The Role of Bilateral Investment Treaties in Mitigating Project Finance's Risks: The Case of Colombia

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1. Introduction

Over the past few years Colombia has been one of the most economically stable countries in the region. In fact, during the past ten years, the Colombian economy has grown by 4% annually and has not experienced negative economic growth, making it the least volatile country in the region.[1] Moreover, in 2011 the country achieved an unprecedented record in foreign direct investment reaching USD 14.027 million.[2]

These figures are the result of the efforts of the current and past governments to enhance the country's business climate and to internationalize its economy. A key element in that strategy has been the government's pursuit of entering into Free Trade Agreements ("FTAs") and Bilateral Investment Treaties ("BITs").[3]

A justification for entering into those agreements, besides the desire to encourage bilateral investments, is the absence of a multilateral legal framework regulating investments; thus, a substantial portion of the relationship between host states and international investors has been developed through bilateral agreements, such as BITs and investment chapters in

[1] Exports, Foreign Investment and Tourism Promotion Agency (Proexport Colombia), Investment Booklet, (Jan. 12, 2012) *available at* http://www.investincolombia.com.co/Adjuntos/044_Improved%20Business%20Environment-December,%202010.pdf.

[2] Industry, Commerce and Tourism Ministry, *Exports, tourism, and investment surpass historical record*, (Jan. 12, 2012) *available at* https://www.mincomercio.gov.co/englishmin/publicaciones.php?id=1797.

[3] At this date, Colombia has eight FTAs in force, as well as two subscribed and three pending negotiations. Also the country has three BITs in force, as well as one signed and nine pending subscription.

FTAs.[4] In the case of BITs, particularly, they have been regarded as a tool for trade liberalization and investment promotion that can easily communicate a developing country's interest in attracting foreign direct investment (FDI) with capital exporting countries' needs for market expansion, without imposing institutional demands on either country (in terms of concrete, institution-building).[5] Therefore, for developing countries, like Colombia, investment security provisions in the form of a BIT or an investment chapter of an FTA constitute a strategic tool in attracting FDI and in improving the country's business climate, without requiring major reforms to the country's institutions.

The aim of this document is to provide an analysis of the most important substantive provisions of the Colombian signed BITs and the investment chapter of the United States – Colombian FTA (as this is one of the most important and recent agreements entered into by Colombia) in order to determine, from a project finance perspective, the scope of the protections given by these instruments to foreign investors and their impact on risk mitigation.

This analysis has been divided into six additional sections. Section 2 outlines the concept and existing categories of risks in a developing country with an emphasis in political risks. Section 3 highlights how BITs might help to mitigate political risks. Section 4 analyzes the substantive provisions of the Colombian BITs dealing with political risks. Section 5

[4] Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 3 (Katia Yannaca – Small ed., 2010).

[5] CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW, 13 (Kluwer Law International 2007).

includes some examples of successful investments carried out under some of the Colombian BITs. Finally, Section 6 concludes with some lessons than can be learned from the analysis of the provisions of Section 4.

2. Typical risks arising in project finance in a developing country

In this section a general framework of what constitutes a risk in project finance, the different categories of existing risks, and the risks that BITs might assist to mitigate, will be provided. This general categorization will provide the reader with a map of the risks normally covered by investment treaties before entering into the specifics of the treaties' provisions in Section 4.

2.1. Definition of risk

Risk has been defined as "uncertainty in regard to cost, loss or damage."[6] Accordingly, in project finance the aim is to reduce that uncertainty through a risk structuring process.[7] In fact, as Hoffman points out,

> During this [structuring] process that risks are identified, analyzed, quantified, mitigated, and allocated so that no individual risk threatens the development, construction, or operation of the project in such a way that the project is unable to generate sufficient revenues to repay the project debt, pay operation expenses, and provide an attractive equity return.[8]

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[6] SCOTT L. HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE, 27 (Cambridge University Press, 2008).
[7] Id.
[8] Id.

In project finance there are two major categories of risks: (i) commercial risks and (ii) political risks.[9]

2.2. Commercial risks

Commercial risks are typically associated with a) constructing and developing the project, operating and maintaining the assets, and finding a market for the output; and b) major economic environment risks, i.e., interest rate changes, inflation, currency risk, international price movements of raw materials, and energy inputs, all of which have a direct impact on the project but are beyond the control of the project sponsors.[10]

In addition, a project may be subject to other commercially related risks, e.g., the demand for a given product may not evolve as predicted, a competitor could undercut the business or revenue may be affected when a natural disaster occurs.[11] Although these risks might not be as foreseeable as others, that does not meant they cannot be mitigated. In fact, insurance against these risks, among other alternatives, might help in that regard. Commercial risks, however, do not constitute the focus of this paper and they will not be discussed in depth.

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[9] International Finance Corporation (IFC), Project Finance in Developing Countries, 36 (World Bank, 1999).
[10] Id.
[11] Noah Rubins and N. Stephan Kinsella, International Investment, Political Risk and Dispute Resolution A Practitioner's Guide, 2 (Oceana Publications, Inc., 2005).

2.3. Political risks

Risks associated with the actions of the state where the investment is located are typically referred to as political risks. These risks derive from the exercise of political power and imply "the probability that a host government will, by act or omission, reduce the investor's ability to realize an expected return on his investment."[12] In other words, political risk is the risk of government intervention in the development or operation of a project.[13] As such, political risk is driven by uncertainty not only over the government and its agencies' actions, but also by actions from minority groups and separatist movements.[14] An impairment of the investors' property rights is normally the effect of such actions.[15]

The types of political risks may vary from one country to another. However, the most frequent risks include the following: 1) transfer and convertibility restrictions, 2) expropriation, 3) breach of contract, 4) non-honoring of sovereign financial obligations, 5) terrorism, 6) war, 7) civil disturbance and, 8) other adverse regulatory changes.[16]

Section 4 analyzes those risks to the extent they are covered by the Colombian BITs.

[12] Id., at 3.

[13] Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk In Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y. L. SCH. J. INT'L & COMP. L. 1 (1994).

[14] Multilateral Investment Guarantee Agency World Bank Group, MIGA, *World Investment and Political Risk 2011*, (2011).

[15] Rubins and Kinsella, *supra* note 11, at 4.

[16] MIGA, *supra* note 14.

3. BITs: Tools to mitigate political risks

BITs are regarded as tools for promoting and protecting investments by investors of one party in the territory of another party.[17] In fact, "promotion" and "protection" are leading nouns included in the heading of the majority of existing BITs.

In particular, investment protection has been regarded as the element driving the expansion of international investment treaties as long as investors from capital-exporting countries required safe conditions to invest abroad.[18] Precisely such protection was aimed to safeguard investors against injurious acts and omissions by host governments as well as other forces generating political risks in the host country.[19] Otherwise, investors will be relying on host country's domestic law and courts for protection, which in particular jurisdictions may be risky for the investment.[20]

If one looks at the preamble of an investment treaty, one may find expressions addressing those typical investor's concerns in terms like "it is the desire to promote and protect investments, the intent to create stable, equitable, favorable and transparent conditions for investments and the necessity of progressive liberalization."[21] Accordingly, the need to address those investor's concerns turns out to be the main reason governments subscribe to

[17] Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L. 501 (1998).
[18] Jeswald W. Salacuse, The Law of Investment Treaties, at 109 (Oxford University Press, 2010).
[19] Id.
[20] Id.
[21] See for reference the Preamble of the Agreement Between Japan and the Republic of Colombia for the Liberalization Promotion and Protection of Investment, Japan-Colom., Sept. 12, 2011, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/COL_JPN_e.pdf.

