, Housing and Territorial Development) is currently developing a set of guidelines to improve the policy framework to promote sustainable procurement. At present, the main barrier to green procurement is the legal framework (Laws 80 of 1993 and 1150 of 2007, General Statute of Public Procurement) under which procurement decisions are based only on economic aspects.

One of the planned reforms is to introduce other criteria in procurement decisions, including sustainability aspects. The government is currently preparing pilot projects to increase capacity for sustainable procurement in eight public agencies, with the aim of establishing sustainable procurement plans in each of these agencies and using these examples to train other government agencies. The reform will also include better information gathering and monitoring under the system in place to monitor and control public purchases. The reform will also promote the use of Colombia's Environmental Label to help boost purchases of eco-labeled products.

In addition, under the National Development Plan, the government has earmarked part of the tax revenues from natural resource exploitation to fund innovation in science and technology, including sustainable development projects, such as GHG emissions reduction in the private sector.

Private sector participation in green infrastructure

All countries must continually develop new infrastructure and upgrade and replace existing one. Choices of infrastructure will lock-in the environmental performance of countries (e.g. their GHG emission and water consumption patterns) and their pollution abatement capacity (e.g. in the wastewater treatment sector) over the medium to long term. Private investment in infrastructure can be essential to reach the scale of investment needed in a country, and bring in the necessary expertise and efficiency gains. Because infrastructure projects, including those in support of green growth, involving the private sector are complex, adequate framework conditions and institutional capacity are required to effectively manage them.

The Colombian government is aware that private, including foreign, investment is needed to achieve the country's infrastructure needs over the next years.¹⁸ For example, according to the NDP, in the transport sector, private investment is expected to cover COP 18 931 billion of the total estimated COP 44 550 billion needed; and in housing and territorial development, COP 73 314 billion, out of COP 95 208 billion. The NDP also stresses that infrastructure development must take into account environmental considerations. However, there are no estimates available of the share of private investment needs linked to "green infrastructure".

There are no specific mechanisms in place that govern private participation in “green infrastructure” either, but the government has conducted a few initiatives to boost public-private partnerships (PPPs) in the construction of infrastructure, including green infrastructure. One area in which PPPs are relatively widespread is in infrastructure related to ecotourism.¹⁹ Modalities include agreements between the authorities managing national parks and private operators, and ecotourism partnerships with local community organisations. For example, the agency managing national parks requires that private or communal operators conform with bioclimatic architecture criteria for adaptations and new infrastructure development, which includes taking into account specific environmental criteria, such as the climate, geographical location, fauna and flora. For example, buildings must use local materials, fit into the landscape, ensure traceability of timber used and include waste water treatment installations.²⁰

A key area for further infrastructure development in Colombia is transport. In addition to energy efficiency, the Climate Technology Fund Investment Plan for Colombia considers that transport is one of the areas which present important opportunities for GHG mitigation. The government developed the National Urban Transport Policy in 2003, under which large and medium-sized cities were to benefit from the implementation of Integrated Mass Transit systems (SITMs) and Strategic Public Transport Systems, respectively. For the SITMs, the government has already spent USD 1 billion since the programme began and plans to invest over USD 1.7 billion by 2016. According to the government, private investment in the SITMs is close to USD 1.1 billion (constant prices of 2009), including building of parking zones, garages, and other facilities; purchase of the transport fleet, technological systems for fleet control, security and cashing systems for the SITM stations; and maintenance of stations, fleet, technological systems and administrative facilities.

Colombia has some experience in private sector development in infrastructure projects funded under the Clean Development Mechanism (CDM). Several transport projects are currently registered with the UNFCCC as CDM projects, including the Integrated Mass Transport Systems for Bogotá (TransMilenio) and the electric transport system “Metro Cable” in Medellín.²¹ The GHG emissions reduction potential of the TransMilenio project comes from the use of new and larger buses with greater fuel efficiency per passenger than existing buses, combined with a modal shift towards greater use of public transport. Co-benefits are reduced traffic and accidents, and improved air quality (Clapp, C. *et al.*, 2010). The government sees these projects as successful examples of private public partnerships. It also recognises that the development of green transport infrastructure projects with private participation is considerably lagging behind, and expects that the recent reforms undertaken by the government to improve the framework for

private participation in infrastructure (including through better design of projects, clearer allocation of risks and a more streamlined regulatory framework) will also help make investment in green infrastructure more attractive to domestic and foreign investors.

