



# Bogotá's Legal Guide to Foreign Direct Investment

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# 18

## FDI PROTECTION



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• Panorámica norte de Bogotá

# Foreign Investment Protection Mechanisms

## Practical Examples

This section examines the main mechanisms for the protection of foreign investment in Colombia. To this end, it first analyzes certain guidelines for structuring Public-Private Partnership contracts with a dispute prevention approach; secondly, it examines Dispute Boards or expert panels, as instruments for monitoring and early dispute resolution; and finally, arbitration as an alternative dispute resolution mechanism.

## 1. Public-Private Partnership Contracts

Public-Private Partnership (PPP) contracts have become a key instrument for channeling foreign investment in Colombia. However, the complexity of these types of projects entails the existence of regulatory, financial, and legal risks that, if not properly managed from the contractual stage, may jeopardize the execution of the contract. In this context, it is essential to adopt preventive measures during the contract structuring phase, aimed at ensuring an adequate allocation of risks and the incorporation of effective dispute management mechanisms. The following are some recommendations:

### 1.1 Technical and Balanced Allocation of Responsibilities

One of the core elements in the structuring of this type of contract is the technical and balanced allocation of risks. According to the Ley 1508 de 2012, risks must be assumed by the party best positioned to manage them<sup>1</sup>. This entails a detailed identification of environmental, regulatory, financial, and political risks, the materialization of which has been recurrent in projects across different sectors.

To illustrate the foregoing, reference may be made to the modernization project of the Refinería de Cartagena (Reficar), which demonstrated how the inadequate allocation and management of contractual risks can lead to significant deviations in project execution<sup>2</sup>.

In this case, the project experienced substantial cost overruns compared to the originally projected budget, largely associated with deficiencies in the contractual structuring process, particularly in the identification, allocation, and management of risks related to engineering, costs, and execution. In practice, these risks were not allocated to the party best positioned to manage them.

Accordingly, the case reflects a departure from the principle established under Law 1508 of 2012 and highlights the importance of: (i) comprehensively identifying risks from the initial stage, (ii) allocating them to the party with the appropriate capacity to manage them, and (iii) establishing risk matrices and clear contractual clauses that allow for their proper administration throughout the execution of the contract.

<sup>1</sup> Congress of the Republic of Colombia, Law 1508 of 2012, “Whereby the Legal Framework for Public-Private Partnerships is Established, Organic Budgetary Provisions are Issued, and Other Provisions are Enacted,” art. 4, Official Gazette No. 48,308 of January 10, 2012.

<sup>2</sup> Office of the Comptroller General of the Republic, “Cartagena Refinery” (Reficar) – Fiscal Liability Proceedings <https://www.contraloria.gov.co/resultados/procesos-de-responsabilidad-fiscal/refineria-de-cartagena-reficar>



## 1.2 Restoration of the Economic-Financial Equilibrium

Another fundamental aspect is the inclusion of clauses that guarantee the restoration of the economic-financial equilibrium of the contract. This principle establishes that, in long-term contracts, unforeseen circumstances may arise that alter the original economic equation<sup>3</sup>. In this context, it is advisable to incorporate clear contractual formulas that allow for the automatic adjustment of variables such as tariffs, deadlines, or financial conditions, as well as technical calculation mechanisms that reduce discretion in the application of such clauses.

The case of EPS Sanitas in Colombia constitutes an illustrative example of the relevance of this type of provision. In April 2024, the National Superintendence of Health ordered its intervention, alleging financial problems, insufficient reserves, and failures in the provision of services to millions of affiliates. Subsequently, this measure was annulled in 2025 by the Constitutional Court due to violations of due process<sup>4</sup>. This case demonstrates how regulatory decisions may significantly alter the economic equation of contracts, thereby reinforcing the need to include clauses that allow for the restoration of such equilibrium through adjustment or compensation mechanisms in response to unforeseen changes, thus reducing the risk for the parties involved.

<sup>3</sup> Congress of the Republic of Colombia, Law 80 of 1993, art. 27, “On the Contractual Equilibrium,” <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=304>.