BITs. In other words, an investment treaty's aim is grounded in the necessity to address the typical risks of a long-term investment project (political risks), providing investors with stable and predictable rules.[22]

Therefore the following are the typical political risks covered by an investment treaty:[23]

- The rights of investors from one state to enter and establish investment in the other state;
- The obligation of the host state to treat investors according to the "minimum international standard;"
- The right of free currency transferability and convertibility;
- The right of appropriate compensation in cases of expropriation;
- The settlement of disputes between the host state and investors through international commercial arbitration.

Next I will review the most relevant substantive provisions of the Colombian investment treaties dealing with political risks highlighting the advantages and disadvantages they present for investors and the differences between them to show the guarantees that foreign investors have in Colombia under such instruments.

[22] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 22, (Oxford, 2008).
[23] Paul E. Comeaux and N. Stephan Kinsella, Protecting Foreign Investment Under International Law Legal Aspects of Political Risks 102 (Oceana Publications Inc., 1996).

4. The substantive provisions of the Colombian BITs dealing with political risks

Investment treaties are normally divided in two parts: (i) substantive rights and (ii) procedural remedies. Substantive rights include guarantees of appropriate compensation for expropriation, assurances of fair and equitable treatment, guarantees of national treatment of the investment, undertakings that a sovereign will honor its obligations, and assurances that treatment no less favorable that the one provided by international law will be granted to investors.[24] Procedural remedies, on the other hand, regulate the procedure that allows investors to take host states directly to international arbitration – normally for breach of a standard included in the treaty. As suggested above we will focus on the substantive rights; notwithstanding, a brief analysis of and comment on the procedural remedies and their importance to an investor will be included before the conclusion. The substantive rights will be analyzed in the order that they normally appear in the text of the investment treaties,[25] beginning with the scope of application clause, which is included first in all of the treaties' legal texts.

[24] Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, McGeorge Global Business and Development Law Journal, Vol. 19, (2007).

[25] The term "investment agreements", "BITs" and "investment treaties" will be used interchangeably in this document to refer to the in force Colombian bilateral investment treaties, which are the BITs with Spain, Peru and Switzerland, to the BIT with Japan which is signed but pending approval and to the Investment Chapter of the Free Trade Agreement with the United States which will enter into force in May 15, 2012.

4.1. Scope of application

The scope of application is an essential part of every investment treaty because it defines the investments and the investors that are covered. In other words, an investment treaty applies only to investors and investments that qualify for coverage under the treaty's relevant provisions.[26] To understand this application, it is important to clarify what are an investment and an investor under the Colombian investment treaties.

i. Definition of investment

Both the United States-Colombia Free Trade Agreement ("USCFTA") and the Japan-Colombia Bilateral Investment Treaty ("JCBIT") define the term investment as follows[27]:

> Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including:
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> (a) an enterprise;
> (b) shares, stock, and other forms of equity participation in an enterprise;
> (c) bonds, debentures, other debt instruments, and loans;
> (d) futures, options, and other derivatives;
> (e) turnkey, construction, management, production, concession, revenue sharing, and other similar contracts;
> (f) intellectual property rights;
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

[26] Organization for Economic Co-operation and Development, OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* 9 (2008).
[27] Free Trade Agreement U.S. – Colom., Art. 10.28, Nov. 22, 2006, *available at* http://www.sice.oas.org/TPD/AND_USA/COL_USA/Draft_text_0607_e/Index_e.asp and Agreement between Japan-Colom., at Art. 1, *supra* note 21.

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges

The USCFTA and the JCBIT definitions of investment may be considered as the most comprehensive ones; however, in all the other investment agreements, though with less specification, a similar definition can also be found. One should bear in mind, nonetheless, that there is no single definition of investment because the term investment varies according to the object and purpose of the investment treaty containing it.[28] However, the definition of investment in all of the agreements covers both direct and portfolio investment and the list of forms that an investment may take is intended to be *illustrative not exhaustive*.[29] In fact, the text of the treaties when referring to what an investment is uses the words "every kind of asset" and then they provide the non-exhaustive list preceded by words like "including," "particularly," "may take the form of," which permit a reader to infer that they are included as examples not as an exhaustive list. That situation was expressly recognized by a tribunal holding that "[t]he specific categories of investment included in the definition [of investment] are included as examples rather than with the purpose of excluding those not listed."[30]

Accordingly, by not having a limited definition of what an investment is, the treaties recognize the fact that the forms of an investment may evolve and should not be limited to

[28] OECD, *supra* note 26, at 49
[29] Id
[30] *Siemens v. Argentina*, ICSID Case No. ARB/02/8 (Germany/Argentina BIT), Decision on Jurisdiction, August 3, 2004.

some specific categories. In so doing, the effect of having a broad investment definition in the treaties' text is to provide an expanding umbrella of protection for investors.[31]

In addition to the general definition, the USCFTA and the JCBIT qualify the meaning of "every kind of asset" by saying it has to have the characteristics of an investment, i.e., (i) the commitment of capital or other resources, (ii) the expectation of gain or profit, or (iii) the assumption of risk.[32] Once more, this is not an exclusive list of characteristics and the "or" conjunction suppose they are not cumulative. These characteristics have been included by the concern of the negotiators that an open-ended definition could result in coverage of assets that the negotiators did not contemplate to include.[33] However, it is difficult to imagine an investment without at least one of those elements.

Notwithstanding the general terms that define the protected investments, exclusions are also included. In fact, some agreements exclude the following from being considered investments: orders or judgments entered in a judicial or administrative action;[34] claims to money that are immediately due resulting from the sale of goods or services;[35] short-term

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[31] Jeswald W. Salacuse and Nicholas P. Sullivan, Do BITs Really Work An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L.J. 67 (2005).
[32] Free Trade Agreement U.S. – Colom., *supra* note 27, at Art. 10.28 and Agreement between Japan-Colom., *supra* note 21, at art. 1.
[33] United Nations Conference on Trade and Development, UNCTAD, Series on International Investment Policies for Development, INTERNATIONAL INVESTMENT ARRANGEMENTS: Trends and Emerging Issues, (2006).
[34] Id.
[35] Id.

loans, maturity date of which is less than 12 months[36] and loans issued by one party to another party (the contracting states to a BIT).[37]

ii. Definition of investor

Investors are defined in different ways in the text of the agreements; however, they normally include: natural persons of the other party who are those having the nationality of that party according to its laws and regulations; legal entities constituted or organized under the laws of the other party[38] and some treaties specifically include contracting parties or state enterprises thereof.[39]

A difference, however, is included in the USCFTA and the JCBIT by mentioning that an investor is one that attempts through concrete action *to make, is making, or has made* an investment in the territory of another party.[40] As a consequence, that definition seems to extend the coverage of the treaty not only to the investments made after the treaty entered