Notes

1. The OECD report *Towards Green Growth* (OECD, 2011) includes a Communication by the Freedom of Investment (FOI) Roundtable on “Harnessing freedom of investment for green growth”. The communication sets forth findings of FOI Delegates on the role of international investment in supporting the realisation of countries green growth objectives.
2. There are no figures available on the amount of domestic private green investment in Colombia, nor on current or past green FDI flows. Collecting this kind of data is still a challenge for governments from both developed and developing countries. The difficulties in defining and measuring green FDI, and possible avenues for future research are described in Golub, S., Kauffmann, C. et al., 2011.
3. http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/colombiacphaccord_app2.pdf.
4. According to WWF, the ease of illegal sourcing of wood, weak governance, inefficient institutions and lack of transparency in granting permits have largely outgrown incentives for legal sourcing in Colombia (WWF, 2010).
5. According to recent research by OECD, only 6.5% of BITs contain references to the environment (Gordon, K., Pohl, J., 2011). These provisions focus on a limited number of themes (e.g. general environmental references in preambles, right to regulate in the environmental policy area, and not lowering environmental standards for the purpose of attracting investment), rather than on promoting “green investment”.
6. In addition to the Low Carbon Development Strategy under preparation, Colombia has already some programs in place which can support its transition to a low carbon economy: The REDD National Strategy (2009) constitutes a national initiative to reduce GHG emissions from deforestation and degradation. The National Adaptation Plan (2011-14) has as its main objective to integrate and co-ordinate sector, community and territorial institutional management and planning for the identification and implementation of climate change adaptation measures.
7. www.minminas.gov.co/minminas/downloads/UserFiles/File/ENERGIA/URE/Resol-Proute-180919-01-06-2010.pdf.
8. See for example OECD (2005) and UNDP (2011).
9. An overview of Colombia’s intellectual property rights regime is provided in Chapter 4.
10. www.siac.gov.co/.
11. See for example, ECLAC (2005) and Resources for the Future (2005).
12. Other examples include CONPES document 3697 of 2011 on a policy for the commercial development of biotechnologies based on sustainable use of biodiversity, and document 3242 of 2002, establishing an institutional strategy for the sale of environmental services and climate change mitigation. A list of environment-related CONPES documents is available at www.humboldt.org.co/iavh/investigacion/politica-y-legislacion/item/135-documentos-conpes.

13. www.bancoldex.com/contenido/contenido.aspx?catID=339&conID=2914.
14. The 2001 Mining Code was recently declared to be unconstitutional by the Constitutional Court and will be replaced by a new Law.
15. www.bancoldex.com/.
16. The Forest Carbon Partnership Facility (FCPF) is a global partnership dedicated to REDD+ (reducing emissions from deforestation and forest degradation, conservation, sustainable management of forests and enhancement of forest carbon stocks), www.forestcarbonpartnership.org/fcp/node/11.
17. The other countries are Chile, China, Costa Rica, Indonesia, Mexico, Thailand, and Turkey. Each country will develop a "Market Readiness Proposal" that will detail their plans; Colombia will focus on the transport sector. In addition, with financial support from the Global Environment Facility (GEF), Colombia is working on designing and implementing a Mechanism for Voluntary Mitigation of Greenhouse Gas Emissions which aims to strengthen capacities for the development of voluntary mitigation projects and to facilitate trade with nationally produced Verified Emissions Units (VERs) through the creation of a market platform. This initiative is expected to promote the formulation and implementation of corporate climate change strategies which include measuring, reducing and offsetting of GHG emissions through purchases of national VERs. <http://wbcarbonfinance.org/>.
18. Chapter 4 provides an overview of the policy framework for private participation in infrastructure.
19. Key policy documents governing concessions for eco-tourism are the "Development of Ecotourism Policy", the Guidelines for Communitarian Ecotourism, and the CONPES document 3296 "Private Participation in National Parks", on the development of ecotourism service concessions.
20. Examples of public-private partnerships can be found in the National Parks of Otún-Quimbaya, and Amacayacu. See www.parquesnacionales.gov.co.
21. Other Mass Transit Systems registered as CDM projects exist in the cities of Cali, Barranquilla and Cartagena.

