BRIEFING REPORT

Colombia: Analysis of Trade and Investment Issues for Regional and/or Bilateral Negotiations

SUBMITTED TO
USAID/Peru
USAID/Colombia

SUBMITTED BY
CRECER Project

UNDER CONTRACT NO.
PCE-I-802-00-00013-00 Task Order 02

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PREPARED BY
James Kenworthy

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Sponsored by USAID, the Creating Conditions for Economic Revitalization (CRECER) Project, 2003–2006, helps Peru and other Andean countries overcome trade constraints and strengthen their competitiveness position in the world economy. The project provides technical assistance and guidance to policymakers and private sector groups on eliminating structural and systemic barriers that inhibit business efficiency, trade, and investment in the region.

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Executive Summary

The purpose of this study is to propose Colombia´s trade and investment-related technical assistance needs for purposes of a trade capacity building strategy designed to facilitate its effective involvement in both the FTAA/ALCA and the Colombia/U.S. free trade agreement negotiations. The study addresses Colombia´s foreign direct investment (FDI) regime, Government Procurement, E-Commerce, Competition Policy, and its overall commercial law regime.

Colombia has no single, comprehensive FDI code. Its legal framework for FDI consists of Law 9 of 1991 that established the general legal basis for regulation of international investment, supplemented by Decree 2080 of 2000, as amended, and various collateral laws dealing with foreign exchange, taxation, special regimes, etc. The legal framework also incorporates FDI-related provisions of the Andean Community (Decisions 291, 292) and Chapter XVII of the G-3 Agreement between Colombia, Mexico, and Venezuela. Colombia has concluded 5 bilateral investment treaties (BITs) since 1994 which have not, however, entered into effect because of objections of the Constitutional Court. It is also a party to the 1965 Washington Convention that established the International Centre for Settlement of Investment Disputes (ICSID) and has two investment insurance arrangements with OPIC and the World Bank/MIGA.

Colombia´s governmental structure for FDI includes the National Economic and Social Policy Council (CONPES), the highest national authority for economic and social affairs, the Senior Council for Foreign Commerce, which advises the government regarding foreign trade, including FDI, and the Ministry of Foreign Trade, which is authorized to formulate foreign investment policy and coordinate strategies relating to FDI. Foreign exchange requirements affecting FDI are governed by the Banco de la Republica, while the Invest in Colombia Corporation (COINVERTIR) is charged with FDI promotion. There appears to be duplication of authorities, policy formation, and requirements relating to FDI within the GOC and limited coordination among its agencies relating to FDI. The perception is that each ministry/agency has its own agenda and institutional imperative for preserving its authorities and functions that sometimes results in contradictory policies and regulatory overlapping.

Colombia´s overall FDI policy reflects three basic principles: (1) equality of treatment, (2) universality (of access to most sectors), and (3) automatic authorisation. However, the

Constitution prohibits FDI with regard to (a) the importing or production of munitions, weapons, or explosives, and (b) the processing, handling, or disposal of toxic, dangerous, or radioactive wastes. Plus, provisions of the Commercial Code and other statutes either prohibit FDI or restrict the percentage of foreign equity allowed in certain sectors. Other sectors are subject to "special regimes". A source of concern for foreign investors is that Decree 2080 provides that ". . . in all cases, (CONPES) may identify sectors of the economy in which the Government determines may admit participation of foreign capital." This effectively establishes what is called "positive list" for sectors amenable to FDI as opposed to the standard "negative list" approach of specifying sectors in which FDI is not allowed. From this it would appear that no sectors are open to FDI.

During the 1990s, Colombia liberalised its restrictions on FDI in the Services sector. Liberalization has been realized most in Financial Services, Telecommunications, Accounting/Auditing, Energy Services and Tourism, whilst restrictions remain on Advertising, Audiovisual, Franchising, Data Processing, and Professional Services. "Special Regimes" regulate FDI in Financial Services, Telecommunications, Broadcasting, Telephone Services, and Minerals, Petroleum and Hydrocarbons.

With regard to treatment of FDI, Law 9 of 1991 provides for National Treatment (the same as afforded domestic investors) for all purposes except profits/capital remission/repatriation. Decision 291 of the Andean Community similarly provides for National Treatment, whilst the G-3 treaty provides for Most Favoured treatment (MFN), e.g., treatment no less favourable than that granted to investors of another G-3 country.

Colombia permits full remittance of profits and/or repatriation of capital if the investment has been duly registered with the Central Bank, except when foreign exchange reserves fall below three months worth of imports. Foreign capital investment and remissions/repatriation thereof must be channelled through an authorized exchange intermediary via the exchange market or through "compensation accounts".

There are two processes available for resolution of investor/State disputes: (a) international arbitration or (b) arbitration and judicial resolution in Colombia under its laws. Private contracts may provide for international arbitration under certain conditions. Enforcement of arbitral awards is confided to Colombian courts, which are said to rely on complex procedures. . In the absence of international arbitration provisions, the law requires disputes to be submitted to the Colombian judicial system for arbitration and enforcement of any awards. Arbitration legislation is pending and designed to modernize and speed-up arbitration and enforcement, but a concern for foreign investors is that such legislation would also authorise Colombian courts to "revise" international arbitral awards as well as enforce them, thereby permitting substantive review of the findings and logic of award decisions, potentially undermining the purpose of such arbitration.

Colombia has a number of fiscal and other incentives designed to promote exports via zones francas, Special Economic Export Zones, the Plan Vallejo, CERT and SIEX programs. The

incentives include tax holidays or reductions, duty-free import of inputs, machinery and equipment, and free access to foreign exchange. Most of the incentive programs involve application of conditions for realisation of the incentives, referred to as "performance requirements". These may involve foreign exchange equalisation, local content rules, or required export levels. If the effect of such conditions is to subsidize Colombia´s exports, they violate provisions of the GATT and the Uruguay Round Agreement on Subsidies & Countervailing Measures, and when such requirements are applied to potential foreign investment in such zones, they constitute Trade-Related Investment Measures (TRIMs) and are prohibited. The GOP has reported it has no current TRIMs. While the WTO has given Colombia until 31 December 2005 to phase-out its export subsidy-related programs, accelerated Colombian compliance with its GATT-WTO obligations is likely to be a factor in conclusion of a bilateral FTA with the USA.

Law 80 of 1993, relating to Government Procurement, provided relatively equal treatment to domestic and foreign bidders on a reciprocal basis, and eliminated the 20 percent score added to domestic bids. But the new Government Procurement Law 816 of 2003 contains provisions that facilitate discrimination against foreign bidders when offers are otherwise equal. It provides for 5 to 15 percent additions to the scores of domestic bidders or when bidders plan to use Colombian goods and/or services. Colombia is not a signatory to the WTO Uruguay Round plurilateral Agreement on Government Procurement.

Colombia was the first Latin American country to adopt the UN model Law on Electronic Commerce. In May 2000, Colombia and the United States signed a Declaration in which both recognized the importance of E-Commerce and agreed to cooperate in removing barriers and to implement a transparent and non-discriminatory legal framework. The Declaration recognizes that the private sector should lead E-Commerce development and that governments should avoid unnecessary regulations or restrictions and ensure full transparency in dealing with E-Commerce.

Colombia´s Constitution requires that the State should prevent any obstruction or restriction to competition and control any abuse of dominant position in its market. It has a legal/regulatory framework governing restrictive business practices and unfair competition. However, there are certain sectors – primarily infrastructure and public services – in which conditions for effective competition between firms (including State entities) are lacking.

1. Background on Foreign Direct Investment (FDI)

Legal Framework for FDI

The legal context or framework within which FDI is admitted into a country and regulated is known as the "FDI Regime" and includes the whole array of constitutional provisions, laws, regulations, decrees, policies, and practices that, taken together, establish and define the rights and obligations of both the foreign investor and the host government with regard to all aspects of FDI. This regime may be supplemented by certain bilateral investment treaties (BITs) or multilateral conventions or treaties that confer certain rights or impose certain obligations on the signatory nations that may expand, reduce, or otherwise vary the rights and obligations of foreign investors and their host governments. Similarly, treaties for the avoidance of double taxation may affect investor rights in signatory nations. Additionally, there nearly always exists a broad spectrum of laws, regulations, policies, or practices that are not FDI-specific but nonetheless affect FDI and foreign investors in ways that can facilitate or impede FDI and are referred to in the aggregate as "collateral regulation". Included in this term are laws and regulations relating to corporate organization/formation and business establishment; foreign exchange; taxation; technology transfer; protection of intellectual property rights; and environmental regulations.

Basic Issues in FDI Regimes

Whether incorporated into a discrete investment "code" or less formalized FDI regimes, the underlying scheme for FDI admission and treatment nearly always addresses four basic issue areas: (a) Admission/Establishment; (b) post-admission Treatment; (c) Expropriation/ Compensation; and (d) investment-related Dispute Settlement.

Admission/Establishment

"Admission" refers to the legal regime and regulatory/administrative process (as well as treaty obligations) through which FDI that is proposed or has already occurred informally is recognized as such and legitimised within a nation´s sovereignty. Admission may be either "formal" or "informal". Informal admission refers to the entry of FDI as an accomplished fact, usually in countries that have no established, formal process for screening or approving FDI. Formal admission refers to the process by which extant or prospective FDI is screened, approved, and/or otherwise regulated under legal norms and administrative procedures established in an investment code or other FDI legal regime. Generally, the criteria for admission of FDI in a country with formal admission requirements will reflect the desire of the country to relate such FDI to its economic development priorities and/or to direct it to specific geographical areas or economic sectors. "Establishment" refers to the requirements and/or processes necessary to enable FDI that has been admitted to the host country to pursue its corporate form, secure licensing, and begin operations.

Treatment

Treatment – refers to the manner in which FDI is received and treated within a country, in particular, the standards of treatment accorded generally to foreign investors (as opposed to domestic ones). If specifically provided for, an investment code or other FDI regime will accord FDI either "Most Favoured Nation" (MFN) or ¨"National Treatment" or some variant of "fair and equitable treatment". "MFN" treatment means that the host country will extend to investors from a particular foreign country treatment no less favourable than the treatment it applies to nationals of any other third country. "National Treatment" implies that foreign investors and their investments will be accorded treatment similar to that accorded domestic investors, that is, they will receive the same treatment as nationals of the country, or as often stated, "treatment no less favourable than . . ." that accorded nationals, no more, no less. "Fair and Equitable Treatment" constitutes a less specific standard that implies a broad range of possibilities but usually relates to treatment within a defined system of rules and regulations related to established constitutional and legal standards and internationally-recognized considerations of due process. Many bilateral investment treaties guarantee "National Treatment" *or* MFN Treatment, "whichever is more favourable". Frequently, however, foreign direct investors and their investors are, in fact, accorded *better* treatment than nationals of that country for investment promotion purposes, that is, given certain fiscal or other incentives not available to host country nationals.

Expropriation/Compensation

"Expropriation" refers to a taking, formal or otherwise, by asserting ownership or a public right to control FDI property for public purposes, either with or without colour of law or under constitutional or legal provisions specifying the grounds for such action, procedures therefore, and legal rights of investors including, most importantly, compensation and the method of calculating the value of the property seized. Most countries specify that such taking may occur only "in the public interest", and laws or authorities therefore usually will specify the manner of valuation and the form for payment of compensation, although only a few require that compensation occur *before* the taking. The standard for assessing value and quantifying compensation may specify "fair and equitable" (usually found in investment treaties) or simply "fair" and-or "just", with the determination in specific situations delegated to a host country court or administrative body.

Investment-Related Dispute Settlement

Disputes relating to FDI involve two possibilities: (a) disputes between States or nations *per* se, which generally arise under bilateral investment or other treaty arrangements; and (b) disputes between an investor and the host government. In the first instance, most such agreements require that the States involved try to settle the issues via bilateral consultation. If the dispute cannot be resolved through consultation, the particular agreement under which the dispute arose generally requires either that they be submitted to international arbitration by a panel specifically established for that purposes under provisions of the agreement involved or, if under a BIT or otherwise, submitted to international arbitration under one or another international convention providing for such arbitration.

The more common situation involves a dispute between an investor and its host government. These may arise out of expropriation or other aspects of the host government´s legal/regulatory regime affecting foreign investors. There are two remedies available: international arbitration or arbitration in the host State under its laws. Countries that are signatories to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) that established the International Centre for the Settlement of Investment Disputes (ICSID) may utilize its services. ICSID does not itself engage in conciliation or arbitration but assists in the initiation and conduct of such proceedings conducted by arbiters appointed by the parties. But no Contracting State of the Convention or national thereof is obliged to resort to ICSID-facilitated efforts. However, once the parties to the dispute have consented to have the dispute facilitated via ICSID, they are bound to carry out their undertaking, and, in the case of arbitrations, to abide by any award. Contracting States are required to recognize awards rendered pursuant to the Convention as *binding* and to *enforce* such awards, which are *not* subject to any appeal.

Other international conventions or treaties dealing with enforcement of international arbitral or national judicial awards include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention), and the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention).

Unless otherwise explicitly governed under a national investment code or international investment treaty, investment disputes between foreign investors and host country governments or their public or quasi public agencies are subject only to adjudication of claims in a local judicial or administrative forum under the laws of the host country. When addressed in investment laws or regulations or in treaties, disputes may be subject to different types of arbitration, under local and/or foreign laws and arbitral procedures, or other conditions. Often codes or FDI regimes will specify that the dispute may be referred to local courts only if arbitration or conciliation has proved unavailing in resolving the dispute.

Types of Foreign Investment Regimes

There are two basic types of FDI regimes: "open investment" regimes and "authorization" or "approval" regimes. Within the second are two identifiable sub-types. "Open investment" regimes contain no stated special restrictions on entry and no special constraints beyond basic, internationally-recognized public order considerations. Open codes usually provide that investments may be "freely made", subject only to specific provisions intended to safeguard public safety, health, morals, the environment, and standard requirements for business organization and establishment.

"Authorization" or "approval" regimes require all or most foreign investors and all or most types of FDI to undergo screening in order to obtain specific authorization or approval for admission of the investment. The granting of almost all types of investment incentives is premised upon screening and approval of the proposed investment. These requirements may be imposed generally on *all* investors or investments, or, on a selected *priority* geographical or sectoral basis. Authorization/approval regimes can be subdivided into two basic categories: (1) high discretion and (2) limited discretion, reflecting the parameters of discretion allowed public officials to authorize and regulate FDI.

"High Discretion" regimes typically provide little or no criteria to guide officials in screening proposed investment and, thereby, impose little constraint on the discretion of such officials in deciding whether to approve such FDI or to impose requirements thereon as conditions precedent to approval. Such regimes are often characterized by a lack of transparency and high levels of inconsistency and unpredictability in their administration, as well as affording significant opportunities for corruption of the process.

In many cases, however, unrestrained discretion may be limited in practice by a provision of law or regulation to the effect that, if approval is not granted within a *specified* period of time, it will be *presumed*; or by general principles of constitutional law or statutory due process that such discretion be exercised in accordance with law. High discretion regimes typically involve provisions that restrict FDI to certain priority geographical or sectoral areas (or provide performance requirements as conditions for authorization or approval, such as export, employment, domestic content, or exchange balancing requirements.

"Limited discretion" regimes confer clearly-defined criteria or limits to the exercise of discretion by public officials in administering investment regimes, for instance, specifying clear criteria against which the proposed investment may be measured, or providing for appeals of preliminary decision reflecting the exercise of discretion. Prospective investors generally see "high discretion" FDI regimes as a disincentive to FDI whilst "limited discretion" regimes area viewed as real incentives to such investment.

2. Investor Motivations and Concerns

Investor Motivations

FDI occurs for one or both of two major commercial reasons: (a) to develop and control assured sources of supply for raw materials or inputs needed for production destined for the global marketplace, and/or (b) to create, expand, or defend a market or market share in the host country or within its region. But, clearly, the basic motivation for private sector investment (whether domestic or foreign) is *profit*, e.g., to maximize an investor´s global competitiveness and, thereby, its rate of return for cross-border commercial activities.

So the basic foreign investor criteria for selecting one country from among any others involve: (1) that country´s market size or possibilities; (2) assessing its comparative advantages in relevant sectoral or product areas; (3) the likelihood of converting its *comparative* advantages into *competitive* advantages in its domestic, regional, or global markets; and (4) the comparative "climates" for FDI in it and among its major regional rivals for attracting such FDI. The bottom line concerns of prospective investors – domestic or foreign – are: (1) to realize the greatest possible return on investment (profit) and (2) at the minimum necessary risk associated with the investment.

Investor Concerns

Major areas of concern for foreign investors include: (a) Admission, (b) Establishment, (c) post-admission Treatment, (d) sectoral restrictions or limitations on ownership of property, (e) rights for and/or restrictions on remission of profits, repatriation of capital, and current account transactions, (f) performance requirements, (g) rights relating to expropriation of the investment and compensation, (h) and availability of international arbitration and/or dispute settlement. These are essentially the issues addressed in most national legislation as well as in negotiation of bilateral investment treaties (BITs) and/or trade agreements.

3. Colombia's Legal / Regulatory Policy Regime for FDI

Constitutional Bases

Colombia´s revised Constitution of 04 July 1991 does not establish an explicit, integrated FDI legal/regulatory regime. It should be noted, however, that Article 4 of the Constitution provides that "the Constitution is the norm of norms. In every case of incompatibility between the Constitution and a *law or other juridical norm*, the dispositions of the Constitution shall be applied."