<sup>4</sup> Constitutional Court of Colombia, Judgment SU-277 of 2025, June 26, 2025, <https://www.corteconstitucional.gov.co/relatoria/2025/su277-25.htm>.

## 1.3 Early Termination and Compensation Mechanisms

Finally, the regulation of early termination scenarios and the associated compensation mechanisms acquires special relevance from a preventive perspective. Recent experience in Colombia has shown that the lack of clarity in liquidation formulas may generate uncertainty for investors and financiers. An example of this is the Ruta del Sol II concession case, in which the early termination resulting from the nullity of the contract gave rise to a complex dispute regarding the liquidation and compensation of the parties, particularly the financiers.

The absence of sufficiently clear contractual formulas required the intervention of the arbitral tribunal<sup>5</sup> and the Constitutional Court<sup>6</sup>, thereby highlighting the importance of establishing, ex ante, precise mechanisms capable of reducing uncertainty in such scenarios. In addition to the foregoing, it is advisable to provide for multi-tiered dispute resolution mechanisms through the inclusion of Dispute Board clauses and/or arbitration clauses, for the reasons discussed below.

<sup>5</sup> Arbitral Tribunal of the Bogotá Chamber of Commerce, *Concesionaria Ruta del Sol S.A.S. v. National Infrastructure Agency (ANI)*, Arbitral Award of August 6, 2019 (Accumulated Proceedings Nos. 4190 and 4209), <https://bibliotecadigital.ccb.org.co/items/1ca3d24a-3d93-4720-b8a4-3f6e970d352a>

<sup>6</sup> Constitutional Court of Colombia, Judgment C-207 of 2019, Cristina Pardo Schlesinger, May 16, 2019. <https://www.corteconstitucional.gov.co/relatoria/2019/C-207-19.htm>



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## 2. Dispute Boards

Dispute Boards (DBs), or expert panels, are independent bodies composed of impartial specialists whose main purpose is to assist the parties in preventing or resolving disagreements through mediation, recommendations, or decisions, thereby promoting the continuity of the project without interruptions. The International Chamber of Commerce (ICC) has defined and delimited this mechanism in the following terms<sup>7</sup>: “A dispute board (DB) is a standing body composed of one or three members. It is generally established upon the signing or at the commencement of the performance of a medium- or long-term contract, and its function is to assist the parties in avoiding or resolving any disagreement or dispute arising during the implementation of the contract. Although commonly used in construction projects, DBs are also effective in other fields, such as research and development, intellectual property, production sharing, and shareholder agreements.”

There are three types according to their binding force<sup>8</sup>: (i) Dispute Review Boards (DRBs), which initially issue non-binding recommendations that become binding if no objection is raised within 30 days; (ii) Dispute Adjudication Boards (DABs), which issue immediately binding and enforceable decisions; and (iii) Combined Dispute Boards (CDBs), or hybrid boards, which combine recommendations with the possibility of issuing binding decisions if the parties so agree.

<sup>7</sup> International Chamber of Commerce. Available at: <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/>

<sup>8</sup> International Chamber of Commerce (ICC). Dispute Board Rules. ICC Publication No. 829. Paris: International Chamber of Commerce, 2015. Available at: <https://iccwbo.org/wp-content/uploads/sites/3/2015/01/icc-dispute-board-rules-2015-english.pdf>

Now, in order to clarify the viability and effectiveness of this type of mechanism, the following examples are presented of Dispute Boards established in the Latin American region that enabled the resolution of disputes and the continuity of projects aimed at regional development: In Chile, there are several hospital concession projects that use technical panels functionally equivalent to Dispute Boards, with notable use in recent years in projects such as the Félix Bulnes Hospital Concession, the Salvador Hospital Concession, and the Antofagasta Hospital Concession<sup>9</sup>. Likewise, during the construction of the Cheves Hydroelectric Power Plant in Peru, Dispute Boards played a key role by providing a practical and specialized approach to resolving disputes arising during the construction and operation of the project<sup>10</sup>.

However, the intervention of Dispute Boards does not always lead to a definitive solution, since in some cases the parties are unable to reach an agreement and, consequently, the dispute ultimately proceeds to arbitration. An example of this is the controversy related to the Panama Canal, which had a DAB in place, yet the disputes ultimately escalated to international arbitration<sup>11</sup>. (For further information on arbitration, see Chapter 16 of this Guide).