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ANNEX A

Statistical Tables

Table A.1. **GDP structure**

Share in GDP (%)	2005	2006	2007	2008	2009	2010
Agriculture	7.7	7.4	7.2	6.9	6.8	6.5
Mining and quarrying	6.3	6.0	5.7	6.1	6.7	7.1
Manufacturing	14.1	14.1	14.2	13.8	13.0	13.1
Services	63.4	63.6	63.7	63.9	64.4	64.1
Communications	2.5	2.8	3.0	3.2	3.2	3.2
Financial services	19.1	19.1	19.1	19.3	19.3	19.1
Share of the private sector (% of GDP)	85.8	85.9	85.6	86.0	85.2	85.2

Source: Colombia, Statistical Office.

Table A.2. **Cumulative foreign direct investment in Colombia – main partners**
Million USD

	2005	2006	2007	2008	2009	2010	2011 (1S)
Subtotal without oil and reinvested earnings	32 377	35 552	39 297	44 187	46 785	47 949	50 758
United States	5 284	6 809	8 110	9 526	11 280	11 291	11 466
Panama	3 299	3 538	4 015	4 775	5 112	5 688	6 211
Spain	3 964	4 456	4 745	5 309	4 982	4 964	5 520
United Kingdom	3 944	3 962	3 997	4 197	4 582	4 773	4 919
Virgin Island	2 698	3 047	3 117	3 259	3 263	3 270	3 283
Anguilla	–	–	958	1 868	2 102	2 654	2 969
Cayman Islands	2 636	2 794	2 926	2 926	2 949	2 983	2 953
Bermuda	1 902	1 910	1 922	1 953	2 241	2 461	2 662
Canada	1 053	1 072	1 080	1 131	1 210	1 373	1 497
Brazil	93	112	641	766	814	867	1 048
France	435	439	578	648	761	795	849
Mexico	1 268	1 299	1 640	2 051	1 404	781	809
Switzerland	409	426	469	525	591	638	675
Chile	348	350	396	440	494	442	667
Netherlands	1 634	1 660	842	712	603	444	497
Rest	3 411	3 679	3 863	4 101	4 398	4 525	4 732

Source: Central Bank of Colombia.

Table A.3. **Cumulative foreign direct investment in Colombia
main sectors**

Million USD

	2005	2006	2007	2008	2009	2010	2011 (1S)
Total	37 526	44 182	53 230	63 827	70 964	77 879	84 887
Oil	3 510	5 505	8 839	12 243	14 671	17 534	20 360
Agriculture, hunting, forestry and fishing	146	154	194	235	263	283	350
Mining and quarrying (including coal)	6 321	8 103	9 204	11 002	14 027	16 093	17 738
Manufacturing	10 707	11 510	13 377	15 124	15 746	16 201	16 585
Electricity, gas and water	3 845	3 704	3 625	3 782	2 804	2 911	3 152
Construction	430	586	796	1 176	1 438	1 736	1 973
Trade, restaurants and hotels	1 899	2 422	3 225	4 274	4 868	5 138	5 595
Transport, storage and communications	4 004	5 084	5 479	6 331	6 679	6 154	7 027
Financial services	6 087	6 551	7 871	8 966	9 686	10 938	11 279
Other services	572	581	621	693	781	891	828

Source: Central Bank of Colombia.

Table A.4. **Colombia's cumulative outward foreign direct investment
main partners**

Million USD

	2005	2006	2007	2008	2009	2010	2011 (1S)
Total	9 394	10 493	11 405	13 659	16 748	23 251	24 994
United States	1 596	1 849	2 445	3 801	4 821	5 196	
United Kingdom	3 447	3 484	3 486	3 486	3 486	4 116	
Bermuda	5	5	80	80	847	2 993	
Panama	1 125	1 413	1 595	1 870	2 210	2 624	
Virgin Islands	422	468	490	490	591	1 952	
Brazil	8	313	485	894	1 040	1 230	
Peru	1 218	1 228	864	818	880	1 188	
Cayman Islands	243	250	264	264	712	727	
Guatemala	5	6	10	10	10	671	
Rest	1 326	1 477	1 688	1 948	2 150	2 554	

Source: Central Bank of Colombia.