Colombia applies the dualism theory in international affairs, e.g., international treaties become valid once approved by the Congress, their enforceability declared by the Constitutional Court, and the respective exchange of ratifications occurs. Once incorporated in this way into domestic law, treaties are a *direct* source of law. Traditionally in most national legal systems, the provisions of a country´s constitution supercede any inconsistent provisions of laws, decrees, or regulations as provided for in the above-quoted extract from the Colombian Constitution. However a concern for foreign investors is whether the quoted portion of Article 4 of the Colombian Constitution also can be interpreted as prevailing over inconsistent norms of FDI-related international treaties or conventions. If so, this may render ineffective any BIT or international trade treaty incorporating specific rights for foreign investors that differ from Constitutional provisions.

Investors may well have further concerns with provisions of the Constitution relating to their treatment and rights in Colombia. For example, Article 100 of the Constitution provides that "Los extranjeros disfrutan en Colombia de los *mismos derechos civiles* que se conceden a los colombianos." (Foreigners enjoy in Colombia the same civil rights as are given Colombians). But, Article 100 then goes on to condition this statement by adding: "No obstante, la ley podra, por rezones de orden publico, *subordinada* a condiciones especiales o *negar* el ejercicio de determinados derechos civiles a los extranjeros." (Nevertheless, the law can, for reasons of public order, subordinate (such rights) to special conditions or prohibit the exercise of certain

civil rights of foreigners"). This creates uncertainty as to the security of such rights since it allows for rights under the Constitution to be potentially undermined by subsequently-enacted laws, and does not also clearly relate to investors´ investments as well.

Moreover, Article 100 states that "Asi mismo, los extranjeros gozaran, en el territorio de la Republica, de las garantias concedidas a los nacionales, *salvo* las limitaciones que establezcan la Constitución *o la ley*" (At the time, foreigners shall enjoy in the territory of the Republic, the guarantees given nationals, *except for* such limitations as may be established under the Constitution *or by law*.). This also suggests that guarantees originally provided by the Constitution could be potentially undermined by subsequently-enacted laws.

Statutory Framework

Colombia has no single, comprehensive FDI code. Its basic legal framework for FDI consists of Law 9 of 1991, which, *inter alia*, established the general legal basis for the regulation of international investment. Law 9 of 1991 is administered and interpreted via two decrees: Decree 2080 of 21 October 2000 entitled the "General Regime of Foreign Capital Investment in Colombia ("inward investment") and Colombian Capital Abroad ("outward investment")" unified Colombian FDI regulations and is considered the effective regime for foreign investment in Colombia, "sin perjuicio de lo pactada en los tratados o convenios internactionales vigentes."; and Decree 1844 of 02 July 2003 that modified the earlier decree. The purpose of Decree 2080 was to integrate the regulation of FDI and to harmonize the terms and concepts utilized in the norms related to FDI as well as to simplify its language.

Relevant International Treaties

Colombia´s legal framework also includes Decisions 291 and 292 of 1991 of the Treaty of Cartagena reflecting Colombia´s membership in the Andean Community, as well as Chapter XVII of the Free Trade Treaty between Colombia, Mexico, and Venezuela, referred to as the "Group of Three" or "G-3". Colombia has a Trade Complementarity Agreement with Chile under which 95 percent of bilateral trade has duty-free status. Colombia is a member country of the World Trade Organization (WTO). The Andean Community nations concluded and signed a free trade agreement with the member nations of the Common Market of the South (MERCOSUR) on 16 December 2003. The MERCOSUR nations include Argentina, Brazil, Paraguay, and Uruguay. Colombia has also negotiated five bilateral investment treaties – with Cuba (1994), Great Britain (1994), Peru (1994), Spain (1995), and Chile (2000), the first four of which, however, have not entered into effect because a decision of the Colombian Constitutional Court declared certain provisions of them relating to expropriation unenforceable. The agreements with Peru and Cuba are in the process of an amending

protocol. The BIT with the U.K. is in the process of renegotiation. The BIT with Chile has not yet been presented for ratification.

Colombia has been a member of the Latin American Integration Association since 1980 and has also concluded LAIA-sponsored Partial Scope or Economic Complementation Agreements with Chile, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama, and, as a member of the Andean Community, with Argentina and MERCOSUR.

On 09 October 2001, the Colombian Government issued a set of ¨Policy Guidelines for the Negotiation of International Agreements Relating to Foreign Investment", under the sponsorship of the Ministries of Foreign Trade, Finance & Public Credit, and Foreign Relations and the Department of National Planning. The purpose of the Guidelines was to analyze the history of Colombia´s negotiation of investment agreements and suggest policies to govern them for the future. The Guidelines are referred to in various portions of this report. On 21 April 2003, the GOC published a "Modelo Acuerdo Bilateral de Promocion y Proteccion de Inversions" or model BIT that reflects the basic policies recommended in the Guidelines.

Andean Decision 291 established the Andean Common Regime for the Treatment of Foreign Investments in the Andean Community, while Decision 292 established a Uniform Regime for Andean Multinational Enterprises. These two decrees plus the relevant chapter of the G-3 FTA are incorporated into, and constitute part of, Colombia´s legal framework for FDI.

Colombia also is a party to the Washington Convention of 1965 that established the International Centre for Settlement of Investment Disputes (ICSID, or CIADI in Spanish), and has also signed two investment insurance instruments, the World Bank-sponsored Multilateral Investment Guarantee Agreement (MIGA) and the U.S. Overseas Private Investment Corporation (OPIC). It does not appear that Colombia has signed any Bilateral Treaties for the Avoidance of Double Taxation.

FDI-Focused Ministries & Agencies

Law 19 of 1958 established the National Economic and Social Policy Council (CONPES) as the highest national authority for economic and social planning for Colombia. The chairman of CONPES is the President of the Republic and its membership includes all Ministers as well as representatives of the General Department of National Planning, the Banco de la Republica (Central Bank), together with other relevant agencies of the GOC. The Senior Council for Foreign Trade (Consejo Superior de Comercio Exterior), established under Article 27 of Decree 2553 of 1999 and chaired by the President of the Republic, is the senior ministerial-level entity whose mandate is to advise the GOC with regard to all aspects of foreign commerce, including foreign investment. The Council is made up of the Ministers of Foreign Trade, Foreign Relations, Finance and Public Credit, Economic Development, Agriculture and Rural Development, Mines and Energy, Transport, and Environment, as well as the Director

of the National Planning Department and the Director General of the Central Bank (Banco de la Republica).

Prior to 1991, the Departamento Nacional de Planeacion (DNP) was charged with authorizing and regulating foreign investment in Colombia. But Law 9 of 1991 transferred to CONPES authority to regulate foreign investment, including identification of sectors of economic activity reserved to nationals and/or define the degree of foreign capital therein. The Ministry of Foreign Trade was created by Law 7 of 1991 and authorized under Decree No. 2553 of 1999 to "formulate foreign investment policy and coordinate governmental strategies for increasing the competitiveness of the country for receipt of foreign investment," as well as to formulate policies for industrial free zones, coordinate Colombia´s participation in the Andean Community, and monitor the application of export incentives. The result, however, was a certain overlap of the functions of the DNP and the Ministry.

Article 5.7 of Decree 2553 provides that the Ministry of Foreign Trade is authorized to:

> Formulate the foreign investment policy and coordinate government strategies oriented towards increasing the country´s competitiveness as a host for foreign investment. To further the progress of multilateral and bilateral negotiations within their competency relating to foreign investment. To formulate the general foreign investment policy based on documents jointly presented by the National Planning Department (DNP) and the National Council on Economic and Social Policy (CONPES).

Within the organic structure of the Ministry of Foreign Trade, matters relating to foreign investment come under the authority of the Vice-Minister, who is authorized, *inter alia*, to "exercise the coordination necessary to enhance the country´s climate for foreign investment . . ."(Article 7.3). Within the Office of the Vice-Minister, authorities and responsibilities relating to foreign investment are delegated to the Directorate of Foreign Investment. Responsibilities undertaken by the Directorate include: (1) undertake diagnostic studies regarding topics related to foreign investment in Colombia (inward) and Colombian investment abroad (outward); (2) promote the adoption of norms relating to foreign investment and modifications and adjustments thereof; (3) coordinate and participate in negotiation of foreign investment agreements; (4) prepare documents and formulate ideas relating to the *authorisation of investment*; (5) prepare, in coordination with the National Planning Department, documents relating to foreign investment for presentation to the Minister and to CONPES; . . ." and "promote among the different government entities the simplifications of procedures, juridical stability, transparency, and all other means for enhancing the business climate for foreign investors in the country.¨"

The tax and customs laws of Colombia relevant to FDI are administered by the Direccion de Impuestos y Aduanas Nacionales (DIAN). In consequence of its authority under Article 371 of the Constitution to regulate international exchange, capital used to effect foreign investments must be registered with the Banco de la Republica**,** under its Circular of 08 July 2003, in order

to ensure freedom of, and accessibility to, foreign exchange for profits remission, capital repatriation, and current account transactions. COINVERTIR (Invest in Colombia Corporation) is a mixed, non-profit, company created in 1992 whose mission is to promote and facilitate the development and consolidation of foreign investment in Colombia. It promotes Colombia as an investment site, provides services for potential investor and investment aftercare, and investment climate monitoring with recommendations for improvement.

Security & Rule-of-Law Concerns

Apart from aspects of its legal/regulatory/policy regime for FDI, Colombia faces investment promotion challenges stemming from its internal conflict and the effort to deal with a significant drug production/trafficking situation, the latter the focus of its Plan Colombia. But in the area of Rule-of-Law, there are concerns regarding the availability of judicial review for expropriation and other investment-related disputes, transparency in government procurement, lengthy dispute resolution processes and possible inefficiency in the courts, concerns for excessive discretion and transparency in administrative procedures and operations, and variability in laws and regulations relating to regulations affecting foreign investors. These are discussed in detail in this report.

4. General Aspects of Colombia's Framework for FDI

According to the Ministry of Foreign Trade, Colombia´s overall policies toward foreign investment reflect three basic principles: (a) equality of treatment, (b) universality, and (c) automatic authorization. By "equality", the GOC means that foreign investment is subject to the same treatment as domestic investment, for which reason, the Government may not interpose conditions or impose treatment that discriminates either in favour of or against foreign investors. "Universality" implies that foreign investment is welcome in all sectors of the economy except as described in the following subsection. And "automatic authorization" means that foreign investors may invest in all sectors of the economy, save those specifically restricted, without prior authorization or approval. Nonetheless, certain investments are subject to *special regimes* that require prospective foreign investors to comply with certain regulations or requirements specific to a sector, in particular involving the financial sector or mining and hydrocarbons.

Performance Requirements

Performance requirements are those imposed upon foreign direct investors as a condition for the admission or operation of their investments. These include requirements for a specified percentage of local content in goods exported, limitations on the level of imports and/or foreign exchange required thereof, or the transfer or licensing of technology. The former two are prohibited by the WTO Uruguay Round Agreement on Trade-Related Investment Measures (TRIMS), although many developing countries have received permission for their gradual phase-out. Apart from certain export incentives relating to investments or the operation of free zones (discussed below), it appears that Colombian law and/or regulations do not impose these requirements. However, Decision 291 of the Andean Community does specifically permit performance requirements for the license of technology, technical assistance, technical services and other technological contracts in accordance with the laws of member countries. The G-3 treaty, however, as well as Canadian and U.S. BITs and most free trade arrangements in the Western Hemisphere prohibit performance requirements as

conditions for the establishment, acquisition, expansion, management, conduct or operation of a covered investment.

Colombia´s Definitions of FDI

Article 4 of Decree 2080 of 2000 defines "Foreign Investor" as follows: "Se considera inversionista de capital del exterior a toda persona natural o juridical titular de una inversion extranjera directa o de portafolio en los terminos previstos en el presente decreto." Article 3 of Decree 2080, as amended by Decree 1844 of 2003, defines ˙"direct investment" as including:

(i) la adquisicion de participaciones, acciones, cuotas socials, aportes representatives del capital de una empresa o bonos obligatoriamente convertibles en acciones;

(ii) la adquisición de derechos en patrimonios autónomos constituidos mediante contrato de fiducia mercantil bien sea como medio para desarrollar una empresa o para la compra, venta y administración de participaciones en empresas que no esten registradas en el Registro Nacional de Valores e Intermediarios;

(iii) la adquisición de inmuebles, asi como titulos de participación emitidos como resultado de un proceso de titularizacion inmobilaria de un inmueble o de proyectos de construcción o a traves de fondos inmobiliarios previstos en las normas legales pertinentes, ya sea por medio de oferta publica o privada;

(iv) los aportes que realice el inversionista mediante actos o contractos, tales como los de colaboración, concesión, servicios de administraction, licencia o aquellos que impliquen transferencia de tecnología, cuando ello no represente una participación en una sociedad y las rentas que genere la inversión para su titular dependan de las utilidades de la empresa; and

(v) inversiones suplementarias al capital asignado de las sucursales.

Article 1 also defines "international investments" subject to Decree 2080 as including

". . . a) las inversions de captal del exterior en territorio colombiano incluidas las zones francas colombianas, por parte de personas no residents en Colombia . . . y las inversiones realizadas por un residente del pais . . . en zona franca colombiana." Finally, Article 5 of Decree 2080 defines the "modalities" of foreign capital investments as follows:

(a) (removed by Article 10 of Decree 1844 of 2003);
(b) Importacion de bienes tangibles tales como maquinaria, equipos u otros bienes fisicas, aportados al capital de una empresa como importaciones no reembolsables. Igualmente, los bienes internados a zona franca y que se aportan al capital de una empresa localizada en dich zona;
(c) Aportes en especie al capital de una empresa consistente en intangibles, tales como contribuciones tecnológicas, marcas y patentes en los terminos que dispone el Codigo de Comercio;

(d) Recursos en moneda nacional con derecho a ser remitidos al exterior tales como principal e interes de creditos externos, sumas debidas por concepto de importacions reembolsables, utilidades con derecho a giro y regalias derivadas de contratos debidamente registrados que se destinen a inversiones directas o de portafolio; y

(e) Inversiones suplementarias al capital asignado de las surcursales.

It should be noted that Colombia has not included loans in the definition of foreign investment at the request of the Banco de la Republica, and these, therefore, have a separate regime. International standards defining FDI usually exempt debt securities of *state* entities, as is the case in Article 1416 of the NAFTA. Neither are defaults of state entities generally classified as "expropriations". However, the GOC´s new investment negotiation guidelines suggest that the Bank´s concerns have changed and that inter-corporate loans and loan payments may be acceptable for inclusion under the designation of foreign direct investment subject to certain conditions set forth in Chapter III of the Bank´s External Resolution 08 of 2001. The conditions include that (1) the loans originate outside of Colombia, (2) exclude payments for services and operations involved with foreign commerce, and (3) such loans continue subject to the regulations of the Bank.

Generally FDI is defined using IMF and OECD criteria that FDI constitutes ownership of 10 percent or more of the equity of an enterprise, while less than 10 percent is considered "Portfolio" investment. It should be noted that Colombia´s laws relating to FDI and to "Portfolio" investment do not state an explicit percentage of equity ownership in Colombian enterprises that draws the line between foreign *direct* investment and portfolio investment. Thus, in close cases, prospective foreign investors would be uncertain of which provisions of Colombian law would govern their investment.

Sectoral & Other Restrictions on FDI/Special Regimes

Foreign investment in certain sectors of the Colombian economy is restricted for reasons of protecting national sovereignty, by provisions of the Colombian Constitution of 1991. Article 223 prohibits foreign investment in the importing or production of munitions, weapons, or explosives, whilst Article 88 prohibits such investment in the processing, handling, and disposal of toxic, dangerous, or radioactive waste not produced in the country. These restrictions are repeated in Article 6 of Decree 2080 of 2000, but the Paragraph to that Article also provides that:

> En todo caso el Consejo Nacional de Politica Economica y Social, CONPES, podra identificar *sectores de la economica* para que el Gobierno determine
>
> si admite en ellos la participación de inversión de capital del exterior.

This creates possible scope for discretionary authority regarding sectors in which foreigners may invest and may also question the transparency of the Colombian regime for FDI. Moreover, the quoted section has the effect of establishing a "positive list" for investments

susceptible to foreign investment, as opposed to the usual "negative list" approach that specifies exactly those sectors in which FDI is not allowed or is otherwise restricted. The point here is that unless CONPES has established a positive list of sectors amenable to FDI, then it would appear that no sectors are open to FDI, a result clearly not reflective of reality, but which needs to be clarified. In addition, Article 1458 of the Commercial Code of 1971, as variously amended, prohibits any foreign ownership interest in commercial ships licensed in Colombia. Article 1490 of the Commercial Code restricts the percentage of FDI in maritime agencies (30 percent) and Article 1426 restricts foreign ownership in national airline or shipping companies (40 percent). Colombia does not permit FDI in Marine insurance.

Article 34 of Law 182 of 1995 as amended by Article 1 of Law 680 of 2001 limits foreign investment in television companies to 40 percent, provided the foreign investor´s home country reciprocates for investment by Colombians to that extent and subject to a finding by the National Television Commission that associated technology transfers contribute to the national television industry. Colombia´s TV laws (182 of 1995, 375 of 1996) imposed several restrictions on FDI and increased restrictions on the foreign content in broadcasting. It imposed a complicated, burdensome system of sub-quotas for different hours of the day – 70 percent locally-produced programming during prime time and a range of zero to 40 percent during other times on national TV and 50 percent for locally-produced programming on regional channels and local stations. Colombian law generally permits foreign ownership of real property (land, improvements) but restricts such ownership in areas within 50 kilometres of Colombia´s borders.

Restricted Sectoral Areas in Hemispheric Agreements

The NAFTA and MERCOSUR free trade agreements both include annexes or provisions for *reservations* against certain sectors that allow them to refuse to permit establishment of member country investments therein. Nearly all BITs do so as well. For example, the 1998 Bolivia-U.S. bilateral investment agreement provides that "The Government of the United States of America may adopt or maintain exceptions to the obligations to accord national treatment to covered investments in the sectors or with respect to the matters specified below." Among U.S. sectors reserved are atomic energy, customhouse brokers, broadcasting, fisheries, air/maritime transport, banking/securities/other non-insurance financial services, and satellite transmissions.