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[36] Agreement between Japan-Colom., *supra* note 21, at art. 1

[37] Free Trade Agreement, US- Colom., *supra* note 27, at art. 10.28 and Agreement between the Republic of Colombia and the Republic of Peru on the Promotion and Reciprocal Protection of Investments, Colom.-Peru., art. 1 (2), 26 April 1994, *available at* *http://www.sice.oas.org/Investment/BITSbyCountry/BITs/COL_PER_s.pdf.*

[38] In the Colombia-Switzerland BIT, as well as in the agreement with Spain, it is required, in addition to being constituted or organized under the law of a party, that the legal entity have its seat of business in the territory of that party. In the BIT with Japan the additional requirement is not to have the seat of business but that the legal entity carries out business activities in the area of the contracting party. In turn, in the agreement with Peru the requirement is not to be constituted under the laws of the other party but to carry out business activities in the area of the contracting party and to be under the control, direct or indirect, of the nationals of one of the contracting parties. The USCFTA besides the enterprises being constituted or organized under the law of a party includes as legal entities a branch located in the territory of a party and carrying out business activities there.

[39] Free Trade Agreement US- Colom., *supra* note 27, at art. 10.28 and Agreement between Japan-Colom., *supra* note 21, at art. 1 (b)

[40] Id.

into force but also to those investments made before. Similarly, the Colombia-Switzerland BIT ("CSBIT") explicitly covers "investments whether prior to or after the entry into force of the agreement."[41] Therefore, investors in any of these agreements have the assurance that their investments (assuming they fall under any of the categories mentioned above) will be protected even if made prior to the entry into force of the agreement. This is particularly important for capital exporting countries as long as these countries have normally made investments in the territory of their developing countries' counterparties prior to the subscription of an investment treaty. That is indeed the case of Colombia with the U.S., Spain, Switzerland, and Japan as well as with most of the countries with whom the Government is currently negotiating or in the process of approving new BITs or investment chapters in FTAs.

The time coverage protection in the other Colombian investment agreements is not specified. As a result, if an investor with an investment made prior to the entry into force of a treaty is not given the solicited protection he may recur to the most favoured nation (MFN) protection (see MFN section below).

The agreements include also a definition of territory if considered that the investment concept is referred in most of the cases to the territory of the other party.[42] Such a

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[41] Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Colom.-Switz., Art. 2, May 17, 2006, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/COL_Switzerland_e.pdf

[42] See Agreement between Colom.-Switz*, id.*, at art. 1(4), Agreement between Colom.-Peru., *supra* note 37, at art. 1(5) and the Agreement between the Republic of Colombia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, Colom.-Spain., at art. I (4), 31 March 2005, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/COL_Spain_s.pdf.

definition is more detailed in the USCFTA and the JCBIT.[43] That may help to avoid disputes in regard to the geographical areas covered or not by the treaties.

In sum, the definition of investment and investor (including the time periods covered by the agreement) is crucial for determining whether an investment of an investor falls under the protection of a treaty and for determining whether a claim may be submitted by an investor to the jurisdiction of an international arbitral tribunal under a BIT.

4.2. National Treatment

National treatment is a principle included in all the Colombian investment agreements' texts whereby the "host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances."[44] In other words, the national treatment seeks to treat foreign investors and foreign investments no less favorably than national investors and their investments. That protection covers differentiation in treatment between foreign and local investors both *de jure* and *de facto*.[45]

[43] Free Trade Agreement US- Colom., *supra* note 27, at Annex 1.3 and Agreement between Japan-Colom., *supra* note 21, at art. 1(f).

[44] United Nations Conference on Trade and Development, UNCTAD*, National Treatment*, UNCTAD Series On Issues In International Investment Agreements, (1999).

[45] See for reference *Feldman v. Mexico,* ICSID Case No. ARB(AF)/99/1 (NAFTA), Award on Merits, (December 16, 2002); *S.D. Myers, Inc. v. Canada,* UNCITRAL (NAFTA), First Partial Award, (November 13, 2000).

The aim of this principle, along with the MFN clause (discussed in section 4.3 below), is to put all the economic actors on equal footing with the idea that such equality will foster competition and economic growth.[46]

Complexities with this principle, however, may arise in regard to the extent of treatment provided to foreign investors, i.e., if the standard covers only post-entry or also pre-entry investments (see definition of investor above). In addition, parties to an agreement may negotiate exclusions in the form of positive or negative lists.[47]

In the Colombian investment treaties the national treatment (NT) provision is drafted in similar terms providing that contracting parties shall grant to investors and investments of the other contracting party treatment no less favorable than the treatment it accords in like circumstances to its own investors and to their investments.[48] Interestingly, in the USCFTA there is an additional provision specifying that the national treatment means, with respect to a regional level of government, treatment *no less favorable than the most favorable treatment* accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which forms part.[49] This provision seems to entitle an investor to most favored treatment in order to receive NT but its scope is not

[46] Jeswald W. Salacuse, *supra* note 18, at 245.
[47] Id.
[48] Free Trade Agreement U.S. – Colom., *supra* note 27, at Art. 10.3.
[49] Id.

completely clear. Fortunately, the tribunal in *Methanex v United States* interpreted and clarified the meaning of a similar provision as follows[50]:

> if a component state or province differentiates, as a matter of domestic law or policy, between members of a domestic class, which class happens to serve as the comparator for an Article [10.3] claim, the investor or investment of another party is entitled to the most favourable treatment accorded to some members of the domestic class.

In addition, the national treatment protection has been qualified in the USCFTA by specifying which investments are covered, i.e., the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[51] These qualifications may turn out to be prejudicial in the event that a specific discriminatory treatment is considered to not fall into any of those categories.

In the Colombia-Peru BIT ("CPBIT"), the national treatment principle is subject to the exceptions provided for in the national law.[52] Accordingly, the effectiveness of the principle might be rendered ineffective by the parties' internal regulation.

In any event, from a political risk mitigation point of view, the national treatment principle confers foreign investors the guarantee to be treated by the host state no less favorably than the way it treats its local investors. Such non-preferential treatment may be decisive in mitigating the risk, for instance, of a public bidding process where foreign and local

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[50] *Methanex v. United States,* UNCITRAL (NAFTA), Final Award, (August 3, 2005).
[51] Free Trade Agreement U.S. – Colom., *supra* note 27, at Art. 10.3.
[52] Agreement between Colom.-Peru., *supra* note 37, at art. 12 (1).

companies are competing for a concession in the host country, or in the process of soliciting a license or permit approval to carry out an infrastructure project. In fact, in any attempt by a host government to favor local investors at the expense of foreign investors, the latter have the right to demand equal treatment unless some exceptions have been provided for in the text of the treaty.

4.3. Most Favored Nation (MFN)

The MFN clause in the context of investment agreements is meant to provide foreign investors of different nationalities with equal competitive conditions in regard to the settlement and/or operation of investments.[53] That means that parties to an investment agreement seek to be treated as favorably as each of the parties treats any other third party.