Table A.5. Colombia's cumulative outward foreign direct investment main sectors

Million USD

	2005	2006	2007	2008	2009	2010	2011 (1S)
Total	9 394	10 493	11 405	13 659	16 748	23 276	24 994
Agriculture, hunting, forestry and fisheries	34	38	40	43	46	60	59
Oil and mining and quarrying	4	6	8	1 258	3 753	8 295	8 471
Manufacturing	5 585	5 921	5 710	6 000	5 990	6 127	6 195
Electricity, gas and water	215	542	717	727	740	1 903	3 035
Construction	50	53	57	9	6	34	54
Wholesale and retail, restaurants and hotels	431	487	659	934	1 131	1 152	1 206
Transport, storage and communications	1 269	1 418	1 433	1 550	1 670	2 086	2 035
Financial, insurance, real estate and business services rendered	1 622	1 806	2 552	2 899	3 103	3 242	3 553
Utilities, social and personal services	46	80	91	113	159	226	233
Other services	139	139	138	145	149	151	153

Source: Central Bank of Colombia.

Table A.6. Shares of FDI in GDP and in domestic investment

Million USD

	2005	2006	2007	2008	2009	2010
GDP	146 547	162 808	207 411	244 646	235 837	288 710
Gross fixed capital formation (GFCF)	28 825	35 175	46 586	56 344	53 701	64 602
FDI inflows	10 252	6 656	9 049	10 596	7 137	6 915
FDI stock	37 526	44 182	53 230	63 827	70 964	77 879
GDP/FDI inflows (%)	35.6	18.9	19.4	18.8	13.3	10.7
GDP/FDI stock (%)	26	27	26	26	30	27
Average exchange rate (USD/pesos)	2 321	2 358	2 078	1 966	2 156	1 899

Source: Colombia, Statistical Office and Central Bank of Colombia.

Table A.7. **Colombia's financial sector – overview**

	December 2009	December 2010	May 2011
Number of financial entities			
Total banks, <i>of which:</i>	18	19	23
Public banks	1	1	1
Private banks	17	18	22
Foreign capital banks	7	7	9
Assets (COP millions)			
Total banks, <i>of which:</i>	202 117 257	242 641 504	262 836 579
Public banks	12 569 152	14 660 900	14 910 082
Private banks	189 548 105	227 980 605	247 926 497
Foreign capital banks	41 153 201	47 926 195	51 652 351
Liabilities (COP millions)			
Total banks, <i>of which:</i>	175 727 050	211 158 267	228 094 767
Public banks	11 446 595	13 448 481	13 687 152
Private banks	164 280 455	197 709 787	214 407 615
Foreign capital banks	36 355 890	42 540 789	46 147 001
Deposits (COP millions)			
Total banks, <i>of which:</i>	141 293 138	157 550 256	167 827 632
Public banks	7 918 108	9 085 139	9 460 505
Private banks	133 375 030	148 465 117	158 367 126
Foreign capital banks	27 598 940	31 892 826	32 238 056
Net worth (COP millions)			
Total banks, <i>of which:</i>	26 390 207	31 483 237	34 741 813
Public banks	1 122 558	1 212 419	1 222 931
Private banks	25 267 650	30 270 818	33 518 882
Foreign capital banks	4 797 311	5 385 406	5 505 350
Earnings (COP millions)			
Total banks, <i>of which:</i>	4 375 239	4 819 418	2 469 974
Public banks	372 304	301 682	187 484
Private banks	4 002 935	4 517 736	2 282 490
Foreign capital banks	700 977	686 536	304 115

Source: Colombia, Superintendence of Finance, Financial Statements effective as of 15 June 2011.

ANNEX B

Colombia's Exceptions to the National Treatment Instrument

A. Exceptions at the national level

I. Investment by established foreign-controlled enterprises

Radio and television broadcasting: Only Colombian nationals or legal persons organised under Colombian law may provide radio broadcasting services. Foreign equity in any enterprise holding a free-to-air television concession is limited to 40%. Reciprocity conditions may apply to radio, television and cable television activities. The decision to offer new concessions for the provision of open national television is based on an economic needs test.