Certain sectors of the economy are subject to "special regimes" reflecting both the particular technical aspects as well as policy concerns with regard to the country´s natural resource endowments, infrastructural concerns, or economic sensitivities.

Services in General

During the 1990s, Colombia liberalized its legal/regulatory regime and restrictions affecting the importation of services. Liberalization has been realized most in financial services, telecommunications, accounting/auditing, energy services and tourism, whilst restrictions have been retained on a number of service areas including advertising, audiovisual, franchising, data processing, and professional services. In October 2000, the National Planning Department issued Decree 2080 which unified foreign investment regulations in most service areas and eliminated most percentage limits on foreign equity participation. A commercial presence is required for firms to provide data processing and information services. Firms with more than ten employees can have no more than 20 percent of specialists and 10 percent of unskilled laborers who are foreign nationals.

Financial Services

In 1991, Colombia promulgated Resolution 51 of the Superintendency of Banks, which permits 100 percent foreign ownership in financial services and simplified the entry/exit of foreign firms in that sector although with limitations on the use of foreign personnel. Laws 45 of 1990 and 35 of 1993, as implemented by Decree 663 of 1993 entitled the "Organic Law for the Financial (Services) System", allow for foreign (as well as domestic) investment in banking and financial services subject to prior approval of the Banking Superintendency and to certain conditions, e.g., (1) if the foreign investor proposes to acquire more than 10 percent of issued shares of the target firm or to increase its share beyond 5 percent, (2) if it proposes to acquire, directly or indirectly, 5 percent or more of the shares or convertible debentures issued by a financial entity incident to its privatisation, or (3) acquisition of 5 percent or more of the voting shares of such entities via foreign capital. Under Law 510 of 1999, minimum capital requirements for creation of new financial entities were increased the Government given the right to intervene in those that failed to meet performance requirements. In April 2000, the Central Bank removed previous reserve requirements on foreign borrowing operations. Colombia permits 100 percent foreign ownership of insurance companies, but prohibits such firms from establishing and operating through local branches. Foreign insurance companies must have a local commercial presence to sell policies for other than reinsurance or international trans-portation.

Telecommunications

The legal framework in Colombia relating to the broad area of Telecommunications is based on the following principles:

Public Service: Telcoms are deemed to be public service that shall be

rendered by the State, whether directly, by state-owned entities, or indirectly through concessions granted to private parties.

Free Competition: Telecommunications services are rendered under a free competition regime in order to guarantee the efficiency in the rendering of such services, as well a free access of new agents to the telecom market.

Under Law 72 of 1989 and Decree 1900 of 1990, telecom services are classified as follows: (1) Basic Services, (2) Diffusion Services, (3) Telematic and Value-Added

Services, (4) Assistance Services, and (5) Special Services. The rendering of Telecom services is subject to the issuance of an authorization from the State granted by means of a license or concession contract, typically granted for up to a 10 year term. But certain individuals in the Telcomm sector assert that requirements for licenses reduce the incentive to invest in that sector, asserting the cost of the licenses is to high compared with other countries in the region and that the term for which licenses are granted and conditions for extension do not guarantee an adequate time of operation to allow for amortisation of the original investment. Concessions or authorisation for certain services, such as Trunking, Cellular, TV, and PCS, are granted by means of public bids. Authorisation for rendering of telcom services includes the authorisation to establish the required telecom network or to use the network of a third party. Public Switch Telephone services do not require authorisations.

The authorities that regulate the Telcom sector include: (a) the Ministry of Communications, which has general regulatory authority over the sector; (b) the Telecommunications Regulatory Commission, a special unit within the Ministry of Communications whose mandate is to (i) regulate domiciliary public telephone service, (ii) regulate monopolies in the rendering of public telecommunications services when competition isn´t feasible, and (iii) to promote competition within the sector; (c) the National Television Commission, which regulates all aspects of television services as well as acting as the licensing authority; and (d) the Superintendency of Domiciliary Public Services, which has control, inspection, and surveillance authority over companies that offer domiciliary public services, e.g., public telephones and rural mobile telephony.

Colombia ended its State monopoly on long distance and international telephone services in November 1998 and generally opened the sector to foreign investment, although it continues to limit foreign ownership of telecommunications companies to 25 percent. While FDI is allowed in telecommunications firms, the company must be managed and controlled by Colombian nationals. Colombia also imposes an economic needs test to determine market access and national treatment in licensing for cellular, PCS, long-distance, and international services. In its commitments under the plurilateral WTO Agreement on Basic

Telecommunications Services, Colombia made fairly liberal commitments on most basic telecom services, but it specifically prohibited "callback" services and fixed and mobile satellite systems. Colombia is not a signatory to the plurilateral WTO Agreement on Information Technology.

Colombia´s television broadcast laws (182 of 1995, as modified by Law 680 of 2001, and 375 of 1996) imposed a foreign equity limit of 40 percent on television firms, several restrictions on foreign investment, and increased restrictions on foreign content in broadcasting. It also imposed a complicated, burdensome system of sub-quotas for different hours of the day. Foreign investors must be actively engaged in television operations in their home country, their investments must involve a transfer of technology, and their country of origin must offer reciprocal investment opportunities to Colombian companies. Law 182 requires broadcasters to transmit 70 percent locally-produced programming during prime time and a range of zero to 40 percent during other times on national television, and 50 percent locally-produced programming on regional channels and local stations.

Petroleum & Hydrocarbons

The Colombian Council of State, the supreme Administrative tribunal, which has review authority for determination of the constitutionality of decrees issued by the national government not otherwise cognisable by the Constitutional Court, has ruled that the subsoil (and, therefore, minerals, petroleum and hydrocarbons) of Colombia pertains solely to the State, a decision upheld by the Constitutional Court. Thus there can be no foreign direct investment in the form of *freehold* interest directly in subsoil resources. Foreign capital investments in oil and natural gas exploration and exploitation, in refining, hydrocarbon transportation and distribution, and mineral exploration, extraction, processing and transformation are subject to special regulations. Exploration and exploitation of petroleum may be carried on either by the State or by *contracts* entered into by private entities with the State relating to concessions and operations. Such entities must have at least 30 percent equity held by the State. Since 1951, such activities have come under the authority of the Empresa Colombiana de Petroleos (ECOPETROL). Distribution of petroleum is by contract with ECOPETROL which sets both levels of daily production and prices thereof. There are also special foreign exchange rules affecting investment in the oil, coal, and natural gas sectors.

Admission & Establishment of FDI: Admission

Article 7 of Decree 2080 of 2000, regarding entry of FDI states that: "Autorizacion. Salvo lo previsto en regímenes especiales contemplados en este decreto, *la realización de una inversión extranjera no requiere autorización.*" But, Article 8 of Decree 2080, as amended by Article 4 of Decree 1844 of 2003, which replaced the original Article 8 in its entirety, does require that an

investor of foreign capital or its representative in Colombia, must register any new or succeeding investments with the Banco de la Republica in accord with procedures established by the Bank and effected via submission of a "foreign exchange declaration" or, if the investment was effected in one of the other modalities described above, by presentation of an application describing the nature of the contribution to capital or other form of investment and a determination of its value. Under Decree 2080 and Bank Circulars 36/2001 and 23/2002, investors have up to three months within which to register or submit their application, but this deadline may be extended for an additional three months upon request of the investor. . Registration with the Banco de la Republica is a legal requirement for foreign investors to exercise their foreign exchange rights. If a foreign investor does not register its investment within the required period, the invested amount and any profit derived therefrom will not be entitled to remittance abroad.

"Establishment" refers to the requirements and/or processes necessary to enable FDI, once admitted, to pursue its corporate form, secure required licensing and registration, and begin operations. As previously indicated, the most significant aspect of establishment for a foreign investment is registration of the investment and, in particular, of the capital transfers effected from abroad, with the Banco de la Republica that is essential to the ability of the foreign investor to remit profits abroad, repatriate its investment, and obtain foreign currency for the purpose of current account payments abroad. COINVERTIR points out that "in general, norms on repatriation of capital and profits in effect when an investment is registered may not be changed to the detriment of the investor, except *temporarily*, when international reserves fall to levels equivalent to less than three months of imports."

Other aspects of establishment involve the formal documentary and notarial requirements for corporate organization, registration of a new investment entity with the Chamber of Commerce, and the obtention of a Tax Identification Number from the Direccion de Impuestos y Aduanas Nacionales or income tax authority.

Post-Establishment Treatment

Paragraph 4 of Article 15 of Law 09 of 1991 provides that ¨"Con excepcion de acquellos asuntos referentes a la transferencia de recourses al exterior, la inversion extranjera en Colombia, sera tratada para todos los efectos de igual forma que la inversion de nacionales colombianos." Thus, foreign investors are given National Treatment for all purposes *except* those related to remission of profits and repatriation of investments to their home country.

In the guidelines for future investment-related negotiations issued on 09 October 2001, the GOC notes that there are two models relating to the right of entry of foreign investment. One, the European model, does not advert to "treatment" until *after* admission of the foreign investment. Thus, such investment is accepted in accord with the laws and regulations of the host country, giving it total discretion to determine the conditions that must be complied with

to be treated as a foreign investment. The other, U.S. and Canadian model does not actually distinguish between *pre* and *post*-admission treatment, and, thereby, provide for National or Most Favoured Nation treatment both before and after admission and establishment, thereby restricting the ability of host governments to *change* the conditions for admission and establishment. Under this model, in order that signatory nations don´t lose their ability to restrict investment in certain sectors, they traditionally establish, via reservations, a list of restricted sectors that prohibits or restricts FDI in the affected sectors. In the 2001 Guidelines, the GOC notes that, at least on the *bilateral* level, Colombia has utilized the European model and that for *future* negotiations involving the U.S. or Canada or those nations adhering to the second model, it is necessary to determine with greater exactitude the implications thereof. The Guidelines state that "Solo en el caso en que se establizca que los beneficios son positivos y que exista consenso al interior del Gobierno de cambiar de modelo de acuerdo, se podra proceder a negociar acuerdos bajo el modelo americano."

Provisions of the Treaty of Cartagena and of the G-3 Treaty also form part of the Colombian framework for FDI and have specific rules for treatment of relevant investors. Article 2 of Decision 291 of the Andean Community similarly provides that "Foreign investors shall have the same rights and obligations as those to which national investors are subject (e.g., national treatment), *except* as provided in the national legislation of each Member country. On the other hand, Article 17.03.2 of the G-3 Treaty provides for MFN treatment, e.g., that "each Party shall grant to the investors of another Party, and to the investments of such investors, treatment no les favourable than that granted, in similar circumstances, to investors and their investments of another Party *or* from a country not a Party (to the G-3)."

Most modern investment treaties, such as NAFTA, and various Canadian, Mexican, and U.S. bilateral investment treaties, require "MFN" and/or "National" treatment or, sometimes both or even the "better of them". Other treaties utilize the term "fair and equitable treatment"or "non-discrimination". The former is a general concept without precise definition and, thereby, provides a standard not specifically dependent on the host state´s domestic law, allowing for wider interpretation of the term under provision of treaties on investment. This reflects the current Colombian investment negotiation strategy and is found in its Model BIT. The latter prohibits discrimination against investments of investors of the other signatory party, with the terms "unreasonable", "arbitrary", or "unjustified" used to characterise measures that impair the management, use, operation, or disposal of such investments.

But most BITs and trade agreements also provide for specific *exceptions*, especially with respect to MFN and National Treatment. The most common exceptions are those found in most BITs and several FTAs in the Western Hemisphere which relate to either (1) privileges which either signatory accords to investors of a third state because of its membership in, or association with, a free trade area, customs union, common market or other regional arrangement; and (2) certain preferences or privileges resulting from international agreements relating to the avoidance of double taxation. Canadian and U.S. BITs usually list a series of exceptions to MFN and/or National Treatment in protocols or annexes to their agreements.

These may include, for example, actions to maintain national security, international peace and security, or public order.

In addition, all of the FTAs in the Western Hemisphere contain a provision to the effect that "each Party reserves the right to deny to a company o f the other Party the benefits of this Treaty if nationals of a *third* country own or control the company and: (a) the denying Party does not maintain normal economic relations with the third country; or (b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized. Of special note, the Colombia-Peru BIT specifies a number of exceptions to *both* MFN and National Treatment: acquisitions via portfolio investment, public services (telecommunications, energy, aqueducts, and alcantarillado), supply of goods and services to the public sector, and automotive assembly.

Profits Remission/Capital Repatriation

A particular area of concern for investors in the treatment of FDI has to do with the rights accorded or withheld to transfer to an investor´s home country (or "repatriate") capital invested or profits derived therefrom as well as to obtain foreign exchange for such transactions and for current account and other operating transactions. Some countries guarantee the unrestricted right of repatriation for capital and/or profits as well as current account transactions. Others condition it on a degree of reinvestment or subject to the availability of foreign exchange or to other national priorities. Many specifically tax such transfers through withholding on the amounts transferred in addition to applicable local income taxes. The GOC permits full remittance of all net profits regardless of the type or amount thereof subject to registration with the Banco de la Republica, under particular provisions of law and regulations of the Central Bank. Nevertheless, Colombian law provides the GOC with a balance of payments safeguard to restrict remittances in the event international reserves fall below three months´ worth of imports, something that has not happened for many years.

The foreign exchange regime in Colombia is governed by Law 9 of 1991 and Resolution 8 of 2000 of the Executive Board of the Banco de la Republica. From an operational standpoint, the foreign exchange regime is divided into two markets: the Exchange Market and the Free Market. Foreign capital investments and yields related thereto must be channelled through the exchange market and, thereby, through an authorized exchange intermediary. Under Chapter V of Resolution 8, foreign currency for the remission of profits, repatriation of capital, or for current account transactions must be obtained on the exchange market.

An exchange transaction through an authorized intermediary requires an exchange declaration, which is presented to the intermediary. Exchange intermediaries are institutions in the financial sector that handle foreign currency for use in exchange market transactions, e.g., buying and selling the currency required for or generated by such transactions. Rates of

exchange are set between the parties involved and the intermediary is not allowed to charge a commission. Intermediaries may include: commercial and mortgage banks, finance corporations, financial cooperatives, stock brokerages, and money exchange offices.

Also available for exchange transactions within the Exchange Market are so-called Compensation Accounts that are accessible without intervention of intermediaries. These are bank accounts opened *abroad* in foreign currencies which can be used to deposit and to withdraw exchange for payment for imports, to deposit payment for exports, to remit profits from investments in Colombia, to receive disbursements from foreign loans or to pay principal and interest thereon, and for payment for all free market transactions. Such accounts must be registered with the Banco de la Republica within one month after opening or after the first exchange transaction. A monthly activity report must be submitted to the Bank noting the transactions of the preceding month, investment of balances, and the source of any deposits in currency not obtained through the Exchange Market. All foreign exchange transactions not classified as Exchange Market transactions may be conducted on the free market without recourse to intermediaries or compensation accounts.

Companies in the oil, coal, and natural gas sectors that have foreign capital and are involved in oil exploration and exploitation, or exploration and extraction of natural gas and coal, or provide exclusively technical services for oil exploration and exploitation, *and* whose contracts are payable in foreign exchange, are *not* required to covert foreign currency except to pay obligations in local currency. Companies *not* covered under this exception must convert proceeds from their sales in foreign exchange into pesos. Neither may these companies purchase foreign currency on the exchange market to cover payments abroad, such as for imports, debt payments or payments for services rendered by residents abroad. Imports of capital goods, spare parts, and other supplies for the exclusive use of such companies are non-refundable.

Under Article 4 of Decision 291 of the Andean Community, investors from both signatory countries and *other* countries have the right to transfer to the exterior net profits from FDI in freely-convertible exchange. Article 5 also grants such investors the right to re-export amounts obtained upon sale of equity in, or disinvestments from, their investments upon payment of applicable taxes. Article 17-07 of the G-3 Treaty states that "each Party shall permit all transferences related to the investment of an investor of another Party in its territory (at the exchange rate current in the market on the date of the transaction) to be made freely and without delay", while providing exceptions in the case of "exceptional or grave difficulties in the balance of payments", in which case a Party ". . . has the right to limit temporarily, and in an equitable and non-discriminatory manner, such payments in accord with internationally-accepted criteria."

Taxation of FDI

Under Article 338 of the Constitution of 1991, only the Congress can impose taxes during peacetime. Whilst public officials may establish the rate of taxation, only the Congress can ordain the systems and methods for establishing profits and losses and forms of payment. The basic income tax is imposed by Law 488 of 1998 and regulated by Decree 624 of 1998, the "Income Tax Statute", and by subsequent laws amending it. In December 2000, a new tax reform was inaugurated under Decree 633 of that year. It aimed at improving tax collection in order to contribute to the elimination of a worsening fiscal deficit. The reform basically consisted of a tax on financial transactions.

For purposes of the income tax, foreign investors are defined as those foreign corporations or other entities properly constituted under the laws of their home country, whose principle domicile is abroad. Taxable income is determined by the formula gross income less costs less appropriate deductions less exempt income equals taxable income. Since 1995, the basic tax for domestic and foreign corporations, as well as for branches thereof, has been 35 percent of taxable income, with however, a surtax established under Law 788 of 2002 of 10 percent for 2003, and five percent for 2004 and subsequent years. The law presumes a minimum taxable income of no less than six percent of the liquid asset value of the firm as of the last day of the prior tax year and assesses income tax thereon. Technical services are taxed at a rate of 10 percent of earnings. Foreign-owned corporations, affiliates, branches, or agencies may deduct from their income, expenses for management, royalties, and/or the use or acquisition of intangible goods, provided the corresponding tax is withheld. Expenses are deductible that were made abroad and have a causal relationship with the revenues of a national source, provided there was withholding at source and if what was paid constituted taxable income for its beneficiary in Colombia. The deduction is limited to 15 percent of the liquid income of the taxpayer.