In the Colombian BITs the wording of the MFN clause varies among the treaties. The CSBIT, for example, provides a mixture of the fair and equitable treatment with the NT standard that

> each party shall ensure fair and equitable treatment within its territory of the *investments* of investors of the other party. This treatment shall not be less favorable than that granted by each Party to the investments made within its territory by its own investors, *or than that granted by each Party to the investments made within its territory by investors of the most favored nation, if this latter treatment is more favorable* (emphasis added). [54]

[53] United Nations Conference On Trade And Development, UNCTAD, *Most Favored Nation*, UNCTAD Series on Issues in International Investment Agreements II, (2011).
[54] Agreement between Colom.-Switz*, supra* note 41, at art. 1(2).

In the agreement with Spain ("CSPBIT") it is provided that the investments and the investor's revenues from each party should not be treated less favorably than the investments and the investor's revenues of another party.[55] In both of these treaties it can be appreciated that the right or the protection is given to the investments, and in the BIT with Spain, this right or protection is also extended to the investor's revenues. In contrast, in the BIT with Peru, the MFN right is placed on the shoulders of the investors in regard to the management, use and disposal of their investments. This approach where different beneficiaries of the MFN clause exist (investments or investors) may have consequences because, although directly interlinked, they are different subjects and may enjoy different rights under the agreements.[56]

In order to avoid that problem the most recent agreements between Colombia and Japan and Colombia and the United States include as subjects of the MFN protection the investments and the investors of the other party[57]; furthermore, these agreements specify that the protection extends to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[58] The MFN clause is therefore qualified by the latter agreements (see national treatment above).

In any case, any investor who feels that his investment is being treated less favorably than that of an investor from a third party may invoke the MFN clause. Moreover, that

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[55] Agreement between Colom.-Spain., *supra* note 42, at art. I (2).
[56] UNCTAD, *supra* note 44.
[57] Free Trade Agreement, US- Colom., *supra* note 27, at art. 10.4 and Agreement between Japan-Colom., *supra* note 21, at art. 3.
[58] Id.

protection can even be extended in the case where an investor feels that the provisions of another BIT entered into by the host country are more favorable than those included in the BIT that protect its investment. For instance, the tribunal in *CME v Czech Republic* extended the criteria to determine the value of an expropriation from the BIT the Czech Republic had with the U.S. to the BIT with the Netherlands through an application of the MFN clause.[59] Similarly, in *Bayindir v Pakistan* to protect Turkish investors the tribunal brought the explicit fair and equitable treatment clause that Pakistan had in the BITs concluded with the Netherlands, China, Australia, the United Kingdom and Switzerland to the Pakistan-Turkey BIT through an application of the MFN clause.[60]

Notwithstanding, in regard to the applicability of the MFN clause to bring dispute settlement provisions from other BITs subscribed to by the host country there is a division in the international jurisprudence. In some cases, for example, tribunals have permitted investors to avoid certain treaty procedural steps allowing investors to go directly to international arbitration by relying on the MFN clause of another BIT subscribed to by the host country.[61] Some commentators, though, have strongly criticized those decisions.[62] To

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[59] *CME Czech Republic B.V. v. Czech Republic,* UNCITRAL (The Netherlands/Czech Republic BIT), Final Award, (September 13, 2001).

[60] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT), Decision on Jurisdiction, (November 14, 2005).

[61] See for reference *Maffezini v. Spain,* ICSID Case No. ARB/97/7, Award on Jurisdiction, (Jan. 25, 2000), Siemens v. Argentina, ICSID Case No. ARB/028, Decision on Jurisdiction, (Aug. 3, 2004) and National Grid PLC v. Argentina, UNCITRAL, Decision on Jurisdiction, (June 20, 2006).

[62] See for reference Impregilo S.p.A. v. Argentine Republic, Dissenting Opinion of Professor Brigitte Stern, ICSID Case No. ARB/07/17, (June 21, 2011).

avoid uncertainty, the MFN clause text of the USCFTA and the JCBIT expressly precludes the use of the MFN provisions in regard to dispute settlement mechanisms.[63]

In sum, the MFN clause guarantees foreign investors are not treated less favorably than investors of any other country. This is particularly relevant in project finance to avoid situations where the host country intends to favor a third party either for political, economic or convenience reasons. Also for cases when the investment or the investor under a specific treaty may not be eligible for protection. In such cases, through an application of the MFN standard it may be possible, absent express exceptions, to invoke more favorable provisions of another BIT that the host country has entered into with another state.

4.4. Fair and equitable treatment

This is a standard that has been included in most of the investment agreements. It has become one of the most relied and successful grounds to submit claims by investors under BITs.[64] The fair and equitable treatment ("FET") standard protects investors against arbitrary, discriminatory and abusive acts by host governments. There is, however, a problem defining the standard's scope and its boundaries.

[63] Free Trade Agreement US-Colom., *supra* note 27, at art. 10.4.2 and Agreement Between Japan-Colom., *supra* note 21, at art. 3.1.
[64] United Nations Conference On Trade And Development, UNCTAD, *Fair And Equitable Treatment*, Series on Issues in International Investment Agreements II, (2012).

The FET standard applies to investments in specific situations regardless of how other investments are treated by the host state.[65] That means the host state cannot prevent a claim by arguing that there is no differentiation in the treatment given to its own national investors.[66] It is an independent standard of protection from the national treatment or the MFN clause. Overall, the purpose of the FET in BITs is to fill gaps left by the other standards of protection (e.g. national treatment, most favored nation clause, expropriation and compensation, among others) in order to meet the BIT desired levels of protection.[67]

The standard of FET is a broad one, and its definition and scope will depend on the specific circumstances of a case.[68] The tribunal in *Waste Management v Mexico* held that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[69] In other words, as the Tribunal in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* held, "in assessing whether the standard has been transgressed, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and equitable, or unfair and inequitable."[70]

As a consequence, there is no particular approach to determine whether conduct by the host state may fall under the standard of FET. Nonetheless, some tribunals have pointed out

[65] Id.
[66] Id.
[67] Dolzer and Schreuer, *supra* note 22, at 122.
[68] Id, at 128.
[69] *Waste Management, Inc. v. United Mexican States* (Number 2), ICSID Case No. ARB(AF)/00/3 (NAFTA), (April 30, 2004).
[70] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3 (France/Argentina BIT), Award, (August 20, 2007).

some elements or criteria that may help to determine whether a violation of the FET has taken place, including: a treatment should not affect the basic expectations that were taken into account by the foreign investor to make the investment; the host state should act in such a transparent manner with the foreign investor as for the latter to have a clear understanding of the applicable laws and regulation, which will permit him to plan its investment; the host state should act consistently, i.e., without arbitrarily revoking any permits or licenses the investor has relied on[71] and generally speaking in an even-handed and just manner, conducive to fostering the promotion of foreign investment.[72]

In the most recent Colombian investment treaties – the USCFTA and the JCBIT – the standard of FET is subsumed within the treatment that each party shall provide to the investors of the other party in accordance with customary international law.[73] In fact, the text of those treaties specifically provides that the standard of FET "does not require treatment in addition to or beyond that which is required by that standard [customary international law]."[74] This may imply a limitation for investors to submit claims alleging a violation of FET that otherwise may have implied a higher standard than customary international law.