<sup>9</sup> Technical Concessions Panel, 2025 Report, [www.panelconcesiones.cl](http://www.panelconcesiones.cl), accessed April 22, 2026.

<sup>10</sup> J. P. Gómez Moreno, “Dispute Boards in Latin America: Advantages, Challenges, and Best Practices to Contribute to the Efficient Resolution of Infrastructure Disputes in the Region,” USFQ Law Review, vol. 10, no. 2, October 2023, <https://doi.org/10.18272/ulr.v10i2.3023>

<sup>11</sup> “Panama Canal Would Proceed to International Arbitration Against GUPC,” Portafolio, February 4, 2016, <https://www.portafolio.co/internacional/canal-panama-iria-arbitraje-gupc-33710>



### 3. International Commercial and Investment Arbitration

As mentioned in Chapter 16 of this Investment Guide, arbitration constitutes the last resort for the protection of foreign investments in cases where other methods, such as those described above, have failed to resolve the dispute. It is possible to distinguish between two major categories: commercial arbitration and investment arbitration.

**Commercial arbitration** refers to the resolution of disputes arising from contractual or non-contractual relationships in the context of international commercial transactions, where its essential basis is the agreement of the parties, incorporated into the contract through an arbitration clause. The dispute is decided by an Arbitral Tribunal under a flexible procedure that may follow rules such as those of the International Chamber of Commerce (ICC), and concludes with an arbitral award. In the region, this type of arbitration has been widely used, with notable cases such as Reficar S.A. v. Chicago Bridge & Iron Company (CB&I), which arose from cost overruns and delays in the expansion of the Cartagena Refinery in Colombia. The tribunal concluded that it had not been proven that the cost overruns were attributable to the contractor and therefore denied most of the claims. The decision highlights the complexity of assigning liability in this type of project and the need to prove breach with precision.

<sup>12</sup> Gary B. Born, International Commercial Arbitration, 3rd ed. (Alphen aan den Rijn: Kluwer Law International, 2021), <https://law-store.wolterskluwer.com/s/product/international-commercial-arbitration-3e-3-volume-set/01t4R00000OkdUZQAZ>.