Dividends of corporations remitted abroad are taxed at 38.5 percent and 36.75 percent in 2003 and 2004, respectively. However, if dividends or shares are reinvested in Colombia, payment of the tax is deferred whilst such amounts remain reinvested, and, if they remain reinvested for five years or more, they become exempt from the tax. There also is a 7 percent income remittance tax applied to income obtained in Colombia by foreign enterprises through branches established in Colombia. Finally, there are also taxes on real estate, a notarial/documentary tax, and a financial transactions tax. Subsidiaries, affiliates, or branches of foreign companies may deduct from their gross income expenses for management, royalties, and/or payments for the use of intangible goods providing the corresponding tax has been withheld.

In addition, there is a Value-Added Tax (VAT) applied to certain commercial operations such as sale of movable goods, rendition of services, or imports of merchandise. The VAT is basically 16 percent, although there are differing rates from 7 to 25 percent for specifically-determined transactions.

Complaints have been raised by the foreign investor community that the tax laws in Colombia do not reflect either transparency in administration nor stability or certainty for economic concerns, whether domestic or foreign, because of their constant changes and adjustments as well as for the frequent introduction of new taxes or administrative rules.

Foreign investors say that the most important resolution to these problems is the formulation of some kind of guarantee of stability in direct tax levels and in the elements for determination of the tax base, together with the allowance for transition periods when changes in rates or rules are introduced. The GOC is looking towards comprehensive reform of the tax system to reduce the levels of taxation, limit exemptions, and widen the tax base. To this end, and in order to allay investor concerns over unexpected changes in the tax code, the Colombian Congress enacted legislation in 1995 – the Special Tax Stability Regime – authorizing the GOC to enter into corporate *contracts* guaranteeing contracted investors a *fixed* tax rate for 10 years. In return for this guarantee, the company would pay an additional two percentage points in corporate income taxes, with the two percent pledged to be eliminated in the near term. A reinvestment of corporate profits in Colombia for a period of five or more years would allow the investor to avoid the otherwise mandatory seven percent dividend withholding tax or the seven percent remittance tax (depending on the method of repatriation). But it is not certain whether this law was ever implemented or remains in effect, nor its effects on the this year´s draft Investor Confidence legislation (described later).

With regard to the inclusion or not of tax provisions in any future investment-related bilateral agreements, the Negotiating Guidelines issued by the GOC in 2001 state that:

> It has been the position of the Colombian Government that tax matters are
> Treated autonomously and independently, since this is an area that is the
> focus of other types of agreements, and, therefore, they are excluded from the
> scope of investment agreements. For this reason, (Colombia´s) treaties signed
> up to the moment do not include tax matters. This position should be main-
> tained, and negotiations of bilateral treaties for the avoidance of double taxation
> should be realized independent of Investment Agreements.

Nonetheless, it appears that Colombia has never concluded any general bilateral treaties for the avoidance of double taxation, though it has concluded certain limited, sector-specific agreements that treat of tax incidence and administration. Decree 1551 of 1978 of the Andean Pact contains provisions to avoid double taxation among members of the Andean Community.

Intellectual Property Rights

Within Colombia, "intellectual property" is held to include literary and artistic works protected via Copyright, and "industrial property" that includes new creations/inventions, trade secrets, and distinctive signs, protected by Patents and Trademarks. The legal regime for intellectual property rights (IPR) starts with Article 61 of the Constitution of 1991, which provides that "El Estado protegera la propiedad intelectual por el tiempo y mediante las formalidades que establezca la ley."

Law 23 of 1982, Law 44 of 1993, and Decision 351 of the Andean Community, together with various decrees of the competent authorities, form the legal regime governing Copyright. Copyright extends protection to artistic, scientific, and literary works as well as to the rights of artists, interpreters, and producers of sound recordings and software, whether operational or application type and whether in source or object code. Reproduction of copyrighted material, even for personal use, requires the owner or copyright holder´s permission. Protection of artistic and literary works does not rely on registration, so that absence or failure of registration does not prevent them from being protected, but it is recommended for negotiations regarding rights and their vindication in the courts. Registration is with the Direccion Nacional de Derechos de Autor.

Industrial property is primarily regulated by Decisión 486 of the Andean Community, made effective for Colombia via Decree 2591 of December 2000 and Regulatory Resolution 210 of January 2001. Industrial property protection divides into two basic categories: new creations (patents) and distinctive signs (trademarks). New creations include invention patents, utility-model patents, industrial designs, and integrated circuit layout designs. Distinctive signs include trademarks, trade slogans, trade names, and emblems.

Expropriation & Compensation

The 1999 amendment of Article 58 by the Congress resolved one significant concern of foreign investors. Prior to the amendment, that Article provided that in the interests of equity, the legislature could determine which cases do not warrant the payment of compensation, by an affirmative vote of an absolute majority of the members of both Houses of Congress. Nevertheless, even with that significant response to investor concerns, an important concern remains given that none of the articles in the Constitution provide for *judicial review* of (a) the *legitimacy* under law of legislative and/or administrative expropriation, nor (b) nor the *adequacy* and *form of payment* of compensation. (Colombia is a signatory to international agreements providing for protection against political risks through both the U.S. OPIC and World Bank MIGA programs.) This concern is heightened given that most Western Hemisphere agreements treating of foreign investment and expropriation include an express requirement for judicial review.

Ownership of private property is incorporated into the Colombian Constitution, but subject to certain conditions. Article 58, Paragraph 1, of the Constitution of 1991 provides that "Se garantizan la propriedad privada y los demas derechos adquiridos con arreglo a las leyes civiles, los cuales no pueden ser desconocidos ni vulnerados por leyes posteriores." However, it goes on to say "Cuando de la aplicación de una ley expedida por motivos de utilidad publica o interes social, resultaren en conflicto los derechos de los particulares con la necesidad por ella reconocida, el interes privado debera *ceder* al interes publico o social." And Article 333 of the Constitution provides that "La ley determinara el alcance de la libertad economica cuando asi lo exijan el interes social, el ambiente y el patrimonio cultura de la Nacion."

Paragraph 4 of Article establishes the basic conditions to the exercise of the State of its rights described above. It provides that "Por motives de utilidad publica o de interes social definidos por el legislador, podra haber expropiacion mediante sentencia judicial e indemnización *previa*. Esta se fijara consultando los interes de la comunidad y del afectado. En los casos que determine el legislador, dicha expropiación podra adelantarse por via administrativa, sujeta a posterior accion contencioso administrativa, incluso respecto del precio." A judgement of the Constitutional Court in 1994 stipulated that compensation ". . . must fully repair the damage, as it must cover consequential damage and the loss of potential earnings incurred by the owner of the expropriated property." Similarly, Article 365, Paragraph 2, of the Constitution provides that "Si por rezones de soberania o de interes social, el Estado, mediante ley aprobada por la mayoria d los miembros de una y otra camara, por iniciativa del Gobierno decide reservarse determinadas actividades estrategicas o servicios publicos, debera indemnizar *previa y plenamente* a las personas que en virtud de dicha ley, queden privadas del ejercicio de una actividad licita."

Unfortunately, the Andean Community rules do not mention either expropriation or indemnification. The G-3 Treaty, however, provides, in Article 17, that compensation shall be equivalent to the fair market value of the investment at the time of expropriation, and shall not reflect any change in value owing to the fact that the intent to expropriate became known prior to the date of such action. It goes on to provide that compensation shall be fully realizable and freely transferable and payment shall be made without delay. Moreover, it states that the amount of compensation should be sufficient to ensure that, should the investor decide to transfer the payment, it can obtain an equal amount of the international currency normally used by the party making the expropriation, and, finally, such payment should include interest at the current market rate for the currency used. Article 7.1 of Colombia´s 1994 BIT with Peru provides for "prompt, adequate and effective compensation" based on the genuine value of the investment immediately *before* the expropriation or at the time the impending expropriation became public or effective, whichever is earlier, and paid without delay, and effectively realizable, freely transferable, and subject to judicial review. This reflects substantially similar requirements in the NAFTA Agreement.

Dispute Resolution

There are two remedies available in the event of investor disputes with the GOC: (a) international arbitration as earlier described in the sub-section of this report entitled Investment-Related Dispute Resolution; and (b) arbitral and/or judicial resolution in Colombia under its laws. As to international arbitration, Colombia is a party to the 1965 Washington Convention that established the International Centre for Investment Disputes Between States and Nationals of Other States (ICSID) as well as of the New York, Panama, and Montevideo Conventions described in the earlier sub-section. (It should be noted that the USA is a party to both the New York and Panama Conventions, but with reservations, and is not a party to the Montevideo Convention.)

As to resolution under the laws of Colombia, Law 315 of 1996 authorizes the inclusion of an international binding arbitration clause in contracts between foreign investors and the GOC, while Decree 1818 of 1998 provides for alternative resolution of controversies. The law allows contracting parties to agree to submit disputes to international arbitration, *provided* that the following conditions are met: (1) the parties are domiciled in *different* countries; (2) the country or state where an important part of the contractual obligations under dispute are to be met is *not* the one where the parties have their main domicile; (3) the place of arbitration agreed on by the parties is in a country or state *other* than the one where they are domiciled; (4) the subject matter of the arbitration involves the interests of *more* than one country, as expressly agreed by the parties; and (5) the dispute has a direct and unequivocal impact upon international trade.

In the absence of an international arbitration clause, Article 23 of Resolution 51 of 1991 mandates that the dispute be submitted to the judicial system for arbitration and enforcement of any arbitral award under Colombian law. The problem for foreign investors is that the arbitration process in Colombia is complex and dilatory, especially with regard to enforcement of awards. Before a party can proceed with arbitration, it is required to obtain an *exequatur* (in effect an authorization or license) from the Supreme Court, the requirements for which exceed those provided for in Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards relating to *refusal* of recognition and enforcement of an award. Even then, *no* awards are enforceable to the extent they involve rights relating to *real property* situated in Colombia.

So, despite Colombia´s adhesion to international arbitral conventions and its domestic legal framework for arbitration and resolution of disputes, foreign companies have been subject to lengthy dispute settlement processes. It is known that there are two significant outstanding investment disputes involving U.S. companies. One claim of a U.S. investor has reportedly been pending in the Colombian judicial system for over ten years, notwithstanding rulings in its favour by local courts, only to have the case referred to an administrative agency whose decision has been further delayed.

Moreover, it should be noted that there is pending in the Colombian Congress an unified arbitration/alternative resolution measure designed to modernize the current arbitration/enforcement system. The measure would modify and unify existing laws and judicial procedures for arbitration at the international and national levels and affect the rights of both investors and the State, but with some concern reported on the part of investors that its enactment could permit judicial *revision* of international awards, thereby permitting substantive review of the findings and logic of the decision, making even more difficult the enforcement of arbitral awards against the State.

Colombia has negotiated five bilateral investment treaties (BITs), with Cuba, Great Britain, Peru, Spain, and Chile, none of which are yet effective because of unresolved constitutional issues. In the past, conclusion of a BIT has been a precondition for entry into a US FTA. Agreement on the provisions for adequate resolution of any bilateral investment disputes would be a necessary part of any FTA.

Article 10 of the Andean Decision 291, which forms part of the Colombian FDI legal regime (as to other Andean Community member states) and relates to resolution of disputes arising out of foreign investment, states simply: "In settling disagreements or disputes arising from direct foreign investments or investments by Subregional investors or transfers of foreign technology, the Member Countries shall abide by the provisions of their *domestic* legislation." Article 17-16.2 of the G-3 Treaty contemplates the possibilities for resolution of disputes via consultation and negotiation, while Article l7-17 establishes rules and a timetable for the reference of such disputes to *international* arbitration under various international conventions. Article 17-18 describes mechanisms for the arbitration of disputes, including a "cooling-off" period and actions required of investors to request arbitration.

Generally speaking, all BITs and FTAs in the Western Hemisphere, including MERCOSUR, include separate provisions dealing with investor/State disputes. All provide for arbitration as a means of settlement of such disputes, and all include a reference to a specific institutional arbitration as opposed to what is normally the case in State/State disputes where they are referred to *ad hoc* arbitral tribunals, often without established procedures. Most such treaties refer to arbitration under the ICSID Convention, but some of the more modern ones include alternative forms of arbitration, such as under the U.N. Commission on International Trade Law´s (UNCITRAL) rules. Most require that the investor and the host state seek to resolve the dispute amicably through consultation and negotiation *before* submitting it to arbitration. Arbitration is generally preferred to recourse to national courts, but a number of treaties, including U.S. BITs, provided for arbitration *only* if the investor has not first had recourse to local courts.

The G-3 Treaty has some similarities to the North American Free Trade Agreement (NAFTA) treaty between Canada, Mexico, and the United States. NAFTA provides that parties to an investment dispute must *first* attempt to settle a claim through consultation or negotiation (Article 1118). It provides that an investor on one of the Parties may submit to arbitration a

claim that the other Party has breached an obligation under the Investment Chapter of the NAFTA, provided it has incurred loss or damage by reason of such breach. The NAFTA contemplates its own "tribunal" to resolve investor claims, but provides that an investor may submit the claim to arbitration under either ICSID or UNCITRAL arbitration rules and utilizing the facilitating procedures of one or the other. Member countries are responsible for enforcement of any award in their territory.

It should be noted that the United States has shifted its negotiating position with regard to investment dispute resolution somewhat away from the NAFTA prescriptions. It´s new position may be seen in the forthcoming Uruguay – U.S. BIT negotiations beginning early next year.

MERCOSUR provides that, if it is not possible to settle a dispute amicably within six months, it will be submitted at the request of the investor to one of the following: (a) competent tribunals of the host Party; (b) international arbitration (ICSID or UNCITRAL), or (c) under a permanent dispute settlement mechanism to be established within the framework of the Treaty of Asuncion that established MERCOSUR. The arbitral body must decide the dispute in accord with the provisions of the MSERCOSUR Treaty, the terms of any specific agreement between the State and the investor, the laws of the State involved, and principles of international law. The State is required to enforce any award according to its *own* laws

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FDI & Export Incentives, FTZ & Other Special Zones, and Performance Requirements

All investors are concerned with risk avoidance, and thereby evaluate the attractiveness of a foreign country in terms of the risks that must be confronted in FDI. A typical response on the part of many nations is to attempt to lure FDI and allay foreign investor concerns – as well as distinguish themselves from other regional competitors for new FDI – by the offering of investment "incentives".

Investment incentives fall into three basic categories: (a) Fiscal, (b) Non-Fiscal, and (c) General FDI Macroeconomic or Investment Climate-Based. The former two relate specifically to individual investor/investment transactions, whilst the latter is more general in nature. Very generally, the purposes for FDI-related incentives include promoting: (a) the overall development of the economy; (b) the development of specific sectors of the economy and/or under-developed regions of the country; (c) transfer of technology; (d) development of small and medium-sized enterprises; and (e) employment generation and worker capacitation.

Fiscal, or tax-based, incentives can include, *inter alia*: duty-free treatment or reduced duties on imported inputs, machinery, capital goods, or raw materials ; tax holidays or partial exemption from income taxes; deductions from tax liability; accelerated depreciation; income tax credits; drawback on customs duties paid; exemption from or reduction of VAT; and exemption from export taxes; tax-free remission of profits or repatriation of capital. Non-fiscal incentives can include: reduction of sectoral restrictions; No (or reduced) local equity requirements; contributions of land or infra-structure; provision of public services at no or low cost; allowance for sales into the domestic economy (in the case of free zones); credit against or reduction of social security payments: reduce worker wage rates; free currency convertibility or preferential availability of foreign exchange; or grants, subsidies, or financial guarantees. Often, however, the "price" to be paid for realization of either fiscal or non-fiscal incentives is the meeting of various expectations, e.g., required local content, export performance, employment generation, domestic equity, and/or technology transfer requirements.

General macroeconomic/FDI climate-related incentives not targeted to specific FDI can include: pro-investment macroeconomic policies; a facilitative commercial regime; low-risk, dynamic business environment; an outward-looking, open and competitive economy; transparent, timely, minimum investment admission/establishment requirements; simplification of administrative requirements; private property (including intellectual property) rights protection and enforcement; lack of official corruption; access to privatisation; stable national currency; restraint of monopolies; adequate public infrastructure; high-quality, educated, and productive workforce; and demonstrated foreign investor satisfaction.

Use of Incentives to try to attract new FDI often generates issues, especially with respect to fiscal incentives, relating to their duration, timing of entry into effect (whether before or after profit generation), performance requirements imposed as a condition to the granting and enjoyment of such incentives, and/or preservation of acquired rights when incentives laws are change subsequent to granting of incentives.

Colombia´s FDI-Related & Other Incentives

Colombia has a number of fiscal incentives, including: deductibility of income realized by new investments in agricultural plantations dedicated to the cultivation of fruits, anchovies, rubber, and cacao; deductibility of income generated from new investments in Environmental enhancements or control once such investments are accredited by the environmental authority; certain fiscal incentives related to investments deemed to generate new employment or production in areas impacted by recent natural disasters; a fiscal credit authorized under Law 633 of 2000 for salary and supplementary payments made to new employees; and exemption from income tax of income arising from the operations of public service enterprises (water, electricity, local telecommunications, and natural gas).

Duty-Free & Export Processing Zones

Colombia regards foreign trade or free zones, duty-free and export-oriented assembly/processing zones, as channels of industrial, commercial, and technological development largely focused on overseas markets. It has approximately nine duty-free zones (zones francas) and in July 2001, Law 677 of 2001 created five new Special Economic Export Zones (Zonas Economicas Especiales De Exportacion or ZEEEs).