[71] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Spain/Mexico BIT), Award, (May 29, 2003).
[72] Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, (Dutch/Czech BIT), Partial Award, (March 17, 2006).
[73] Free Trade Agreement US- Colom., *supra* note 27, at arts. 10.5.1-10.5.2 and Agreement between Japan-Colom., *supra* note 21, at arts. 4.1-4.2.
[74] Id.

In the CPBIT it is mentioned that foreign investors should receive FET, *and* receive entire protection and security pursuant to international law principles (emphasis added).[75] Therefore, it seems that two different standards have been included in the text of the treaty: the FET and the treatment accorded by international law. Accordingly, an investor facing a hostile treatment by a host state will have a broader basis to allege a treaty violation – not limited to customary international law.

In the other Colombian investment agreements with Switzerland[76] and with Spain,[77] there is no specific FET wording included in the text. Both of the treaties, however, provide that the governments should not impair by *unreasonable or discriminatory measures* the management, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.[78] The fact that the FET obligation has not been included could imply that the parties have purposefully done so to avoid being exposed to this broad standard of protection.[79] Inasmuch, "the prohibition of unreasonable, arbitrary and/or discriminatory measures is consonant with the FET standard, but the standard itself goes beyond this prohibition."[80] Furthermore, the agreement with Spain provides that each party will provide full protection and security in their territory to the investments of the other party pursuant to international law although, again, no mention to the FET is included.[81]

[75] Agreement between Colom.-Peru., *supra* note 37, at art. 3 (1)
[76] Agreement between Colom.-Switz., *supra* note 41.
[77] Agreement between Colom.-Spain, *supra* note 42.
[78] *Id.* at art. III:1 and Agreement between Colom.-Switz., *supra* note 41, at art 4(1).
[79] UNCTAD, *supra* note 64, at 20.
[80] Id, at 31
[81] Agreement between Colom.-Spain., *supra* note 42, at art. III:1

In any event, the FET standard continues to be an undefined concept and it is not clear what its elements and boundaries are. In the USCFTA and the JCBIT, however, the standard is somehow limited. In fact, as suggested above, those treaties refer the FET treatment to the customary international law (CIL) minimum standard.[82] There is, however, no defined concept as to what the minimum standard of treatment for investors should be.[83] Such undefined situation, however, should not be a serious issue as long as the minimum standard is in any case international law; what is important thus, is that an arbitral tribunal take into consideration those minimum international law standards.[84] As such and as noted in *Mondev International Ltd. v. United States of America,* a tribunal does not have unfettered discretion or *carte blanche* to decide when the FET standard is breached, but it must reach its decision based on relevant sources of general international law.[85]

As a result, except for situations like the USCFTA and the JCBIT where the FET is subject to the CIL, investors will continue to have leeway to submit treaty violation claims and will thus continue to take host states to international arbitration under a broad spectrum of activities that may prejudice their investments, even beyond the CIL. That certainly may prove valuable for investors trying to allocate political risks in countries prone to interfere

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82 Free Trade Agreement US- Colom., *supra* note 27, at art. 10.5.2 and Agreement between Japan-Colom., *supra* note 21, at art. 4.2.

83 UNCTAD, *supra* note 64, at 45.

84 Comment by Professor Daoud Khairallah, Project Finance and Investment course, Georgetown University Law Center, (2012).

85 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, (October 11, 2002). See also *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1 (NAFTA), Award, (January 9, 2003).

with foreign investments; on the negative side, however, this is a situation that may led to abuses by investors and that might eventually clash with the states sovereignty.[86]

4.5. Expropriation and compensation

Based on the same structure followed in the last sections, I will provide here a general framework of what constitutes expropriation from an international investment perspective and then focus on the specific provisions of the Colombian BITs to conclude how those provisions may help an investor mitigate the risk of expropriation.

i. The concept of expropriation

Expropriation takes place when the government takes foreign investor's property located in the host state.[87] The forms of expropriation have evolved from outright expropriation through government seizure to the imposition of regulatory measures by which the investor remains in possession of the investment but is deprived the benefits originally contemplated.[88] Therefore, two forms of expropriation may affect an investor's investment: (i) direct takings or direct expropriation, which involve the transfer of the investor's title and, (ii) measures that impair the investment by affecting its economic value and/or the owner's ability to use, manage or control its property in a meaningful way (indirect

[86] Roland Klager, Fair and Equitable Treatment, 317, (Cambridge Studies in International and Comparative Law, 2011).
[87] Rubins and Kinsella, *supra* note 10, at 6.
[88] Salacuse, *supra* note 18, at 286.

expropriations).[89] In turn, the category of indirect expropriation has been subdivided in: a) Creeping expropriation, that is, the use of a series of measures in order to achieve deprivation of the economic value of the investment, however, no measure by itself amounts to expropriation; and b) Regulatory expropriation, where a regulatory measure by itself has an impact on the economic value of an investment sufficient to be deemed an expropriation.[90]

In regard to indirect expropriation, however, the tribunal in *Glamis v United States* held that a state is not responsible "…for loss of property or for other economic disadvantage resulting from bona fide ... regulation ... if it is not discriminatory."[91] Accordingly, not any measure impairing an investment may entitle an investor to submit a claim for expropriation; "the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."[92]

The reasons for expropriation are diverse and can change rapidly and dramatically as a consequence of shifting political and economic dynamics in host countries, the region and the world itself.[93] Notwithstanding, the most common cause for an expropriation to take place is the existence of a public purpose that is normally regarded as being more important than the investor's rights. That does not mean, though, that investors are left unprotected; on

[89] United Nations Conference on Trade and Development, UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, (2011).
[90] United Nations Conference On Trade And Development, UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, (2005).
[91] *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL (NAFTA), Award, (June 8, 2009).
[92] *Id.*
[93] *Id.,* at 286.

the contrary, the treaties provide for some remedies as seen in the specific expropriation provisions of the Colombian investment treaties.

ii. The expropriation provisions in the Colombian BITs

In all the investment treaties it is clear that a host state has the right to expropriate, nationalize, etc. a foreign investor's investments. However, that right is limited by the exceptions or requirements included in the treaties and by the obligation to compensate the investor. Hence, in order to determine whether an investment may be expropriated according to the treaties procedure and whether an investor is entitled to compensation, it is first required to determine whether the investment is covered by the agreement (see scope and coverage in section 4.1.).

The expropriation requirements have been developed by customary international law and are now included in most of the BITs.[94] Such requirements and limitations imply that a host state cannot expropriate a covered investment of investors of the other party or take any measure equivalent to expropriation or nationalization, except for:[95]

- A public purpose. The term public purpose is referred to in the USCFTA and the JCBIT as a concept in customary international law, and a clarification is

[94] Dolzer and Schreuer, *supra* note 21, at 91.
[95] See for reference the Free Trade Agreement US- Colom., *supra* note 27, at art. 10.7.1, the Agreement between Japan-Colom., *supra* note 21, at art. 11.1, the Agreement between Colom.-Spain., *supra* note 38, at art. V, the Agreement between Colom.-Peru., *supra* note 37, at art. 7 (1) and the Agreement between Colom.-Switz, *supra* note 37, at art. 6.

provided that public purpose may be expressed in domestic law as "public necessity, "social interest," etc.[96]

- In a non-discriminatory manner.