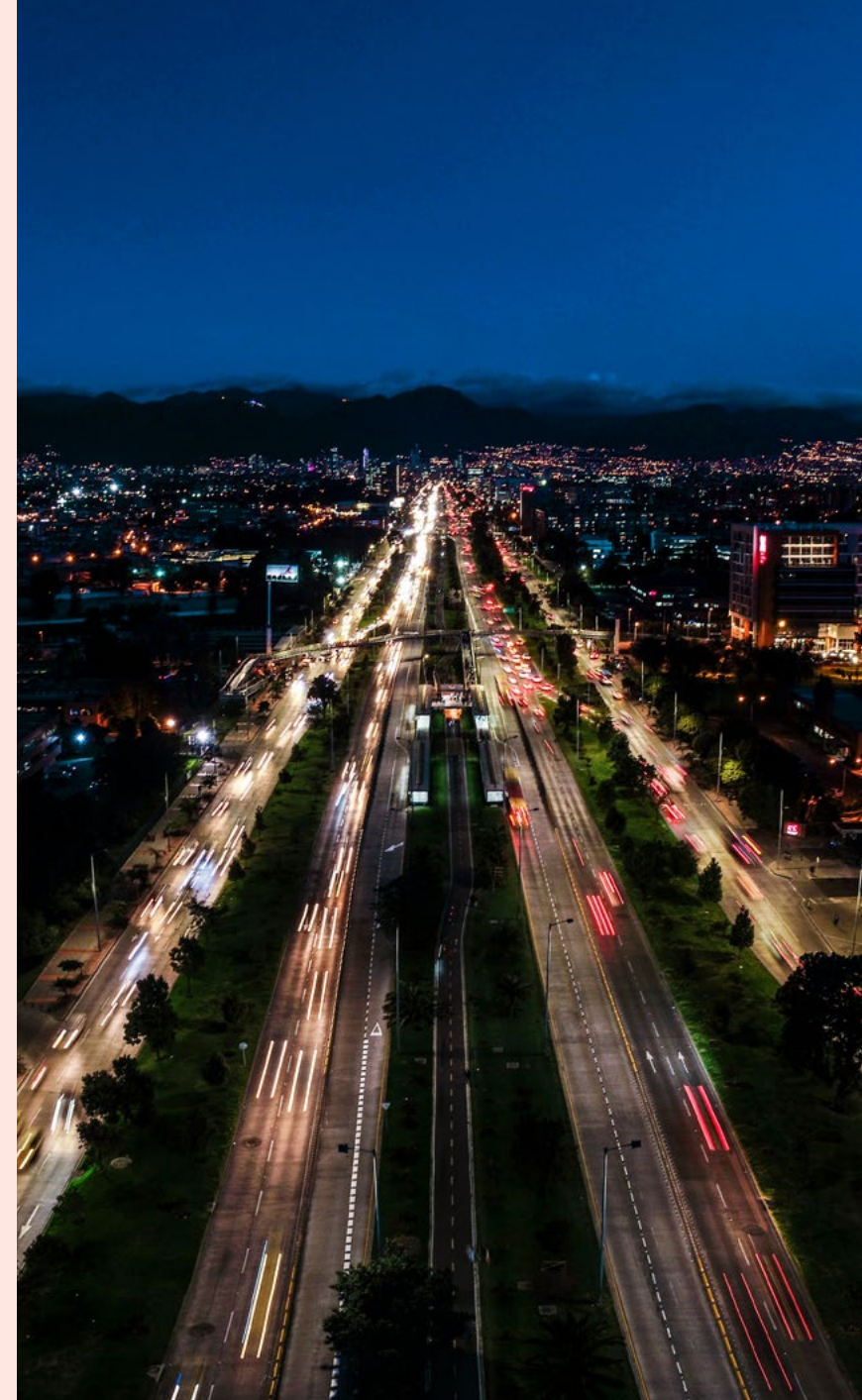
<sup>13</sup> Franco Ferrari, Friedrich Rosenfeld y John Fellas, International Commercial Arbitration: A Comparative Introduction (Cheltenham: Edward Elgar Publishing, 2021), <https://www.elgar.com/shop/gbp/international-commercial-arbitration-9781839100995.html>

**Investment arbitration**, on the other hand, is a dispute resolution mechanism between foreign investors and host States, primarily grounded in international investment treaties, such as bilateral investment treaties (BITs)<sup>15</sup>. Within this framework, disputes may arise from contractual relationships with the State or its entities. Thus, in some cases, the contractual breach itself constitutes the basis of the claim when the contract contains an arbitration clause enabling international arbitration. An emblematic case in the region is Telefónica S.A. v. Colombia, in which the company argued that the interpretation of certain contracts related to software services, adopted by the State, unpredictably altered the legal framework applicable to its investment<sup>16</sup>. As a result, the tribunal declared the State internationally liable and ordered the payment of compensation.

<sup>14</sup> Refinería de Cartagena S.A. (Reficar) v. Chicago Bridge & Iron Company (CB&I), International Court of Arbitration of the International Chamber of Commerce (ICC), Arbitral Award, 2019, <https://jsumundi.com/en/document/decision/en-refineria-de-cartagena-sa-reficar-v-chicago-bridge-iron-company-nv-cb-i-uk-limited-and-cb-i-colombiana-sa-wednesday-1st-january-2020#:~:text=Witness%20Statement%20of%20Carlos%20Bustillo,and%20Evidence%20%2D%2010%20Jan%202020>

<sup>15</sup> Rudolf Dolzer, Ursula Kriebaum y Christoph Schreuer, Principles of International Investment Law, 3rd ed. (Oxford: Oxford University Press, 2022), <https://global.oup.com/academic/product/principles-of-international-investment-law-9780192849776>.

<sup>16</sup> Telefónica, S.A. v. Republic of Colombia. Award. ICSID Case No. ARB/18/3. 12 de noviembre de 2024. Accedido en italaw. <https://www.italaw.com/cases/documents/13200?>





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