Colombia´s Zonas Francas

Colombia has nine zonas francas, the first of which dates from 1958. Decree 97 of 1993 established the tariff structure for the Zonas Francas. Originally public sector entities, Law 7 and Decree 2131 both of 1991 authorized their transformation into private sector establishments. The zones are regulated under Decree 1227 of 2002. The zones are declared and approved by the Ministry of Foreign Trade after authorization from the DIAN, and are distinguished by firms dedicated primarily to production for export. Users of zones francas include zone operators, developers, industrial manufacturers, and industrial service firms. Foreign investments in such zones may include: transfers of capital for their establishment and operation, contributions of machinery and equipment, raw materials or intermediate goods, technical services, intangible assets, and capitalization/reinvestment of profits generated by activities in the zone. The zones are engaged in activities involving manufacturing, assembly/processing, storage, preservation, management, packing, re-packing, classification, cleaning and distribution of goods for foreign or domestic markets.

The principal fiscal incentives include: exemption from income tax for receipts derived from exports, exemption from customs duties and from VAT otherwise imposed on capital goods, equipment, supplies, and spare parts imported from abroad to be used in the zona franca; and exemption from tax imposed on the repatriation of profits by foreign enterprises. Additionally, foreign currency benefits available to entities in the zones francas include: possession and use of hard currency, opening of current accounts in foreign currencies in Colombian and foreign banks, payment to the exterior for goods and services obtained in third countries, and the contracting of credits or other debts in foreign currency. Finally, Decree 2233 of 1996 afforded even more incentives including allowances for importation into the domestic market of up to 25 percent of zona franca production, establishment of commercial operations without need for a new enterprise, unlimited storage of inventory, and allowance for the transit of semi-processed goods for final or partial processing and ultimate exportation.

ZEEEs

Decree 1227 of 2002 provides the regulatory framework for the Zonas Economicos Especiales de Exportacion. They are located in Buenaventura, Cucuta, Ipiales, Tumaco, and Valledupar. ZEEEs are a specified area of Colombian territory dedicated to *new* enterprises engaged in industrial manufacturing and/or the rendition of services *primarily for export*. Firms must export at least 80 percent of production to qualify for the incentives. The advantages of ZEEEs operations incude labor and tax incentives. Labor incentives include exemption from additional wages for holidays or overtime and reduced social security, health, and other employee benefits. Fiscal incentives are the same as provided in the zones francas. Remittances abroad of income from ZEEEs are not subject to income or remittance taxes. In

order to realise the incentives for operation in ZEEEs, investments must be less than one million U.S. dollars during the first two years of operation but must ascend to two million within four years. Such incentives may be granted for a period up to 50 years. ZEEEs are governed by the same customs regulations as free trade zones.

Plan Vallejo, CERT & SIEX Programs

Other duty-free zones currently authorized by Colombia are the "Plan Vallejo" and the CERT Program. The Plan Vallejo (PV) is a program for national economic development under which firms involved are provided customs duty and VAT exemptions on the import of capital goods, raw materials, and spare parts used to manufacture goods subsequently exported. Imports of raw materials, however, remain subject to VAT. In order to qualify for the tax exemption in the case of capital goods, the producer must show that at least *70 percent* of the product produced is *exported*, while, in the case of raw or partially finished materials, the producer must *export* a value equal to *1.5 times* that of the value of imported material. Resolutions 1791 of 2002 and 011 of 2003 were issued to adjust the terms of the PV to comply with Colombia´s obligations under the GATT/WTO Uruguay Round Agreements on Trade-Related Investment Measures (TRIMs) and Subsidies and Countervailing Measures (SCM). Studies indicate that exports generated under the PV involved several firms with foreign investment.

Law 48 of 1983 created a tax rebate certificate program (CERT) designed to subsidize production for export of non-traditional products. The certificate represents a credit issued to Colombian exporters with a two year maturity, that is applicable to taxes on income, customs duties and certain other taxes of between 2.25 and 6.5 percent. It is freely negotiable and can be sold in the secondary market. The *amount* of the CERT is calculated as a flat percentage of the value of goods *exported*, and varies by product and country of destination. CERTs are not available for exports to the Andean Community countries or to the U.S. or for production originating in free trade zones. Historically, sectors most benefiting from the CERT include Agriculture, Textiles & Clothing, and Meat Products. In furtherance of its representation to the WTO that it would phase-out CERTs by 2002, CERTs´face value were decreased and currently range from zero to 4.5 percent, and Decree 1989 of 06 September 2002 set the future percentage value of CERTs at zero percent, while Law 779 of 18 December 2002, in effect, liquidated all remaining Government liabilities for such certificates at $P 300 mil milliones. Another program, Colombia´s Special System for the Import/Export of Capital Goods and Spare Parts (SIEX), grants tax and duty exemptions for such goods for use by exporting companies.

Other Special Programs

Two programs, one for capital goods and one for spare parts, allow the temporary import of capital goods or spare parts with total elimination of customs duties, if the goods are used in the instalment, expansion, or replacement of productive units used to produce *export* goods or to provide services directly related to the production of *export* goods. The Special import/export program for services exports allows the temporary import of capital goods and spare parts, with partial or total suspension of customs duties and deferment of VAT, that support the export of various services, including lodging, air transportation, investigation and development, consulting and administration, architecture and design, engineering, value-added telecommunications services, health, and software development. Beneficiaries of this program must export an amount equivalent to or over *1.5 times* the FOB value of the imported goods, ensure they are used only as temporary imports, and refrain from selling or using them for purposes not allowed under the program. The Industry and Commerce Tax is a *municipal* tax on industrial, commercial, or service activities performed within the municipality´s territory. Exports do not pay the tax.

Finally, Colombia has a number of Zonas de Desarrollo (Development Zones) created and provided incentives for investment in small/medium-sized enterprises operating in the Forestry, Tourism, Telecommunications, Petrochemical, Textiles, Steel, Agroindustrial, and Software sectors.

Performance Requirements: GATT/WTO Considerations

Performance requirements, whether FDI or Export-related may involve: (a) foreign exchange equalization (importer input costs versus foreign exchange generated from resulting exports); (local content requirements; (c) required export levels; (d) employ-ment generation; and/or (e) technology transfer requirements. When employed with specific reference to incentives for *investment* (as opposed to export generation conditions), such requirements have been referred to as "trade-related investment measures or "TRIMs". Use of TRIMS to condition enjoyment of FDI incentives presents issues for governments of countries that are Members of the WTO, including Colombia, which are obliged to conform their FDI-related legal/regulatory regimes to the requirements of the GATT/WTO. The TRIMs Agreement requires that all TRIMs inconsistent with GATT provisions must be notified to the WTO secretariat along with their principal features (in the case of TRIMs applied under *discretionary* authority, each such application must be notified) and, subject to certain exceptions, must have been phased out by 01 January 2000.

Incentives as such are not prohibited under the GATT/WTO framework of rules for global trade, only those that constitute Trade-Related Investment Measures (TRIMs) or provide export subsidisation. The Uruguay Round TRIMs Agreement generally prohibits the following types of TRIMs: (1) so-called "domestic content" provisions that require that an

enterprise must buy or use products from a domestic source or of domestic origin; (2) provisions that limit an enterprise´s use of imported inputs or other supplies to a given percentage related, in terms of volume or value, to domestic production; (3) restrictions of imports by an enterprise of inputs used in or related to local production either generally or in terms of the volume or value of local products it exports (referred to as a "balancing requirement"; (4) restrictions on an enterprise´s access to foreign exchange to pay for imports to a percentage reflecting its foreign exchange earnings from its exports; and (5) restrictions on an enterprise´s exports of products to a percentage, by volume or value, of its domestic production. The TRIMs Agreement regulates *only* performance requirements specifically imposed as conditions to *investment* incentives.

Nevertheless, the GATT/WTO framework also imposes obligations on Member countries relating to export promotion and *export*-related performance requirements, some of which may also qualify as TRIMs if their effect is to condition the enjoyment of export incentives by foreign investors. Article XVI of the GATT´94 and the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM) prohibit the use of *export subsidies* by WTO Members and provide remedies in the form of countervailing duties and/or dispute settlement procedures that could result in the removal of trade benefits enjoyed by the offending country. Paragraph 4 of Article XVI states that a Member of the WTO must cease to grant (if it does), either directly or indirectly, *any* form of subsidy on the export of any product other than a primary product (subject to its own rule), which subsidy results in the sale of such product for export at a price *lower* than the comparable price charged for the same or like product to buyers in the country´s domestic market. Among the subsidies that can contravene Article XVI and the SCM Agreement are those that: (1) provide a financial contribution where: (i) government practice involves a direct transfer of funds (grants, loans, equity infusion, etc.), potential direct transfers of funds or liabilities (loan guarantees); (ii) government revenue otherwise due that are foregone or forgiven (drawback) or otherwise not collected (tax credits); (iii) government provision of goods or services or purchases goods); or (iv) government payments to a funding mechanism, or entrusts or directs a private body to undertake one or more of the functions in (i) through (iii) above which would normally be vested in the government, *or* (2) there is any form of income or price support, *and* (3) a benefit is thereby conferred.

The GATT/WTO prohibits subsidies that are granted *contingent* on export performance or on the use of *domestic* over *imported* products (note similarity to TRIMs rule). Members of the WTO are forbidden to maintain or grant *prohibited* export subsidies and are required to ensure the conformity of their laws, regulations, and administrative procedures by 01 January 1998 and, in the case of *developing* countries (like Colombia), required to phase them out by 01 January 2003. Moreover, if a Member country had *no* export subsidies as of the entry into effect of the WTO Agreement (01 January 1995), then it may *not* institute a *new* such subsidy or *increase* the *level* or *scope* of existing subsidies thereafter (known as a "standstill" requirement). Subsidies on Agriculture products are covered by the UR Agreement on

Agriculture, and are required to be phased-out subject to Colombia´s specific commitments under that Agreement.

Based on Colombian notifications to the WTO, the WTO Committee on Subsidies has identified the following Colombian programs as export subsidies: (1) the Plan Vallejo and (2) the CERT program. It appears that apart from export incentives relating to the operation of special or free zones, Colombian law and/or regulations *do not* currently impose specific *TRIMs*-regulated performance requirements. However, measures imposing performance requirements on either foreign or domestic investors in Colombia´s duty-free zones, SIEX program, or zones francas, would appear to violate Colombia´s obligations and commitments under the UR SCM Agreement as described above and must, eventually, have been phased-out by 01 January 2003. But, in 2002, Colombia requested an extension for its Zonas Francas and SIEX programs. In December 2002, the WTO Committee on Subsidies and Countervailing Measures extended Colombia´s phase-out period until 31 December 2006. As reported to the WTO, this process began with a dialogue between the Ministry of Foreign Trade and the various Free Zones, resulting in a draft decree to modify Decree 2233, consideration of which is being finalised at the technical level between the Ministries of Foreign Trade and Finance and Public Credit which would extend these programs until 2006.

Decision 291 of the Andean Community specifically permits performance requirements (not regulated by the GATT/WTO framework) for the license of technology, technical assistance, technical services and other technological contracts in accordance with the laws of the member countries. The G-3 Treaty, however, as well as certain Canadian and U.S. BITs and most free trade arrangements in the Western Hemisphere prohibit performance requirements as conditions for the establishment, acquisition, expansion, management, conduct, or operation of a covered investment. In the case of the G-3, these include requirements for specific geographic location of production facilities, employment-generation requirements, and worker capacitation requirements.

Government Procurement

The last paragraph of Article 150 of the Constitution of 1991 empowers the Congress to enact a general statute of government procurement, and, in particular, procurement by the National Government. But the legal/regulatory regime does not contain an *express* definition of public sector procurement. Under Article 209 of the Constitution, the administrative function (of which government procurement is a part) must serve a general interest and be performed in accordance with the principles of equality, morality, efficiency, economy, celerity, impartiality and publicity. Execution of contracts entered into outside of Colombia may be governed by the regulations of the foreign country where the contract was executed, unless they have to be performed in Colombia. In such case, they must be ruled by Colombian law. But contracts entered into in Colombia that are to be executed *abroad* are subject to the law of the country where they are to be executed. Contracts financed by multilateral credit organizations or

entered into with foreign public agencies for cooperation, technical assistance, or international aid organizations, may be subject to the regulations of such entities in all matters regarding formation and awarding procedures, compliance, payment, and adjustment clauses.

Law 80 of 1993, as supplemented by Decree 679 of 1996, contained the basic conditions affecting public procurement until its amendment by the recent enactment of Law 816 of 2003. The laws apply to every public organization and entity, at both centralized and decentralized levels, e.g., national, departments, regions, provinces, indigenous territories, districts, municipalities, metropolitan areas, municipality associations and public establishments, commercial and industrial companies, and mixed economy corporations. It gives equal treatment to foreign and domestic companies on a *reciprocal* basis. However, if conditions of offer are equal, preference is given to the offer utilizing more national components such as domestic workers and domestic content of inputs, as well as technology transfer. It appears that the Codigo de Comercio´s rules for public contracting requires foreign corporations to constitute branch offices in Colombia in order to enter into contracts with the State.

Law 80 establishes certain exceptions to the law that allow for direct purchasing, e.g., contracts for minor amounts, emergency supplies, certain loan agreements, individual professional services, lease or acquisition of real estate, goods and services required for national defense and security, and lack of bids and/or bids failing to conform to the terms of reference or specifications. It also authorizes some form of reimbursement for the private contractor when conditions facilitating performance of the contract have changed, either by agreement among the parties or by submission of the issue to administrative adjudication. Contracts for exploration and exploitation of natural resources and those relating to telecommunications, television, long-distance telephone services, and specialized public services are governed by separate legislation.

Two contracting procedures are available: public or open bidding or direct purchase or contracting. Article 16 of the proposed new law would define "direct contracting" as " . . . the method of objective selection provided for those cases in which, by reason of the characteristics or purposes for the contracting, or the quantity or use of the good, work, or service, makes it advisable to ensure the efficiency of the contracting process and its requirements via an abbreviated process." The direct purchase procedure is used when the contract or purchase value is lower than a specified amount, depending on the annual budget of the entity, or in cases of tied loan conditions, inter-agency contracts (excluding insurance), artistic or exclusive professional services, leasing or purchase of real estate, emergency situations, inadequate number of bidders, goods and services relating to national defence and security, agricultural and related products available in commodity exchange markets, health services, and contracts affecting State enterprises.

A new draft proposal orchestrated by the Department of National Planning and the Ministry of Transportation would amend existing laws relating to government procurement. Article 21 of the proposed new law would require publication of the specifications or terms of reference

" . . . for the purpose of advising the public in general of the information necessary to comment on its contents." State entities would be required therein to specify the guarantees necessary to cover the most relevant risks," and to point out the requirements for such guarantees when it is not possible to obtain bank guarantees or insurance. Under current procedures, prior to publishing calls for tenders and initiation of the procurement process, Government entities submit to the chambers of commerce of their jurisdiction the general information on each such tender. On the basis of this information, the chamber publishes a monthly bulletin that serves as a means of disseminating the information to future participants. The bulletin is published within the first 20 calendar days of each month. Its information does not include final conditions and specific requirements that may appear in the bidding documents. Public entities also publish calls for tenders in major circulation newspapers some 10 to 20 calendar days before opening of offers. The notices contain information on the object and characteristics of the tender such as the name of the procuring entity, type of procurement, number of the tender, object of the procurement, place where the tender documents can be obtained, value of the procurement, and the place, date, and time of opening of offers as well as conditions of participation and evaluation factors.

Law 80 established a central, unified register of suppliers maintained by local chambers of commerce. National firms must register with local chambers of commerce. Foreign firms have to submit to the register proof of similar registration in their country of origin and appoint a legal representative in Colombia. Under the proposed new government procurement law, the National Government would define by regulation the nature and scope of qualification and classification factors required for the Register. State entities would be required to submit three times a year information describing the contracts concluded, their quantity, degree of compliance therewith, and any sanctions or fines issued with regard thereto. In this regard, Article 12 of the proposed new law would require that any processes relating to sanctions for non-compliance must be undertaken under administrative due process. These requirements for registration may pose a potential barrier to entry for foreign firms.

Qualified bidders are classed according to their experience, and their technical and financial capacities. In addition to registration, bidders must submit a guarantee of seriousness or a deposit, usually equivalent to 10 percent of the estimated budget. Under

Article 26 of the proposed new law, public entities must make information public relating to their evaluation of bids with the goal of affording bidders the opportunity to make such observations as they deem necessary and to adjudicate all bids in public. Article 39 of the draft law establishes the Consultative Council on State Procurement whose role will be to review and advise with regard to the public policy relating to government contracting and the efficacy thereof.

Law 80 granted equal treatment to foreign companies on a reciprocal basis and eliminated the 20 percent surcharge previously added to foreign bids. But Law 816 departs from this treatment in its regulation of the evaluation systems used in public bids and tenders. Instead,

it provides for specific percentages of the score in an evaluation process to be given to offers incorporating Colombian goods and services and the fact concerning the nationality of the ingredients composing the goods and services offered. According to Article 2 of Law 816, governmental entities will assign between 10 percent to 20 percent of the total score of their evaluations to proposals offering Colombian goods and services, and, between 5 percent and 15 percent of such score to proposals incorporating Colombian components in the goods and services offered. In all cases, the favorability principle established in Law 80, according to which, in equal conditions to win a tender or bid, the government entity should prefer a Colombian offeror from a foreign offeror remains in force.

Under the new rules and taking into account the favorability principle, a specific bid could provide that 20 percent of the score would be determined by the nationality of the goods or services, and a Colombian offeror, scoring 20 percent less than a foreign offeror on technical or financial issues could obtain an equal score as the foreign offeror by the sole fact it is offering Colombian goods or services. In this case, the Colombian offeror would be awarded the contract pursuant to the favorability principle.