Source: Law No. 014 of 29 January 1991, Article 37; Law No. 680 of 8 August 2001, Articles 1 and 4; Law No. 335 of 20 December 1996, Articles 13 and 24; Law No. 182 of 20 January 1995, Articles 37, 47 and 48; Law 80 of 28 October 1993, Article 35; Decree 1447 of 30 August 1995, Articles 7, 9 and 18.

Fisheries: Foreign-flagged vessels may obtain a permit and engage in commercial and industrial fishing in Colombian territorial waters only in association with a Colombian enterprise that owns a permit allowing association with foreign partners. Reciprocity conditions may apply under existing bilateral and plurilateral agreements.

Source: Law No. 13 of 15 January 1990, Articles 4 and 30; Decree No. 2256 of 4 October 1991, Article 28.

II. Official aids and subsidies

None.

III. Tax obligations

None.

IV. Government purchasing

None.

V. Access to local financing

None.

B. Exceptions at the territorial subdivisions

None.

Measures Notified for Transparency

A. Measures reported for transparency at the level of national government

I. Measures based on public order and essential security considerations

a) Investments by established foreign-controlled enterprises

Land: Foreigners are not authorised to own land along the Colombian coastlines and in border regions with neighbouring countries, defined as a zone of 2 km of width from the highest tide or from national borders.

Source: Decree No. 1415 of 18 July 1940 as amended, Article 5.

Manufacturing, possession and use of chemicals, biological and nuclear weapons; trade of weapons, ammunition, explosives, raw materials, machinery and appliances for their production: Foreign ownership in these activities is prohibited.

Source: Constitution of 1991, Article 81; Decree No. 2535 of 17 December 1993.

Private security and surveillance services: Partners of corporations have to be Colombian nationals.

Source: Decree No. 356 of 11 February 1994, Articles 8, 12, 23 and 25.

II. Other measures reported for transparency

a) Corporate organisation

Maritime transport: All vessels with a Colombian registration certificate must have a Colombian captain, officers and no less than 80% of remaining crew must be Colombian nationals. Maritime and fluvial transportation between two points with the territory of Colombia (cabotage) can be provided only by enterprises organised under Colombian law and using Colombian flag vessels. Reciprocity conditions may apply under existing bilateral and plurilateral agreements.

Source: Decree 2324 of 18 September 1984, Article 99. Decree 804 of 2001.

Air transport: Only legal persons organised under Colombian law may own and maintain effective control of an airplane registered to supply commercial air services. Differential treatment in aviation may apply to countries under bilateral agreements.

Source: Commercial Code; Decree No. 410 of 1971, Articles 1705, 1803 and 1804.

Newspapers: The director or general manager of a newspaper published in Colombia that focuses on Colombian politics must be a Colombian national.

Source: Law No. 29 of 1994, Article 13.

Radio broadcasting: The director of news must be a Colombian national.

Source: Law No. 74 of 3 November 1966.

B. Measures reported for transparency by territorial subdivisions

None.

C. Private or mixed (public-private) monopolies

At the national level

I. Public monopolies

Production, imports, exports, distribution and sale of liquors in Colombia.

Games of chance and gambling.

Source: Constitution, Article 336; Law No. 14 of 6 July 1983; Decree No. 4692 of 21 December 2005 (regulating Articles 61 and 63 of Law No. 14 of 1983 and Article 51 of Law No. 788 of 2002); Law No. 10 of 10 January 1990.

II. Private monopolies

None.

III. Concessions

To obtain a concession, a legal person organised under the laws of another country and with its principal domicile in another country, must establish a branch or other legal form in Colombia. Concessions in some sectors may be subject to the economic needs test.

Source: Commercial Code, Articles 469, 471 and 474.

D. Measures reported for transparency by territorial subdivisions

None.