- On payment of prompt, adequate, and effective compensation; and

- In the USCFTA it is also required that the procedure of expropriation follow a due process of law and a minimum standard of treatment.[97] Thus, by referring the expropriation to the due process of law, which is a minimum standard under customary international law that includes fair and equitable treatment and full protection and security, it is not clear if the treaty is adding an independent requirement.[98]

In regard to the compensation, the CSPBIT, the CPBIT and the CSBIT provide that such compensation shall amount to the *market value of the investments expropriated before the expropriatory action was taken or became public knowledge, whichever is earlier*[99] (emphasis added). The JCBIT provides for *fair market price* of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation

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[96] Free Trade Agreement US- Colom., *supra* note 27, at art. 10.7.1 and Agreement between Japan-Colom., *supra* note 21, at art. 11.1.
[97] Free Trade Agreement US- Colom., *supra* note 27, at art. 10.7.1.
[98] Dolzer and Schreuer, *supra* note 21, at 91.
[99] Agreement between Colom.-Spain., *supra* note 42, at art. V, Agreement between Colom.-Peru., *supra* note 37, at art. 7 (1), Agreement between Colom.-Switz, *supra* note 41, at art. 6.

occurred, whichever is earlier[100] (emphasis added). Consequently, it adds an element of fairness to the compensation value, which however is not defined in any part of the text. In any case, by referring the value to the moment when the expropriation was publicly announced or when the expropriation occurred, that may represent a limitation or disadvantage if compared with the treaties of Spain, Peru and Switzerland where the value is being determined the moment immediately before the expropriation or when it became public knowledge.[101] In fact, the moment when something becomes public knowledge and the time when something is publicly announced may differ substantially. As a result, an expropriation may become public knowledge long time before it is publicly announced. Consequently the market value of an investment may vary significantly from one moment to another. For instance, if it becomes publicly known that a road will cross an investor's property and that it will affect the characteristics of that property, the value of the property before that situation became public knowledge will totally differ from the value when the expropriation is publicly announced.

The USCFTA in turn, refers the market value to the date of expropriation[102], which results even more aleatory, as long as an expropriation may become public knowledge long time before the date of the effective expropriation. Therefore, the market value before the expropriation become public knowledge may vary substantially from the price when the

[100] Agreement Japan-Colom., *supra* note 26, at art. 11.2.
[101] Agreement between Colom.-Spain., *supra* note 42, at art. V, Agreement between Colom.-Peru., *supra* note 37, at art. 7 (1), Agreement between Colom.-Switz, *supra* note 41, at art. 6.
[102] Free Trade Agreement US- Colom., *supra* note 27, at art. 10.7.3.

expropriation takes place. That may be favorable or unfavorable to the investor depending on the effect of the expropriation on the investment.

In addition, the USCFTA excludes from the expropriation treaty protection measures taken by the host state in relation to intellectual property rights (compulsory licenses).[103] That provision ensures that compulsory licenses will not be challenged by intellectual property rights (IPR) holders for being expropriatory.[104]

Overall, it is a common element in all treaties to include in their texts a provision recognizing the host states' right to expropriate and the investors' right to have their investments protected pursuant to the minimum requirements the host state would have to comply with before proceeding with an expropriation. These requirements are basically the existence of a public purpose, the non-discriminatory basis of the measures and the payment of prompt, effective and adequate compensation. These minimum requirements are definitely a protection for investors conducting projects in foreign countries and certainly help them to mitigate the risk of government's interference with the project, even when there is no bad faith or expropriatory intent by the governments.

A good example is the case of *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* where some regulatory measures taken in good faith by the

[103] Id., at art. 10.7.5.
[104] UNCTAD, *supra* note 89, at 34.

Argentinean government were found by the tribunal to be expropriatory[105], even though that was not the intention of the government[106]. In fact, as the tribunal held "showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor."[107] Moreover, in that case even though the measures were found to be expropriatory that was not the fact that amounted to a violation of the treaty because, as explained above, all the BITs recognize the right of host states to nationalize. What was found to be a violation was that no compensation was paid.[108]

Investors therefore have the security in the presence of a BIT that, if the effect of a government's measure is expropriatory of their investment, no matter the measure's intent, they will have a right to prompt, effective and adequate compensation (Hull Doctrine standard).[109] In order to make such determination, however, as mentioned above, the test will be based on "whether the [government's] interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."[110]

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105 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, supra* note 70.
106 Id.
107 Id.
108 Id.
109 Kevin Smith, The Law of Compensation for Expropriated Companies and the Valuation Methods used to Achieve that Compensation, (2001), *available at,*
http://www.wfu.edu/~palmitar/Law&Valuation/Papers/2001/Smith.htm
110 *Glamis Gold, Ltd. v. The United States of America, supra* note 91.

4.6. Transfer of funds

The same structure of the previous sections will be employed in the discussion of the transfer of funds protection: general understanding of the subject matter; analysis of the Colombian BITs provisions and a conclusion will be provided.

i. Background

From the perspective of a foreign investor, an investment cannot be considered protected unless the host country has committed itself to permit the payment, conversion and repatriation of monetary sources related to the investment.[111] The ability to make monetary payments freely both into and out of the host country is essential for the success of any foreign investment.[112] Accordingly, in international project finance one of the risks to a project entity rely on the ability to transfer foreign exchange into and out of the host country.[113] The risk of transferring currency out of the host country supposes in turn the possibility to convert local currency into foreign exchange and then, the ability to transfer that converted currency out of the country.[114]

One, however, should bear in mind that currency inflows and outflows are elements that have an effect on a host country's financial markets; therefore, these are elements that a

[111] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD, Transfer of Funds, UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, 2000.
[112] Jeswald W. Salacuse, *supra* note 18, at 256.
[113] Hoffman, *supra* note 6, at 41.
[114] *Id.*

host country's government wants to regulate and control. That in turn may lead to divergent interests between a foreign investor and a host country's government.[115] In order to solve potential conflict of interests between foreign investors and host governments, provisions regulating this subject matter are included in BITs.

ii. The text of the Colombian investment treaties

The text of the treaties will be reviewed by separating the main sections of the transfer of funds provisions.

a. General scope to make transfers

Both the USCFTA and the JCBIT provide as a general scope that each party shall permit all transfers relating to an investment to be made freely without delay into and out of the territory.[116] Even though some authors mention that the term "transfers" supposes payments both to the host country and from the host country to a foreign country,[117] the USCFTA and the JCBIT specifically say so[118], leaving clear that the scope of the provision is to permit transfers in both directions.

[115] Dolzer and Schreuer, *supra* note 22, at 191-192.
[116] Free Trade Agreement US- Colom., *supra* note 27, at arts. 10.8.1 and Agreement Japan-Colom., *supra* note 21, at art. 14.1
[117] Jeswald W. Salacuse, *supra* note 18, at 257; see also Dolzer and Schreuer, *supra* note 22, at 193
[118] Free Trade Agreement US- Colom., *supra* note 27, at arts. 10.8.1 and Agreement Japan-Colom., *supra* note 21, at art. 14.1

In the CSBIT, the term included is "transfers," however it does not specify if they apply in one or both directions.[119] In the agreements with Spain and Peru the text of the treaties are clear enough to permit inference that the free transfer of payments applies in both directions.[120]

In addition, all of the Colombian treaties contain a list of non-exclusive transactions[121] that investors may undertake. The list includes contributions to capital, profits, payments under a contract including loan payments, payments arising out of the settlement of any dispute, etc.[122] The list mentions, without limitation, transactions of currency into and out of the host country. In the CSBIT, however, the list mainly refers to currency transactions out of the host country; that, nonetheless, does not seems to be a sufficient argument to infer that the treaty does not cover transactions into the host country because, as mentioned above, the list is non-exclusive.