Nevertheless the law does provide for *equal* treatment for goods and services produced elsewhere whenever (i) Colombia has entered into a *treaty* for equal treatment on government procurement with such country of origin of the goods and services, or (ii) there is reciprocity for Colombian goods and services in the country of origin of the foreign goods and services.

Apart from the fall back in the new law in equality among domestic and foreign bidders enshrined in Law 80, there are other concerns for foreign investors. Under the Codigo de Comercio, hat companies without local headquarters must certify *reciprocity* in government procurement in the *home* country. This is intended to ensure National Treatment under the *same* conditions for Colombian bidders in other countries. The problem is that the U.S. Government is unable to provide such a reciprocity certificate since each of the 50 U.S. states acts as a separate commercial jurisdiction. Instead, the U.S. Department of State provides a certificate that U.S. companies can offer in lieu of a statement certifying reciprocity. Colombia is not a signatory to the Uruguay Round *plurilateral* Government Procurement Agreement although it has "observer" status.

Hemispheric Agreements Relating to Government Procurement

Neither the Andean Community nor MERCOSUR have rules relating to government procurement. However, the "New Strategic Design of the Andean Group", approved by the Andean Commission in 1995, establishes some guidelines on the subject. The document stresses the necessity of adopting legislation in the area of government procurement based on the parameters and taking as a reference the WTO´s plurilateral Government Procurement Agreement.

The G-3 has provisions providing rules for the three member countries affecting only federal government entities and government enterprises, although the Parties have undertaken to further negotiate to include lesser governmental units on a voluntary and reciprocal basis. Product coverage includes all goods and services including construction services, procured by listed entities unless they are expressly exempted. However, because of a number of reservations taken by Colombia, its obligations are less than those of Mexico. Colombia applies its national legislation for tendering procedures, including bid challenge procedures such that the G-3 provisions do not apply to it.

Chapter 10 of the NAFTA contains provisions on government procurement. While it extends to central governments and their entities, it does not extend to lesser governmental units. Government entities are listed in each country´s schedule. All goods and services are covered unless specifically exempted. Parties must accord goods, services, and suppliers of other Parties treatment no less favourable than accorded to domestic products, services and suppliers (National Treatment). Parties may deny benefits to a supplier of services of another Party if nationals of a non-Party own or control the enterprise and it has no substantial business activities in the territory of a Party. The use of offsets in the qualification and evaluation of tenders is explicitly prohibited.

NAFTA tendering procedures and qualification of suppliers provisions are similar to those of the Uruguay Round plurilateral agreement. Bids are subject to challenge. Parties must promptly publish any law, regulation, judicial decision, or administrative ruling of general application and any procedure covering procurement under the Agreement. The NAFTA provisions for government procurement do not contain dispute provisions specific to GP so that the dispute settlement rules of Chapter 20 apply.

Chile and Mexico have signed various ¨commercial complementation" agreements within the Latin American Integration Association (LAIA) framework most of which contain a similar provision to the effect that an administrative commission will, within the first year subsequent to the agreement´s entry into effect, define the scope and terms that will regulate government procurement purchases among signatory countries. For that purpose, it will focus on criteria established in the WTO Government Procurement Code (subsequently superceded by the WTO´s plurilateral GPA.)

Electronic Commerce

CONPES and the National Department of Planning are responsible for the legal and regulatory framework governing electronic commmerce. Colombia was the first Latin American country to adopt the United Nation´s Model Law on Electronic Commerce (MLEC) sometimes referred to as the UNCITRAL Model Code. The Colombian law, Law 527 of 1999, defines and established the rules for access to and use of electronic data, electronic commerce, and digital signatures. It applies to any kind of information in the form of data message used

in the context of commercial activities. It specifically establishes requirements for the binding effects of electronic data and electronic documents. The law recognizes the contracts concluded over the Internet and gives examples of the types of transactions that would be valid as part of an electronic contract. It also establishes the legal attributes of a digital signature to be valid. Law 527 grants regulatory authority to the Superintendency of Industry and Commerce.

Decree 1747 of September 2000, administers Law 527 with regard to certificates and digital signatures, and establishes minimum capital and other requirements for certifying agencies. Issues addressed in Law 527 include: (1) characteristics and requirements of certification entities (Art. 29); (2) activities of certification entities (Art. 30); (3) Remuneration for service rendering (Art. 31); (4) duties of certification entities (Art. 32); (5) unilateral termination (Art. 33); (6) activity discontinuance by certification entities (Art. 34); (7) certificate content (Art. 35); (8) acceptance of a certificate (Art. 36); (9) certificate revocation (Art. 37): (10) term of registry maintenance (Art. 38); (11) duties of subscribers (Art. 39); and (12) responsibilities of subscribers (Art. 40). Colombia´s intellectual property laws to electronic documents.

Resolution 307 of 2000 issued by the Telecommunications Regulation Commission regulates the Internet service providers, while Resolution 26.930 of 2000 issued by the Ministry of Economic Development and the Superintendency of Industry and Commerce establishes the standards for certification authorities. The Resolution classifies certification authorities into two groups, closed and open authorities, and set standards for each. Certification entities authorized by the Superintendency may include:public or private corporations of national or *foreign* origin, and chambers of commerce previously authorized by the Superintendency that observe the following requirements: (1) having sufficient economic and financial capacity to render the services authorised; (2) having the requisite technical capacity and elements needed to generate digital signatures, issuance of certificates on the authenticity thereof, and maintenance of data messages, (3) legal representatives or administrators must not have criminal records.

The GOC has worked intensively to promote E-Commerce in Colombia. In early 2000, it inaugurated a pilot program called the Agenda de Conectividad, which facilitate the completion of government-to-government and government-to-citizen transactions on-line. Its objectives were to (1) expand access to information infrastructure, (2) promote use of ICT is education and training as well as in business, (3) promote development of a national ICT industry, (4) generate national content, and (5) facilitate the Government´s on-line activity. The latter is designed to provide information by topic area, jurisdiction, and government branch. Users may find information about (i) administrative processes, (ii) government procurement, (iii) public institutions and individuals, (iv) legislation, and (v) Internet services for the handicapped. Still, the internet structure for e-commerce in Colombia lags behind the average of other Andean Community nations and Colombia, in 2000, had the lowest percentage of Internet use per 10,000 population of the South American countries and ranked last in e-sales in Latin America. Problems include high access costs and low Internet

penetration. Government agencies area not allowed to receive electronic payments directly or indirectly through Internet-based processing intermediaries. Security and privacy issues remain a source of public concern as well as for the banking and financial services sector. Some banks have taken measures to offer increased security and privacy to their clients, and the Government is working with the private sector to assure privacy and security.

In May 2000, Colombia and the United States signed a declaration in which both countries recognized the importance of electronic commerce and agreed to cooperate in removing barriers and to implement a transparent and non-discriminatory legal framework for such activity. The declaration outlines general principles that should guide governmental policy on e-commerce. It recognizes the private sector should lead e-commerce development and that governments should avoid unnecessary regulations or restrictions, and ensure their actions with regard to e-commerce are fully transparent.

Competition Policy

Purposes for Competition Policy

Competition policy (sometimes referred to as Anti-Trust policy) refers to a legal/regulatory regime designed to facilitate fair trade in an entrepreneurially-driven, investment-based, free market economy. It promotes open and fair trade by keeping markets open to new entrants, promoting consumer and user industry interests, and controlling undue concentration of markets in a few hands. It safeguards open competition in an economy through: (1) prohibition of hard-core cartels, (2) control of vertical restraints, and (3) review and control of mergers and acquisitions that could lead to creation of monopolies. Cartels can include domestic, import, export, and international cartels. Vertical restraints refers to anti-competitive action such as: (a) resale price maintenance, (b) refusal to deal, (c) certain exclusive dealing, (d) tied selling, and (e) predatory pricing. Competition policies are important to developing country economies because they can facilitate price liberalisation, deregulation, privatisation, and trade and investment liberalisation.

Colombian Framework for Competition

As is the case with many developing countries, Colombia suffers from a relatively high level of industrial concentration in a few large conglomerates and a lack of effective antitrust laws. Nonetheless, it does have a legal/regulatory framework governing restrictive commercial practices and unfair competition. Article 333 of the Constitution provides that it is a function of the State to prevent any obstruction or restriction to the free market and to avoid or control any abuse of dominant position in the Colombian market. This substantive area is governed by the Colombian Commercial Code as well as Laws 155 of 1959, Law 256 of 1996, and Law 446 of 1998 and Law 510 of 1999 that grant the Superintendency of Industry and Commerce, a technical agency of the Ministry of Planning powers to deal with unfair competition, and Decree 1302 of 1964 on restrictive trade practices, Decree 2153 of 2000 which restructured the Superintendency and authorised it to regulate competition, and Decision 285 of the Commission of the Cartagena Agreement, with Rules for Prevention or Correction of

Distortion in Competition Generated by Practices that Restrict Free Competition, which do not, however, govern integration and mergers. From 1962 the Ministry of Development was the competent authority with regard to any merger or integration. But, until 1992 there was no substantive application of antitrust or competition law.

Under Article 1 of Law 155, as amended by Article 10 of Decree 3307 of 1967, it is illegal to enter into any agreement that directly or indirectly tends to limit production, supply, distribution, or consumption of national or foreign raw materials, products, merchandise, or services, and, in general to engage in any practices , procedures, or systems that tend to limit free competition and to maintain or fix unfair prices. Article 46 of Decree 2153 provides that all conduct affecting free competition in the markets which pursuant to the terms of the Civil Code are considered to have an illicit purpose, are prohibited. Article 2(1) of Decree 2153 provides that the Superintendency of Industry and Commerce is authorized to ensure that the provisions on the promotion of competition and restrictive business practices are complied with throughout Colombia . . . in order to accomplish the following goals: improve the efficiency of the national productive system; ensure that consumers are free to choose goods and services and have access to the markets; ensure that firms may participate freely in the market; and ensure that there is a variety of prices and qualities of goods and services in the market.

This is accomplished through the semi-independent office within the Superintendency of the Delegate for the Promotion of Competition. The Office of the Delegate, in turn, works through three divisions, which include the Division for the Promotion of Competition, the Working Group on Unfair Competition, and the Chambers of Commerce Division.

For purposes of the law, the term "agreement" includes any contract, covenant or practice undertaken consciously or unconsciously in a parallel manner by two or more businesses. Article 45 of Decree 2153 provides the following agreements, *inter alia*, are considered to be contrary to free competition: (1) those whose purpose or effect is to directly or indirectly fix prices; (2) those whose purpose or effect is to impose discriminatory sale or marketing conditions for third parties; (3) those whose purpose or effect is to divide the markets between producers or between dealers; (4) those whose purpose or effect is to assign production or supply quotas; (5) those whose purpose is to assign, divide, or restrict the sources of supply of productive inputs; (6) those whose purpose or effect is to limit technical developments; (7) those whose purpose or effect is to condition the supply of a product to the acceptance of additional obligations which, because of their nature, were not contemplated in the purpose of the business; (8) those whose purpose or effect is to refrain from producing goods or services or affect their production levels; (9) those whose purpose is bid or contest rigging or collusion or division of contract awards, distribute tenders, or fix the terms of proposals; (10) infringe advertising standards as contemplated in the consumer protection statute. (11) influence a firm to increase the prices of its products or services or to give up its intention to lower such prices; and (12) refrain from selling or rendering services to a firm or discriminate against the same when such an act may be understood as retaliation for its price policy.

Under Decree 2153, "Dominant Position" is considered the ability to determine market conditions, directly or indirectly. The following activities are considered to be abuse of dominant position: (1) lowering of prices under the cost when the purpose is to drive on or several competitors out of the market, prevent them from entering the market, or prevent their expansion; (2) the use of discriminatory conditions for equivalent operations placing a consumer or supplier in a disadvantageous situation before another consumer or supplier with analogous conditions; (3) those whose purpose or effect is to condition the supply of a product to the acceptance of additional obligations not otherwise contemplated in the business; (4) sale to a buyer under conditions different from those offered to another buyer with the intent to reduce or eliminate competition in the market; and (5) sell or provide services in an area of the Colombian territory at a price different from the one offered in another area of the Colombian territory with the intent or effect to reduce or eliminate competition therein and the price does not correspond to the transaction cost structure.

The following conduct is *not* considered contrary to free competition: (1) the national government may authorize the signing of agreements or accords limiting free competition in order to defend the stability of a basic sector of goods and services in the public interest; (2) those whose purpose is to cooperate in research and development of new technology; (3) agreements on the compliance of standards, rules and measures not adopted as compulsory by the competent agency if they do not restrict the entry of competitors into the market; and (4) those concerning procedures, methods, systems, and ways of utilizing common facilities. Law 155 only provides regulations to control horizontal as opposed to vertical integration. In 2001, the Superintendency issued Circular 10 which provides that all concentrations are deemed approved by means of the simple approval of the competent corporate bodies, *except* those whereby the integrated parties control more than 20 percent of the relevant market and their total assets exceed a set level of minimum monthly wages. These procedures reflect similar simplification of procedures in the United States and other countries of Latin America.

Companies engaged in the same sector of production, supply, distribution, or consumption of a given article, raw material, product, merchandise or service, and whose individual or aggregate assets are twenty million pesos or more are required to inform the GOC of any plan for merger, consolidation, or integration among themselves. The Superintendency may initiate official action to determine whether there is an infringement on the rules for promotion of competition and restrictive business practices, either on its own or at the request of a third party and shall conduct a preliminary inquiry whose result will determine the need to conduct a full investigation. The Superintendency may object to such action when it would lead to undue restraint of free competition in the following cases: (a) when it follows agreements among the companies with a view to unify or fix prices for producers of raw materials or consumers, or for dividing markets among themselves or limiting the production, distribution, or provision of a service; (b) when the situation of the products and services in the market is such that the merger, consolidation, or integration of the companies can result in unfair prices to the detriment of competitors or consumers. After an appeal to the Superintendency of any ordered action, there is opportunity for recourse to the

Administrative Court by filing an appeal to nullify the action. Under Article 51 of Decree 2153, the Superintendency may not contest the cases of mergers, consolidation, integration or acquisition of control of firms if the parties involved prove there may be significant efficiency improvements, that the action will result in cost savings that may not otherwise be obtained, and they guarantee such act shall not result in a reduction of supply to the market.

Foreign invested firms in Colombia have suggested that, notwithstanding the positive juridical regimen for competition, there are certain sectors, primarily in infrastructure and public services, in which conditions for fair competition between firms (including State entities), suggest the GOC´s lack of understanding of the economics and commercial realities of these areas. Others allege that, although a structure for enforcement of free competition exist, it cannot be advanced as a factor attractive to foreign investors, since, in practice, it is basically inoperative due to corruption and the lack of clear rules of the game. Moreover, they have alleged that there remain discriminatory treatment between private enterprises and the State entities when it comes to subsidies, especially in the telecommunications sector.

The Basic Commercial Law Regime

Colombia´s Commercial Law Regime

Colombia has a large and complex body of comercial law, based in its Civil Code (which dates back to 1887 as now and then amended) and the new Comercial Code of 1971, as amended or even replaced by statutes enacted with specific application to discrete areas of comercial law. The Codes reflects the genesis of Colombia´s legal system in the Roman Law/French Civil Code as these have evolved over the centuries. A difference between a Code legal system and a Common Law system generally is that the former is broadly focused on specifically authorising rights and actions, whilst the latter is focused more narrowly on permitting and facilitating action. Legal history has it that under Code Law, any commercial action must be specifically authorized, whilst under Common Law, any action not specifically prohibited is authorized. As a result, there is a temptation to assume Code law-based legal systems restrict commerce, whilst Common Law encourages commercial innovation.

But most modern economies with an inheritance of Code Law have seen the necessity of modernizing their commercial legal system as an aspect of economic development, usually through enactment of freestanding statutes apart from, and not dependent on, the Codes, and which tend to be more facilitative of commercial transactions. This appears to have been the purpose of Colombia´s adoption of a new Commerce Code in 1971. The Code, with its amendments, no longer constitutes the only commercial law framework, but is buttressed by superseding statutes or decrees, for example the law on E-Commerce. Together with related provisions of the Civil Code, they constitute the commercial law regime.

For instance, the Commercial Code and the freestanding laws incorporated by reference there, covers such broad areas as: Agency, Banking and Credit, Bankruptcy/Reorganisation, Business Establishment/Conduct, Commercial Contracts/Obligations, Commercial Credit, Corporate Organisation, Fiduciary Obligations, Insurance, Industrial Property, and Real Property Law. In the area of Corporate Organization and Business Establishment, for example, it covers such areas as the Forms of Corporate Organisation, the Powers and Duties of Management, Shareholder Rights, Corporate Property Rights/Titles, Management of

Corporate Assets, etc. In the area of Contract Law, it covers: Contractual Obligations (initiation, securing, and enforcement), Offer and Acceptance, Requirements for Valid Contracts, Nullity/Non-Enforceability of Contract Provisions, Purchase/Sale/Barter Contracts, Seller´s/Purchaser´s Obligations and Rights, Payment Terms, etc. In Banking and Financial Services, it covers: Deposits/Withdrawals, Credit Extension/Loans, Negotiable Instruments, Checks, Certificates of Deposit, Security Deposits, Credit Securitisation/Mortgages, Fiduciary Obligations, Bearer Instruments, etc.

The Civil Code, in addition to covering civil status, inheritance, and other matters, also has a significant section (Title I, Book 4) on Contractual and Other Obligations, that prescribes rules for Freedom to Contract, Contracts as Civil Obligations, Performance of Contracts, Effects of Contracts, Contract Interpretation, Extinguishment of Contract Obligations, Subrogation, Nullity, Rescission, Purchase/Sales Contracts, Vendor Obligations, Purchaser Obligations, Mortgages, Liens, Notarial Functions, Registries etc.