ANNEX C

Colombia's Participation in International Organisations and International Conventions

A. Membership in International Organisations

International Centre for the Settlement of Investment Disputes (ICSID).
 Inter-American Development Bank (IADB).
 International Atomic Energy Agency (IAEA).
 International Labor Organization (ILO).
 International Monetary Fund (IMF).
 International Organization for Migration (IOM).
 Latin American Integration Association (LAIA).
 Multilateral Investment Guarantee Agency (MIGA) (World Bank).
 Organisation of American States (OAS).
 South American Community of Nations (SACN).
 Agreement on the Global System of Trade Preferences (GSTP).
 United Nations (UN).
 United Nations Conference on Trade and Development (UNCTAD).
 United Nations Economic Commission for Latin America and the Caribbean (ECLAC).
 United Nations Educational, Scientific and Cultural Organization (UNESCO).
 United Nations Food and Agriculture Organization (FAO).
 United Nations Industrial Development Organization (UNIDO).
 World Bank.
 World Health Organization (WHO).
 World Intellectual Property Organization (WIPO).
 World Trade Organization (WTO).

B. Adherence to International Conventions

Corruption

United Nations Convention against Corruption (UNCAC), ratified 27 October 2006.

United Nations Convention against Transnational Organized Crime (UNCTOC), ratified 4 August 2004.

Inter-American Convention against Corruption, ratified 1 June 2006.

Environment

Antarctic Treaty entered into force for Colombia 31 January 1989.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, ratified 31 December 1996.

Convention on Biological Diversity, ratified 28 November 1994.

Convention on Nuclear Safety signed 20 September 1994.

Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), entered into force for Colombia 11 September 2008.

Convention on Persistent Organic Pollutants, ratified 22 October 2008.

Convention on the Prevention of Marine Pollution by Dumping of Waste and other Matter, signed 29 December 1972.

Convention on Prior Informed Consent Procedure for Hazardous Chemicals and Pesticides (PIC), ratified 3 December 2008.

Convention on the Protection of the Ozone Layer, accession 16 July 1990.

Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES), ratified 15 September 1981.

Convention on Wetlands of International Importance Especially as Waterfowl Habitat, accession 18 October 1998.

Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, ratified 8 June 1999.

Framework Convention on Climate Change, ratified 22 March 1995.

International Convention for the Regulation of Whaling, adhered 22 March 2011.

International Tropical Timber Agreement, signed 3 May 2007.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, accession 30 November 2001.

Montreal Protocol on Substances That Deplete the Ozone Layer, accession 6 December 1993.

Protocol on Environmental Protection to the Antarctic Treaty, signed 4 October 1991.

Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, ratified 17 October 1985.

Human Rights

Universal Declaration of Human Rights, adopted 10 December 1948.

International Covenant on Civil and Political Rights, ratified 29 October 1969.

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment, ratified 8 December 1987.

Convention on the Prevention and Punishment of the Crime of Genocide, ratified 27 October 1959.

International Covenant on Economic, Social, and Cultural Rights, ratified 29 October 1969.

International Convention on the Elimination of All Forms of Racial Discrimination, ratified 2 September 1981.

Convention on the Rights of the Child, ratified 28 January 1991.

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ratified 7 August 1992.

American Convention on Human Rights, ratified 28 May 1973.

Inter-American Convention to Prevent and Punish Torture, ratified 12 February 1998.

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family accession 24 May 1995.

Convention on the Political Rights of Women, ratified 19 January 1982.

International investment

Convention on the Settlement of Investment Disputes between States and Nationals of Others States (ICSID), ratified 14 August 1997.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, accession 25 September 1979.

Labour

Colombia has ratified most ILO Conventions,* including the 8 ILO Core Conventions:

- Convention 29: Forced Labour Convention, ratified 4 March 1969.
- Convention 87: Freedom of Association and Protection of the Right to Organise Convention, ratified 16 November 1976.
- Convention 98: Right to Organise and Collective Bargaining Convention, ratified 16 November 1976.

* Conventions 1-14, 16-26, 29-30, 52, 62, 80-81, 87-88, 95, 98-101, 104-107, 111, 116, 129, 136, 144, 151, 154, 159-162, 167, 169, 170, 174.

- Convention 100: Equal Remuneration Convention, ratified 7 June 1963.
- Convention 105: Abolition of Forced Labour Convention, ratified 7 June 1963.
- Convention 111: Discrimination (Employment and Occupation) Convention, ratified 4 March 1969.
- Convention 138: Minimum Age Convention, ratified 2 February 2001.
- Convention 182: Worst Forms of Child Labour Convention, ratified 28 January 2005.

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