Interestingly, the JCBIT includes in the list earnings and remuneration of personnel;[123] the USCFTA in turn includes management fees, technical assistance and other fees.[124] These inclusions suppose specific protection for a project's personnel transfers that may turn out to be decisive when recruiting new talent to work for a specific project overseas. In fact, it

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[119] Agreeement between Colom.-Switz., *supra* note 41, at art. 5 (1).
[120] Agreement between Colom.-Spain., *supra* note 42, at art. VII (1) and Agreement between Colom.-Peru., *supra* note 37, at art. 6 (1).
[121] Jeswald W. Salacuse, *supra* note 18, at 258.
[122] See for reference the Free Trade Agreement US- Colom., *supra* note 27, at art. 10.8, the Agreement between Japan-Colom., *supra* note 21, at art. 14.1, the Agreement between Colom.-Spain., *supra* note 42, at art. VII (1), the Agreement between Colom.-Peru., *supra* note 37, at art. 6 (1) and the Agreeement between Colom.-Switz., *supra* note 41, at art. 5 (1).
[123] Agreement between Japan-Colom., *supra* note 21, at art. 14.1.
[124] Free Trade Agreement US- Colom., *supra* note 27, at art. 10.8

would not be surprising that some workers may want to repatriate all of their earnings to their home country. Notwithstanding, even if such provisions are not included in the text of a treaty, employees may have the right to transfer their earnings under a treaty's general rights of transfer. That right, however, will depend on whether the right to transfer is placed on the investment or on the investor, because if it is placed on the investor it is less likely to be interpreted to permit transfers by employees. If, on the other hand, the right is placed on the investment it might be interpreted that transfers by employees are covered in "payments in connection with an investment,"[125] which is a term included in most of the treaties. That term, nonetheless, is limited to the investors in most of the cases. In the CSBIT, notwithstanding, among the permitted transfers *for investors,* there is a provision that allows transfers of payments made under a contract entered into *by the investor or its investment* (emphasis added).[126] Such provision may be interpreted to cover labor contracts, however, it might require the investor (as the holder of the right to transfer) to pay its employees all or part of their salary outside the host country.

In the CSPBIT the holders of the rights to transfer are the nationals or the enterprises of the other party.[127] Therefore, the employees who are nationals of the other party might be entitled to make transfers of their earnings freely. However, those employees who are not nationals in the case of the CSPBIT and in general those working in a contracting party where the BIT does not include a specific provision of personnel earnings transfers are not, by that solely fact, unprotected. In the case of Colombia, in all of the investment treaties the

[125] Jeswald W. Salacuse, *supra* note 18, at 259.
[126] Agreeement between Colom.-Switz., *supra* note 41, at art. 5 (1).
[127] Agreement between Colom.-Spain., *supra* note 42, at art. VII (1).

list of permitted transfers is a *non-exclusive list*. Therefore, it is possible to include in such a list the transfer of earnings by a project's personnel (directly or through the investor depending on who is given the right).

b. Access to freely convertible currency and market exchange

All of the Colombian investment treaties contain a provision ensuring that transfers shall be made in a freely usable currency at the market exchange rate prevailing on the date of each transfer.[128] This is a very important provision because revenues in an overseas project are very likely to be earned in a local currency. Accordingly, in order for an investor to be able to repatriate funds or simply to make payments abroad (for instance a loan) it is first necessary that that investor convert those funds into a freely convertible currency.

Therefore, this provision ensures investors access to freely usable currencies at the market exchange rate prevailing on the date of each transfer. A freely usable currency is defined in the Articles of Agreement of the International Monetary Fund as "a member's currency that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets."[129]

[128] See for reference the Free Trade Agreement US- Colom., *supra* note 27, at art. 10.8, the Agreement between Japan-Colom., *supra* note 21, at art. 14.1, the Agreement between Colom.-Spain., *supra* note 42, at art. VII (1), the Agreement between Colom.-Peru., *supra* note 37, at art. 6 (1) and the Agreement between Colom.-Switz., *supra* note 41, at art. 5 (1).
[129] International Monetary Fund, Articles of agreement of the International Monetary Fund (1944). – Washington, D.C. : International Monetary Fund, 2011. Art. XXX.

In addition, only the USCFTA contain a provision whereby each party shall permit returns in kind relating to a covered investment.[130] This turns out to be an essential provision if considered that Colombia is going through a period of great activity in exploration and exploitation of natural resources. As a result, a provision like that will permit to multinational companies, in the case of production-sharing agreements for instance, a return of its investment in the form of oil, coal, gas, etc.

c. Exclusions

Most of the BITs do not confer an absolute right to make transfers. In fact, because of the countries' necessity to control their balance-of-payments and their need to conserve foreign exchange to pay for essential goods and services[131] the right of transfers is commonly subject to the laws' of the host state.

The USCFTA, the JCBIT and the CSBIT contain almost identical provisions whereby a party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to criminal offenses, bankruptcy, insolvency, trading and dealing in securities, financial reporting and ensuring compliance with judgments in judicial or administrative proceedings.[132]

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[130] Free Trade Agreement, US- Colom., *supra* note 27, at art. 10.8.3.
[131] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries, 24 Int'l L. 655 (1990).
[132] Free Trade Agreement US- Colom., *supra* note 27, at arts. 10.8.4, Agreement between Japan-Colom., *supra* note 21, at art. 14.3 and, Agreeement between Colom.-Switz., *supra* note 41, at art. 5 (4).

In the CSPBIT and the CPBIT the exceptions are not subject to specific laws but serious difficulties on the balance of payments, which give the parties the right to restrict free transfers for a limited time through an equitable, non-discriminatory, and good faith application of its laws.[133] There is, however, no definition of what a serious difficult on the balance of payments is. This lack of definition may lead to governmental arbitrary decisions eventually affecting foreign investors' transfers.