In the area of commercial law development, often achieved through technical assistance financed by international or national assistance agencies, the tendency has been to address new areas of legal and regulatory reach (like E-Commerce) through separate statutory enactments which can extend integrated regulation to all of the aspects of such new areas, rather than on amendment of Codes which often result in an un-integrated, less coherent body of law. It appears that Colombia in recent years has taken the latter approach in an effort to encourage and facilitate commercial innovation and development.

Colombian Property Law

Colombia´s body of comercial law includes significant legal coverage of the law of property, personal ("Movable") and real ("Immovable"). Personal property law is substantially covered in Book 2 of the Civil Code but also in various articles of the Commercial Code relating to "Contracts", as each of these have now and then been amended. For the most part, *real* property is covered in the Civil Code but not in any organised, single framework. Rather, the Civil Code regulates various aspects in different titles and chapters. For instance, the Second Book describes the legal framework for ¨"Property '- Its Ownership, Possession, Use, and Enjoyment" which includes aspects of real property among the various classes of property covered. In terms of real property, it addresses "quality" of ownership, the acquisition of property (purchase, inheritance, donation), the forms of possession (freehold title, lease, rights-of-way, usufruct), the nature of other interests (mortgages, liens, marital), registration of titles and other interests and the effects thereof, inheritance or intestate or other succession to property, etc. Book 4 addresses contractual obligations and, *inter alia*, the rights and obligations relating to the purchase/sale of property. In Title XXXVII of Book 4, there are several articles specifically addressing the mortgaging of real property and the rights, obligations, and effects of mortgages on the various interests of the persons involved. The Commercial Code includes requirements for the registration of transfers and other acts

relating to personal property for the purpose of public awareness and transparency. Various aspects of Industrial property are addressed in the Commercial Code, but more effective protection is provided in the various IPR-specific statutes.

Apart from the Codes, there are laws or decrees specific to particular aspects of real property. For instance, Decree 144 of 1968 governs the pledging of property rights through mortgages, while Decree 1644 of 1978 governs the recording and registration of all acts affecting transactions in real property. The most recent of statutory enactments is the new Basic Condominium Law, Law 675 of 2001, which establishes the legal regimen for condominium ownership and interests in real property. It covers the juridical personality of a condominium establishment, separate and apart from those of the condo owners, enabling the condominium as such to contract. It also covers the obligations of the condominium management to the condo owners, sanctions for failure to comply with such obligations, and the process for formation and dissolution of condominiums and the residual rights of participants therein.

In terms of the external indiciae of laws, regulations, and other protections of property rights, Colombia seems to have the full legal framework to be expected by investors and others. But as in many other countries, the practical impact of the framework on property rights is often wanting because of administrative and bureaucratic insufficiencies, lack of technical experience, and motivation for the proper administration of the laws.

Colombia in the Country Ratings

In the fierce international competition among countries to attract new FDI, perceptions often count more in investor decision making than facts as such. International country ratings resources are frequently resorted to by managers of multinational corporations and other possible foreign direct investors in assessing the desirability of investing in a *particular* foreign country, or in determining which among a number of countries in a given region of interest (such as the Andean countries) is the most desirable country for their investment. But more important is for a country seeking new FDI to show up *better*, and thus more *attractive* than its competitors for new FDI in the same region. The ratings, depending on their specific focus and scope, offer relative rating scores and country rankings addressing: (a) FDI attractiveness, barriers, and confidence factors; (b) political risk; (c) FDI-related legal/regulatory regimes, transparency, corruption, and administrative practices; (d) fiscal/tax regimes; (e) macroeconomic indicators and policies; (f) credit/financial risks and policies; (g) labor regimes and policies; and (h) global competitiveness.

In terms of the overall business climate, the World Bank Group´s Doing Business report provides objective measures of business regulations and their enforcement across more than 130 economies, indicating the regulatory costs of doing business and how business regulations enhance or constrain investment, productivity, and growth. The Report measures existing laws and regulations, uses targeted interviews with regulators and private sector

professionals, covering the five basic topics of (1) starting a business, (2) hiring and firing workers, (3) enforcing contracts, (4) getting credit, and (5) closing a business.

The most practical concerns of investors whether domestic or foreign are the requirements in terms of time, cost, and complexity of establishing a firm and getting it ready to engage in operations. The Bank´s 2002 report starts with "*opening a business*" and scores countries with regard to the number of procedures required, the number of days involved, the cost (as a percentage of GNI per capita), and the minimum capital required (again as a percentage of GNI per capita). The figures for Colombia (prior year figures in italics) were: 19 (*18*) procedures required, over a period of 60 (*60)* days, with a cost index figure of 27.2 *(15.3)*, and a minimum capital index of 0.0 *(0.0)*. The figures for its Andean Community partners (and major competitors for new FDI) were for Bolivia: 18 procedures, 67 days, cost of 166.6, and minimum capital index of 0.0; for Ecuador, 14 procedures, 90 days, cost of 63.0, and minimum capital of 27.6: for Peru 9 procedures, 100 days, cost of 24.9, and minimum capital of 0.0; and for Venezuela, 14 procedures over 119 days at a cost of 19.4 and minimum capital of 0.0.

In this regard, a September 2000 National Bureau of Economic Research (NBER) also described the required procedures governing entry regulation, as well as the time and cost of pursuing them in 75 countries. It focused on legal requirements that need to be met before a business can officially open its doors, the official cost of meeting such requirements, and the minimum time it takes to meet them if the government does not delay the process. The study differentiates the steps among differing administrative requirements, e.g., (1) total number of procedures or steps, (2) safety & health-related, (3) environmental, (4) taxes, (5) labor, and (6) screening. It scores the time in terms of days and the cost as a share in GNP/capita. The following are the results for Colombia and for its Andean Community competitors for attracting new FDI:

Country	# Steps	Safety/ Health	Environment	Taxes	Labor	Screening	Time in Days	Costs
Colombia	17	3	1	1	3	10	55	0.1244
Ecuador	12	2	0	1	2	7	141	0.1533
Peru	14	1	1	1	4	7	171	0.2142-
Venezuela	15	3	1	2	3	6	124	0.1107
Bolivia	20	1	1	1	2	10	82	2.6252
Peru	14	1	1	1	4	7	171	0.2142-

The NBER study makes the point, based on its statistics, that "countries with *heavier* regulation of entry have *higher* corruption and *larger* unofficial economies, but *not* better quality of public or private goods. Countries with more democratic and limited governments have fewer entry regulations."

With respect to *closing a business*, the World Bank report scores the actual time (in years), actual cost (as a percentage of the estate), the degree to which it services the goals for bankruptcy (maximize proceeds to creditors, shareholders, employees, rehabilitation as opposed to liquidation), and court powers index. In these three indices, Colombia scored time (3.0 years), cost (1%), Goal of Insolvency Index (77), and court powers index (33). Scores for Bolivia were 2 years, cost 18%, goals index 53, court powers 100; for Ecuador 3.5 years, 18%, goals index 24, and court powers 67; for Peru 2.1 years, 8%, goals index 67, and court powers 33; and for Venezuela 4 years, 38%, goals index 67, and court powers 67.

A major concern for investors, domestic as well as foreign, is the *enforcement of contracts*, e.g., the quality and effectiveness of the judicial system, the formality of procedures, and the time it takes to resolve a dispute. The Bank´s study focused on all independent procedural actions, mandated by law *or* court regulations, that demand interaction between the parties or between them and court officials or judges. The duration measures the total average number and duration of procedures in calendar days, including achieving service of process, trial, and post-trial enforcement, cost (as a percentage GNI per capita), and a Procedural Complexity Index ranging from 0 (good) to 100 (bad). For this measure, Colombia shows 37 total procedures, a duration of 527 days, a cost of 5.9, and a Procedural Complexity Index of 56. This compares with Bolivia 44 procedures, 464 days, a cost of 5.3, and complexity index of 78; Ecuador 33 33 procedures, 332 days, cost of 10.5, and complexity index of 72; Peru 35 procedures, 441 days, cost of 29.7, and complexity index of 82; and Venezuela at 41 procedures, 360 days, cost of 47, and complexity index of 81.

Basic Finding on Subjects Addressed

Legal/Regulatory Regime for FDI

There is a primordial basis for concern of prospective foreign investors in Colombia relating to Article 4 of the Constitution´s statement that its provisions can be interpreted to the effect that provisions of the Constitution take precedence over and supercede *all* inconsistent laws or other *judicial norms*. This raises the question of whether Constitutional provisions supercede FDI-related treaties, conventions, or other international agreements which establish agreed norms of international behaviour. If this were so, it would make implementation of future international agreements or other arrangements difficult even if the Colombian Congress ratified them, as was the case with at least four of Colombia´s previously concluded BITs which were declared unenforceable because of Constitutional inconsistencies.

Further, there is a significant concern regarding Article 100 of the Constitution which states that, for reasons of public order, the rights of foreigners (which are otherwise defined under the Constitution to be the same as for nationals) can be negated or subordinated to those of nationals, although there is no definition in the Constitution nor guidelines establishing what *public order* means or how the lack of it or the need for it is to be determined, in effect providing total discretion authority of implementing this section of the Constitution. Nor does it provide for any judicial review for the exercise of such authority.

Also, Article 100 would appear to extend the juridical ability of the Government to limit guarantees applicable to foreign investors not only in accord with *Constitutional* provisions but also by means of *laws* enacted under authority of the Constitution. This again suggests that *Constitutional* guarantees originally provided foreign investors could be undermined by subsequently-enacted laws (presumably including decrees).

Statutory/Administrative Regime

Apart from the few advertences in the Constitution to rights of foreigners, there is no single, integrated, comprehensive code or statute relating to the rights and obligations of foreign investors in Colombia. Instead, there is a melange of laws, decrees, and resolutions of Congress, the competent ministries, and other entities defining the rights and obligations of foreign investors.

In view of the provisions of Article 100 of the Constitution (described in section 7.1(c) hereof), there is a significant issue of whether Decree 2080 of 2000, as amended, supercedes or accommodates inconsistent provisions of international treaties and other agreements that may be concluded in the future.

Colombia´s laws relating to FDI and to "Portfolio" Investment do not state an explicit percentage of equity ownership in Colombian enterprises that separates foreign *direct* investment from *portfolio* investment, such as the standard IMF/OECD approach that defines FDI as 10 percent or more ownership of the equity in an entity, whilst *less* than 10 percent constitutes portfolio investment. This could have the effect, in close cases, of rendering it difficult for prospective investors for either type of investment to understand with certainty how their investment in Colombia would be regulated.

The derogation of Law 619 that introduced a useful variable royalty structure related to daily petroleum production levels was declared unconstitutional in 2001, which not only has deteriorated the attractiveness of participation of foreign investors in this sector but raised significant concerns regarding the certainty of acquired rights of investors previously participating in such program.

Surveys of managers of foreign investments in Colombia suggest there is considerable duplication of authorities, policy formation, and requirements relating to FDI without extensive or effective coordination among the various state entities charged therewith. For example, according to COINVERTIR, the formulation of GOV policies relating to FDI involve at least six ministries or other agencies, including the often dispositive role of the Office of the Presidency. The selection of priority sectors for new FDI and strategies therefor involve five ministries/agencies. The creation and administration of incentives associated with investment involve, apart from the National Congress, five entities within the Executive Branch. Negotiation of investment-related international agreements involves three agencies, the Ministry of Foreign Trade, the DNP, and the Ministry of Foreign Affairs (Cancilleria). A number of sectoral-specific or other regulatory agencies also impact on certain aspects of FDI.

There is clearly a concern articulated by current foreign investors in Colombia regarding the juridical and administrative *stability* of the legal/regulatory/policy regime for FDI. This derives from the nearly constant modifications in the laws, regulations, policies, procedures, and requirements affecting FDI with little opportunity for foreign investor involvement and little, if any, official advertence to the maintenance and security of acquired rights of

investors under laws and policies in effect at the time of admission and establishment but that subsequently may be changed in derogation of their interests, such as changes in the tax regulations and rates, the lack of investment protection, and the increasing level of litigation of investor/State disputes.

While the GOC seems very much aware of the problem, its response to resolving the problems and concerns of current investors in Colombia (and, thereby, of potential investors there as well) has been largely ineffective. A 1995 effort of the Colombian Congress in enactment of the Special Tax Stability Regime appears to have had little result in assuaging investor concerns, indeed it appears that, once enacted, it was never actually implemented in fact.

In October 2003, the Government submitted new draft legislation to the Congress designed to promote the confidence of foreign investors in Colombia (and, thus, prospective ones as well). In its transmittal to the Congress, the GOC admitted that:

> . . . investors (should) have confidence and a (sense of) security in those provisions, articles, paragraphs, sections, subsections, and clauses of laws or administrative acts that are transcendent (essential) in their determination to invest, which will not be modified to their detriment.

The draft legislation´s provisions can be summarized as follows:

a) it establishes a system of investor/State contracts which purportedly will guarantee to both domestic and foreign investors that, if the specific norms described in the contract are modified during its effectiveness in such a manner as to result in certain (quantifiable) damages, the investor shall be indemnified up to a specifically limited amount under the contract. (Arts. 1, 6);

b) The GOC State entities whose actions would be covered in the contract are those specified in Art. 38 of Law 489 of 1998 (essentially all GOC governmental entities) plus national regulatory commissions that have taken actions that amend the norms or administrative actions that are specifically described as subject to the provisions of the contract (Art. 2);

c) The legislation would apply *only* to those investors, domestic as well as Foreign, who (i) are making *new* investments, (ii) of at *least* C$ 50,000,000,000 (approximately US$ 18 million) (Art. 3);

d) The contracts must specify, in clear, precise terms, the specific norm (e.g., law, regulation, policy, administrative act of a *general* character) whose modification would impact negatively upon the investor or the investment *and* the *reasons* for which the stability of such norms *induced* the decision to invest (Art. 4, 5);

e) Other requirements for the contract include that (i) it must establish *explicitly* the agreement of the investor to realise the new investment in accordance with the provisions of the draft law (ii) within the time period specified in the contract, (iii) and specify the period of its effectiveness. The period of effectiveness must be from a minimum of three to a maximum of ten years duration (Art. 5, 7);

f) The draft law requires an *advance* estimation (or liquidation) of the damages foreseen as occurring as a result of modification and a *specification* of the *formula* for the calculation of such damages (Art. 5 (d));

g) Given the foregoing, and subject to the following conditions, if the norms specified whose modification would cause the damages foreseen, the GOC will indemnify the investor in the amount estimated in the contract, but in *no* even for more than the total amount of the investment realized as of the date of modification. But payment of such indemnity must be approved *in advance* by the Budget Office of the Ministry of Finance and Public Credit (Art. 6, 9);

h) The draft requires the contract to include a settlement clause by virtue of which any dispute arising out of the provisions of the draft law shall be submitted to a national or international arbitral tribunal whose consideration thereof shall be governed by *Colombian* law (8);

i) The parties to the contract must also agree to and specify an amount certain that must be paid, presumably by the investor, into an account with the Contingency Fund for State Entities (Art. 10);

j) the contract must be registered with the Departmento Nacional de Planificacion (DNP)(Art. 11); and

k) The GOC is authorized in the draft law to specify the *conditions* and requirements for the conclusion and execution of the contract and the grant of any benefits thereunder (Art. 12).

The draft law is more likely to be a cause for concern rather than for confidence on the part of prospective investors in Colombia. It has a number of aspects that are unlikely to attract new investors. These include:

1) It requires an *advance* estimation and formula therefor for liquidation of any damages that may be sustained and limits any indemnity to that amount, even though it would be difficult for investors to accurately forecast such amount given the imponderability of the state of the investment at the time of any norm modification and the difficulty of specifying in advance the nature and source of any action taken that would affect the investment over the three to ten year period.

2) The draft law limits its coverage only to *new* investors after its entry into and, so, does nothing to inspire confidence in *current* investors. Moreover, it limits its coverage to new investors making initial investments of approximately US$ 18 million, a figure well beyond most initial direct investments, especially in a country with the security and other concerns of Colombia.

3) The contracts are required to address a *specific* norm, whose amendment would cause specific damages. Given the panoply of possible laws, regulations, policies, and administrative actions that might occur over a three to ten year period, this has the effect of *eliminating* all other possibilities and restricting the security of the investor to one norm only.

4) Payment of any indemnity is subject to the prior approval of the Budget Office of the Ministry of Finance and Public Credit, but the draft fails to specify any grounds or criteria upon which disapproval might be based nor a transparent process for such a determination, thus giving the Ministry of Finance untrammelled administrative discretion in the matter.

5) Although the draft allows for the invocation of national *or* international arbitration of any GOV decision to deny indemnity or with regard to any issues involved in its decision, it provides that such arbitration must be governed by *Colombian* law rather than basic international standards found in bilateral investment treaties or bilateral or multilateral trade arrangements incorporating investment-related provisions. Moreover, as described in this report, the Colombian judicial process for the review and enforcement of any arbitral awards involves a complex, timely, non-transparent, and unpredictable process. Moreover, draft legislation relating to arbitration in Colombia would permit Colombian courts not only to enforce international arbitral awards but to *revise* them as well, which would include reviewing the logic upon which such awards were based.

6) The draft law requires the investor to pay an amount "agreed to" with the GOC into a contingency account, presumably to help fund indemnisations under the draft law, in effect, imposing a cost upon the investor that would have the effect of actually *reducing* any indemnity recovered under the law.

7) The draft law gives the GOC unchecked authority to specify the conditions and other requirements for the administration of the law and pay out of any resulting indemnification, without any role or opportunity for current or prospective investors to participate in such determinations.

8) The draft does not provide that the terms of the law or any contract entered into thereunder may be superceded by investment-related provisions of any BIT or multilateral or bilateral trade arrangement entered into by Colombia.

Restrictions on FDI

Articles 88 and 223 of the Constitution impose *specific* restrictions on sectors closed to FDI. However, although Article 7 of Decree 2080 of 2000, as amended by Decree 1844 of 2003, which is identified as the "General Regime of Foreign Capital Investment in Colombia" states that "realization of a foreign investment requires *no authorization*, Article 6, Paragraph 8 thereof provides that "in every case, the [CONPES may identify sectors of economic activity to which the Government determines to admit foreign capital participation". First, Articles 6 and 7 are inconsistent provisions, but, moreover, Article 6 provides extremely discretionary authority to CONPES to determine, via a so-called "*positive list*", what sectors are amenable to FDI. Use of a positive list approach essentially means that CONPES must specify each and every sector amenable to FDI, as opposed to a "negative list" that would specify the sectors in which FDI was *prohibited.* Has CONPES issued such a list? Research suggests there is *no* positive list issued by CONPES indicating sectors of economic activity into which foreign investment is *permitted*. While there´s no suggestion of a CONPES attitude not to publish such a list, this inconsistency in the primary law regulating FDI complicates legal counsel to prospective investors regarding their rights in Colombia and the inconsistency should either be clarified or eliminated. There is also a question regarding protection of acquire rights should CONPES take action to eliminate foreign investment in any sector.

The "special regimes" operated by the Colombian Government with regard to a number of sectors (Financial Services, Telecommunications, Petroleum & Hydrocarbon) are unnecessarily limiting in terms of achieving the most effective and efficient rendition of such services in support of enhancing the economic development of Colombia through encouraging more, rather than less, FDI in them.

Post-Establishment Treatment of FDI

Paragraph 4 of Article 15 of Law 09 of 1991 (with Decree 2080 the basic regime for FDI) provides that "with the exception of those matters referring to the transfer of resources to the exterior, foreign investment in Colombia shall be treated for all effects the same as investments by Colombian nationals." This conflicts with a number of provisions restricting FDI in various sectors of the Colombian economy including Financial Services, Telecommunications, and Petroleum/Hydrocarbons. Moreover, it authorizes establishment of a special regime regarding the rights of foreign investors to remission of profits and repatriations of capital that reduce the attractiveness of Colombia for new FDI.

Neither the Constitution nor the laws and decrees that affect the rights of post-establishment investors in Colombia provide "most favoured nation" (MFN) treatment for them. This does not reflect most treatment modalities found in most modern investment treaties, such as NAFTA, and various Canadian, Mexican, and U.S. bilateral investment treaties that usually

require "MFN" and/or National Treatment, and, often, the "better of them" nor does it fit into the usual exceptions thereto found in such agreements.

Expropriation & Compensation

The Colombian Constitution clearly permits expropriation of private property "for public utility or social interest s defined by the legislature." Nevertheless *none* of the Constitution´s articles relating to expropriation specifies either a definition or other understanding of the terms "public utility" or "social interest" but leaves this to the discretion of the Congress. This creates significant uncertainty for prospective and current foreign investors who need to have some degree of confidence as to what exactly are the rules of the game.

Moreover, *none* of the articles of the Constitution accord those affected a right to judicial review of either (a) the legitimacy of the expropriation nor of (b) the adequacy and form of payment therefor. Neither is there any provisión for subrogation of the rights of the rights of those negatively affected by such expropriation such as international investment insurance agencies like OPIC or MIGA.

Investment Dispute Resolution

Colombia allows for international arbitration of investment disputes and is a signatory to a number of international conventions on the subject. Nonetheless, the enforcement of international arbitration awards or of investment-related disputes within the Colombian judicial system is complex and dilatory and generally characterized by negative results. Moreover, *no* international or domestic arbitration awards are enforceable as to real property located in Colombia.

Legislation in Congress for a unified Arbitration/Alternative Dispute Resolution law to modernize the system would permit Colombian courts to *revise* as well as enforce international arbitration awards. This would effectively destroy the utility of international arbitration for application in Colombia.

Investment Incentives/Export Incentives/Performance Requirements

According to the GOC and UNCTAD, Colombia has no current directly-related FDI incentives or performance requirements that would contravene the GATT/WTO Uruguay Round TRIMs Agreement. However it is clear that it has a number of export incentives available to attract investors in its Plan Vallejo, CERT, and Zonas Francas export promotion

programs. Export promotion incentive performance requirements, like local content requirements, limits on the use of imported inputs for export-destined production, exchange balancing requirements, and required export levels, if applied as performance requirements conditioning the participation of foreign investors can violate not only Colombia´s obligations under the Subsidies & Countervailing Measures Agreement (SCM) but also its obligations under the TRIMs Agreement. Colombian adherence and compliance with its GATT/WTO obligations and commitments is likely to be another precondition to entry into bilateral free trade negotiations with the U.S.

Government Procurement

Law 80 of 1993, the basic Colombian Government Procurement Law until enactment of Law 816 of 2003, provided relatively *equal* treatment to domestic and foreign companies on a reciprocal basis, and eliminated the 20 percent added to domestic bids. But the new law of 2003 contains provisions that effectively facilitate discrimination against foreign bidders when the conditions of offers received are equal. It provides for specific (5 to 15 percent) additions to the scores of domestic bidders and/or when bids submitted provide for use of Colombian goods and/or services. This constitutes a retreat from equal treatment of domestic and foreign bidders. There have also been complaints of non-transparency in the awarding of major government contracts. Colombia, although classified as an "observer", is not a signatory to the GATT/WTO Uruguay Round plurilateral Agreement on Government Procurement. It´s adherence to that agreement is likely to be a precondition to any bilateral free trade agreement with the United States.

Competition Policy

Foreign firms in Colombia have suggested that, not-withstanding the relatively positive juridical regimen for competition, there are certain sectors, particularly those governed by "special regimes" wherein GOC entities both regulate the sector *and* compete with private sector firms in the same sector, a situation that has often resulted in unfair competition between State and private entities, but which is not addressed in the competition laws. Moreover they complain that enforcement of competition policy often involves discriminatory treatment of foreign-owned firms.

The General Commercial Law Framework

Colombia´s business community, both domestic and foreign, have raised concerns relating to public administration focused on excessive paperwork; failure to consult with private sector

managers in the formulation of new laws, policies, and procedures; excessive, non-transparent, administrative discretion, and corruption within the bureaucracy.

Te country´s labor law regime is seen as inflexible and unrealistic in terms of the costs and delays it imposes on manufacturers. Moreover, there has been reported a history of violence against trade unionists.

Colombia needs to legislate and implement a new structure of bankruptcy and corporate reorganization designed, not just to terminate through dissolution, but to rescusitate and restore them to successful, profitable operation, while at the same time protecting the economic interests of creditors, customers, and other stakeholders.

They also complain about a weak, ineffective judicial system with excessive, non-substantive procedural requirements and dilatory and costly practices.

Recommendations

Legal/Regulatory Regime for FDI

The Colombian Constitutional Court should make it clear and unquestioned that Article 4 of the Colombian Constitution takes precedence over and supersedes *all* inconsistent laws, decrees with the force of law, other decrees, and other administrative and regulatory rules, procedures and policies. This should be achieved by a case brought by the GOC or the Congress to ensure a judicial focus on the issue and ultimate determination as indicated.

Similarly, the Constitutional Court should clarify the juridical effect of provisions of international treaties and conventions concluded with Colombia, such as BITs or other multilateral or regional investment or trade arrangements, and indicate clearly and convincingly whether or not inconsistent provisions or "norms" incorporated into such international instruments supersede or not provisions of the Constitution of 1991. If it is determined they do not, but that provisions of the Constitution prevail, then the GOC should either support changes in the Constitution necessary to ensure consistency with Colombia´s Constitution or seek in its negotiations to find ways to conform treaty provisions with the Constitution in a way acceptable to its negotiating partners, or take reservations against any provisions in such agreements inconsistent with its Constitution.

Article 100 of the Constitution, which states that, for reasons of *public order*, the rights of foreigners can be negated or subordinated to those of nationals, should be amended to specify in *explicit* terms, exactly what are the aspects of public order for which such actions can be taken. This requires *Constitutional* clarification and change in the judicial system from the Constitutional Court on down, or the Congress via legislation, may change judicial precedents or enact legislation to interpret and apply the existing Article 100 as suits the needs or concerns of the time.

Statutory/Administrative Regime

Ideally, there should be no Constitutional, legal, administrative, regulatory, or policy distinction between foreign and domestic investors under Colombian law. Foreign investors should be treated exactly the same as domestic investors, no better nor worse. Colombia should eliminate all distinctions between domestic and foreign investors and replace them with laws and policies that promote, facilitate, and provide security for investment by all investors.

In view of foreign investor concerns regarding their rights under the Constitution and subordinate laws, regulations, policies etc., and given the unliklihood of realizing the foregoing recommendation, the GOC should give careful consideration to the enactment of an integrated, comprehensive code governing all major aspects affecting FDI.

Colombia, in its legislative and administrative framework for FDI, should adopt the definition of foreign direct investment utilized by the IMF and OECD and most major national hosts thereof, e.g., that FDI constitutes the ownership or holding of ten percent or more of the equity of an enterprise or of 10 percent right to profits allocated among investors in a branch or other unincorporated national entity.

There is concern in the foreign investment community about the *stability* of the legal/regulatory/policy regime for FDI, deriving from frequent modifications of that regime and the changing requirements and uncertainty imposed on foreign investment as a result. This militates for the establishment of an FDI-specific code of laws/regulations/policies that brings together in one place all or as many as administratively feasible of the requirements and other provisions relating to FDI. Or as a more immediate possibility, the GOC should legislate a stability-based measure providing for the recognition and safeguarding of investor rights under prior and existing laws, regulations, and policies when these become subject to change via either legislation or administrative/regulatory action.

Unfortunately, the two attempts at juridical stabilisation, the Special Tax Stability Act of 1995 (which apparently never was implemented), and this year´s draft Investor Confidence Law (which has been withdrawn from consideration by the Congress), are essentially self-defeating in terms of reassuring current foreign investors and attracting new FDI. Therefore, the GOC should scrap the latter and initiate an altogether new effort to draft legislation relating to safeguarding of investor rights, *after*, significant and substantive consultation with the foreign investment community.

Restrictions on FDI

There is an inconsistency in the GOC´s FDI regime relating to Colombia´s openness to FDI. Whilst Articles 88 and 223 of the Constitution impose *explicit* restrictions on sectors closed to

FDI, Article 6 of Decree 2080 of 2000 – referred to as the "Regime for Foreign Capital Investment in Colombia" – provides that CONPES "may identify sectors of the economy for which the Government determines to admit the participation of foreign capital investment." Thus, whilst the Constitution utilises a *negative list* iteration of sectors *closed* to FDI, Decree 2080 authorises CONPES to utilise a *positive list* statement of specific sectors that are *open* to FDI. Yet there is no evidence that CONPES has ever exercised that authority, leading to the conclusion that there has never been a *positive* identification of sectors of the Colombian economy open to FDI as contemplated in Decree 2080. Government officials say that the level of FDI in Colombia indicates there is not a problem, nonetheless, the provision of Decree 2080 leaves it open to CONPES, apparently on its own authority, to initiate a *positive list* regulation of sectors of the economy open or not to FDI, and/or in its discretion to change it. This Article of Decree 2080 should be stricken from the Decree such that the *only* authority for designating sectors open or not for FDI should be the Constitution.

Colombia should sign and adhere as a party to the WTO Agreement on Basic Telecommunications.

Treatment of FDI

Paragraph 4 of Article 15 of Law 09 of 1991 provides that "with the exception of those matters referring to the transfer of resources to the exterior, foreign investment in Colombia shall be treated for all effects the same as investments by Colombian nationals." Nevertheless, the various "special regimes" governing specific sectors such as Financial Services, Telecommunications, E-Commerce, and Mining, Petroleum, and Hydrocarbons impose special requirements on *foreign* investment in those sectors which *differs* from the regulatory treatment accorded *domestic* investors therein. In some cases, such difference in treatment may be justified, as in differing requirements for bank reserves in the financial services sector, but for the most part, concerns about risks to the national sovereignity or the need to protect the domestic industries of those sectors, are no longer justified and should be stricken from those laws.

Colombia should adopt the more prevalent norms of modern investment treaties and provide Most Favoured Nation treatment to new investors *prior to* Admission of their investments in Colombia, and *subsequently*, during the process of Establishment and organization to initiate operations. This would reflect the nature of investor "treatment" in the NAFTA and various Canadian, Mexican, and U.S. bilateral investment treaties, and including the Chile/U.S. FTA.

Profits Remission/Capital Repatriation

Colombian law permits full remission of profits and repatriation of capital for foreign investments that have been timely registered with the Banco de la Republica, with one exception, e.g., in the case of a balance-of-payments-type "safeguard" that permits restriction of such remittances in the even Colombia´s international exchange reserves fall below three months´worth of imports. In its description of this caveat to the general policy, COINVERTIR notes that such a reserve deficit "has not happened in decades". If this is the case, then this caveat to the overall freedom of foreign investor remissions should be removed.

Colombia should seek international funding for a program of capacitation and supervision of tax officials and bureaucrats charged with the application of fiscal and tributary authorities and responsibilities so as to enable and encourage them to administer tax requirements on a transparent, effective, fair, and honest basis and reduce the general impressions of instability and corruption that currently attaches to tax administration.

Expropriation & Compensation

The Colombian Constitution permits expropriation of private property, with compensation, "for public utility or social interest as defined by the Legislature." While the Congress has described these concepts on an ad-hoc basis in certain statutes, there remains no clear, uniform, authoritative statement of *all* of the constituent concerns or occasions that define these terms for purposes of the understanding of foreign investors. The Colombian Congress, by legislation, should provide such definition via a single statutory law bringing into its ambit all possible uses and application of these terms.

While the Constitution permits expropriation of private property, with compensation, "for public utility or social interest", none of the relevant articles of the Constitution accord to those affected a right to *judicial review* of either the (a) *legitimacy* under law of the expropriation nor of the (b) *adequacy* or *form* of compensation. Neither is there any provision for subrogation of the rights of those negatively affected by such expropriation, such as international investment insurance organizations like OPIC or MIGA.

Investment Dispute Resolution

Draft legislation that otherwise has the progressive purpose of modernizing and speeding up the enforcement of arbitral awards, domestic or international, in the Colombian judicial system, contains a provision that would permit such courts to "revise" arbitral awards, in effect permitting them to review the substance of the decision and decide whether or not it deserved enforcement. Apart from possibly being inconsistent with the provisions of the international agreements under which such arbitration takes place, this would undermine the

whole utility and desirability of international arbitration, since, in the long –run, decisions to enforce or nor, nor how to enforce such judgements would remain with the Colombian judiciary. Accordingly, authorization for Colombian courts to "revise" international arbitral awards should be stricken from the legislation.

There are at least two significant investment disputes between Colombia and U.S. companies that are languishing in the Colombian judicial system. Colombia should either accelerate the resolution of these disputes on a State to investor basis through an accelerated procedure within the judicial system, or seek to resolve them on a bilateral State-to-State basis prior to entry into negotiations for a free trade arrangement with the United States.

Investment/Export Incentives & Performance Requirements

Colombia has a number of special export regimes, some of which, as described in sections 6 and 11.9 of this report, in terms of the relevant laws or their application, may be inconsistent with Colombia´s obligations and commitments undertaken by reason of its membership in the World Trade Organization (WTO). Although Colombia has requested and received an extension for the phase-out of the laws and programs that violate provisions of the WTO TRIMs and Subsidies & Countervailing Duties Agreements, it is important to creating a climate of negotiating willingness on the part of its trading partners, that Colombia accelerate its phase-out of any provisions that are in non-compliance with the SCM and TRIMs rules of the GATT/WTO.

Government Procurement

The recently-enacted Law 816 of 2003 on Government Procurement revised the prior law´s relatively equal treatment to domestic and foreign companies, and contains provisions that effectively discriminate against foreign bidders in the adjudication and selection of bids. Draft legislation currently pending in the Congress does not specifically address such discriminatory treatment, but should be revised to ensure non-discrimination in public procurement, including reinstating some of the provisions of Law 816.

Colombia, currently an "observer" with respect to the Uruguay Round plurilateral Agreement on Government Procurement, should become a signatory thereto and implement its terms in full, action likely to be a precondition to entry into any bilateral free trade talks with the United States.

Competition Policy:

As pointed out in section 12.4 of this report, foreign firms in Colombia sense that, notwithstanding the otherwise relatively positive juridical regime for competition in Colombia, there are certain sectors, particularly those governed by “special regimes”, in which the Colombian Government acts as both *regulator* and as *competitor* with private sector companies engaged in commercial operations in the same sector. This problem apparently is not yet addressed in Colombia´s competition law and policy, but needs to be addressed by *explicit* separation of the roles of the Government as regulator and commercial operator. Indeed, the optimum resolution to this problem would be for the GOC to withdraw completely from commercial competition with private sector entities and concentrate solely on ensuring free and fair competition in all sectors of its economy.

Colombia should seek international funding for a training program for capacitation and supervision of government officials and bureaucrats charged with the implementation of its competition laws and policies. The training would include awareness of the importance of antitrust control and its effects on business and economic development, as well as assistance with drafting legislation designed to enhance Colombia´s legal framework for competition so as to realise the competition mandates of its Consititution.

Colombian competition authorities should give careful consideration to adopting the set of guidelines that have emerged from Professor Michael Porter at the Harvard Business School, for consistent application to cases that arise before such authorityies, and, in particular, relevant to the aspects of (a) merger significance and baseline productivity growth and analysis, (b) effects of transactions on the health of competition in all relevant markets and on consumers (using Porter´s Five Forces Diamond framework), and (c) basic risk/reward analysis.