Alternatively, there is another currency related risk, which is not addressed in any BIT, i.e., the devaluation risk. This risk may have a direct impact on the finances of a project that has to meet its obligation in a currency other than the one generating revenues. For instance, a foreign owned thermoelectric project in Colombia will receive a tariff for the energy produced in Colombian pesos. However, for that thermoelectric plant construction a loan was subscribed by the project entity in US dollars. Thus, if the Colombian peso is devaluated the ability of the thermoelectric project to meet its US dollar obligations will be affected. This risk normally takes place in countries without well-established and liquid long-term debt markets and without market-based currency hedge products (cross-currency swaps, for instance).[134] As a result, a different alternative to a BIT will have to be considered to mitigate the devaluation risk. This can be accomplished by, for example, obtaining loans in local currency[135] or agreeing that the payment in the revenue-producing project contracts will be made in a hard currency or by employing a currency swap, if

[133] Agreement between Colom.-Spain., *supra* note 42, at art. VII (6), the Agreement between Colom.-Peru., *supra* note 37, at art. 6 (3)
[134] Tomoko Matsukawa, Review of Risk Mitigation Instruments for Infrastructure Financing and Recent Trends and Developments, The World Bank, 2007.
[135] Id.

available.[136] Other devaluation risk mitigation mechanisms might be included by host governments' commitments in concession contracts.[137] Interestingly, devaluation risk is neither covered by MIGA nor by the Overseas Private Investment Corporation (OPIC).[138]

In sum, BITs provide investors with advantageous mechanisms to mitigate transfer and convertibility risks. In the case of the Colombian BITs, subject to the provisions included therein, the risk is mitigated by providing investors or investments of the other party with the guarantee to make transfers without delay and in a freely convertible currency.

4.7. Procedural remedies

Even though procedural remedies do not constitute the focus of this paper it is important to briefly mention that they constitute one of the most important guarantees for a foreign investor to mitigate the risk of being subject to the host country's domestic law and courts for protection, which is something that in particular jurisdictions may be risky for the investment.[139] In fact, one of the most important features of the investment agreements is the conferral of rights upon the private individual to submit investment disputes to international arbitration without having to resort to diplomatic means. In order to submit a claim it is necessary to determine what is the source of the right allowing a foreign investor

[136] Hoffman, *supra* note 6, at 41.
[137] Comment by Professor Marcia Wiss, Project Finance and Investment course, Georgetown University Law Center, (2012).
[138] MIGA, *supra* note 14.
[139] Jeswald W. Salacuse, *supra* note 18, at 109

to bring a claim,[140] which normally is the violation of a substantial provision of the BIT. Consequently, an investor has to have a clear understanding of the scope of the jurisdictional clause—namely, what breach by the host state grants him access to international arbitration.

Moreover, due to the broad definition of investment included in the text of the treaties, as discussed above, a single and even a minority shareholder is entitled to bring a claim against the host state and have *jus standi* before the tribunal, as it occurred in the case of *CMS Gas Transmission v. Argentina*.[141]

Accordingly, in international project finance the possibility of a foreign investor taking host state governments directly to international arbitration, without the support or even knowledge of their home state,[142] is definitely a deciding element when allocating political risks.

Next, I will provide some successful examples of investments that took place in Colombia under the umbrella of the existing BITs.

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[140] ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 482 (Oxford University Press 2009).

[141] C*MS Gas Transmission Company v. The Argentine Republic, Decision on Jurisdiction* ICSID Case No. ARB/01/8 (US/Argentina BIT), (July 17, 2003)

[142] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, Damon Vis-Dunbar, *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answer*s, IISD, 9 (2011).

5. Successful cases of investments in Colombia related to BITs

As Sallacuse and Sullivan point out "while BITs, in and of themselves, may not have directly and substantially liberalized FDI, there is strong evidence to show that they both protect and promote FDI in developing countries... BITs have a particularly strong effect on encouraging FDI in developing countries."[143] Conversely, other authors believe that "there is a very minimal connection between investment treaties by themselves and the volumes of FDI a host state receives."[144] In fact, "businesses appear to place little if any weight on whether an investment treaty is present (much less what specific protections it provides) when making their investment decisions."[145]

Even though the aim of this paper is not to prove whether investment treaties effectively promote investments, I would like to outline without going into major detail a few cases where investments have been made in Colombia by Colombia's BITs counterparties.[146]

i. Switzerland

- In 2005 the Swiss company "Glencore" purchased the coal mine "La Jagua" for US $ 110 million.

[143] Jeswald W. Salacuse and Nicholas P. Sullivan, *supra* note 31.
[144] Nathalie Bernasconi Et. Al., *supra* note 142, at 6.
[145] Id.
[146] This cases have been taken from the Exports, Foreign Investment and Tourism Promotion Agency (Proexport Colombia), Main FDI Cases, (April. 23, 2012) *available at* http://www.investincolombia.com.co/success-stories.html

- The “Colombian-Switzerland Group” won the concession for remodeling the Bogota Airport “El Dorado” in 2006. The investment amounted to US $650 million.
- In 2009 the Swiss company “Xstrata” acquired the Colombian mining company “Prodeco” for US $2,000 million.
- The Swiss company “Nestle” inaugurated in 2009 a project called "Cisco", aimed to transform the resulting residue from coffee production into energy. This initiative, the most important and ambitious of the company worldwide, required an investment of over US $12 million.

ii. Spain

- In 2005 the BBVA bank acquired a local bank for US $424 million.
- In 2007 “Telefónica Group” built an intelligent building in the city of Pereira for US $85 million.
- The Spanish group “Unión Fenosa” announced in 2007 the investment of US $56 million for the purchase and adaptation of the “Hidroprado hydroelectric power plant.”
- The Spanish company “Cepsa” purchased the oil area “Caracara” located in the Colombian plains for US $920 million.

Some of these projects more likely than not involved project finance. The project’s participants, if cautious and properly advised, almost certainly made an assessment of the

Colombian regulatory framework and of the country's political risks. Hence, the existence of a BIT, even though it might not have been the final determining factor, surely contributed to the lenders making their decisions to granting the loans – when the project involved debt – or to proceed with the execution when the parent or private sponsors provided the resources. As a result, the existence of the BITs with Spain and Switzerland more likely than not contributed to allocate the political risks for these and other projects and in so doing it helped to promote investments in Colombia.

The other projects that have been carried out in the country, especially by the U.S. as Colombia's largest source of FDI, took place without a BIT being in place, nonetheless, they are now covered under the FTA entering into force (see section 4.1.)

6. Conclusions

There is a clear evolution from the first BITs Colombia signed in 1995 and the latest one signed with Japan, which, along with the USCFTA, can be categorized as new generation investment treaties. In fact, these later agreements contain much more detailed regulation and advanced provisions, which to my surprise did not always result in enhancing the investor's protections. Notwithstanding, it can be appreciated as a common factor in all of the agreements that the basic protections are included in all of them, with some variations nonetheless. In any case, from a project finance perspective after having reviewed the most important substantive provisions of the Colombian BITs, it is clear that the protections given by these instruments in the form of rights, standards or clauses are essential mechanisms that help an investor to mitigate a project's political risk. That does not mean, however, that under the existence of a BIT a project will be risk free, but at least some of the investor's biggest concerns, such as transferring money into and out of the country, and prompt, effective and adequate compensation in the face of expropriation or discriminatory treatment, are covered and an investor has the right to make his protections effective by having the possibility to take the host government to international arbitration if there is a breach of the treaty.

As a result, an investor from a country with which Colombia has subscribed to an investment treaty may rest and be confident that its investment will be safe; on the one hand, because the legal framework included in the Colombian BITs, with minor variations, is very comprehensive and protective of investors, and on the other hand, because Colombia has been internationally catalogued as a country with a low political risk.[147]

[147] Control Risks, Risk Map, available at http://www.controlrisks.com/RiskMap/Pages/Political.aspx. See also IMD World Competitiveness Yearbook, 2011, *available at* http://www.imd.org/research/publications/wcy/index.cfm.