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A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia



Daniel García Clavijo

International Arbitration and Litigation

On 16 September 2021, the Governments of the Kingdom of Spain ('Spain') and the Republic of Colombia ('Colombia') signed¹ a new bilateral investment treaty² ('2021 BIT') to replace the one signed in 2005³ ('2005 BIT'). This new treaty is the

¹ 'Sánchez y Duque acuerdan reforzar la cooperación económica y política entre España y Colombia, La Moncloa (16 September 2021) <<https://www.lamoncloa.gob.es/presidente/actividades/Paginas/2021/160921-sanchez-colombia.aspx>> accessed 14 February 2022; 'Acuerdo de protección recíproca entre España y Colombia impulsará inversión, Cancillería de Colombia (16 September 2021) <<https://www.cancilleria.gov.co/newsroom/news/acuerdo-proteccion-reciproca-espana-colombia-impulsara-inversion>> accessed 9 May 2022.

² Acuerdo entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones, signed in Madrid, 16 September 2021 (not yet in force) <<https://www.tlc.gov.co/acuerdos/a-internacional-de-inversion/contenido/acuerdos-internacionales-de-inversion-suscritos-1/espana/apri-colombia-espana-16-09-21.aspx>> accessed 14 February 2022.

³ Acuerdo entre el Reino de España y la República

de Colombia has negotiated and signed under the new Model BIT of 2017.⁴ It also follows the European Union's new approach to international investment law. While the 2005 BIT was only 13 articles long, the 2021 BIT has three times the number of articles, reflecting Colombia and Spain's intention to fill in the gaps left by previous investment treaties and the lessons they have learned from investor-State disputes.

In this Article we highlight some of the important changes to be aware of once the 2021 BIT enters into force.

de Colombia para la promoción y protección recíproca de inversiones, signed in Bogotá, 31 March 2005 (22 September 2007) <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-16205> accessed 14 February 2022.

⁴ See D. García Clavijo, 'Model International Investment Treaties: Outlining the Future Landscape of International Investment Law' (2020) 7 *Investment Arbitration Outlook*, p 21.



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Scope of application

The 2005 BIT had a specific Article dedicated to its scope of application⁵ and the 2021 BIT also regulates this issue in detail.⁶ The 2021 BIT, however, contains further provisions relating to the financial sector, rights and obligations related to the International Monetary Fund, subsidies and regional economic integration (such as the European Union).

⁵ 2005 BIT, Art 11.

⁶ 2021 BIT, Art 1.

Definitions

While both BITs have an article dedicated to defining important terms such as 'investment', 'investor', 'national' and 'enterprise',⁷ the 2021 BIT is significantly more detailed.

In the 2021 BIT the term 'enterprise' has been linked to 'substantial business activities, a phrase that has also been defined as the 'production of goods/

⁷ 2005 BIT, Art 1; 2021 BIT, Art 2.

providing services in a continuous and significant manner in the territory of the other Contracting Party, which will be determined in a case-by-case analysis [...].⁸ The term 'investment' incorporates some of the *Salini Test*⁹ elements to define an investment such as a commitment of capital or other resources, a duration of at least one year and the assumption of risk by the

⁸ 2021 BIT, Art 2, *Empresa*.

⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on jurisdiction (23 July 2001), paras 52–57.

This new treaty is the first one Colombia has negotiated and signed under the new Model BIT of 2017. It also follows the European Union's new approach to international investment law



investor, and also provides guidance on what will be understood as ‘control’ by the investor. However, the 2021 BIT leaves the definition open-ended as to what constitutes an ‘investment.’ It also provides a short list of excluded transactions and assets to which the 2021 BIT will not apply, such as public-debt transactions, commercial transactions, loans, rulings and awards.¹⁰

‘Investors’ are defined in the 2021 BIT either as ‘nationals’ (natural persons) or ‘enterprises.’¹¹ There is a special provision for dual nationals¹² according to which only those who can prove that their effective nationality¹³ is not that of the country they are investing in are protected by the BIT. For this purpose, the state of ‘effective nationality’ is the one with which the investor has full political links and where they have established their main domicile, in accordance with the Agreement regarding Nationality between Colombia and Spain of 27 June 1979 and its Additional Protocol of 14 September 1998.

Investment-protection standards

The 2021 BIT contains provisions related to the following investment-protection standards: National treatment,¹⁴ most-favourable nation (‘MFN’),¹⁵ fair and equitable treatment (‘FET’),¹⁶ full physical protection and security,¹⁷ compensation

10 2021 BIT, Art 2, *Inversión*.
11 2021 BIT, Art 2, *Inversionista*.
12 2021 BIT, Art 2, *Nacional*.
13 2021 BIT, Art 2, *Estado de la nacionalidad efectiva*.
14 2021 BIT, Art 4.
15 2021 BIT, Art 5.
16 2021 BIT, Art 7.
17 2021 BIT, Art 8.

Another innovation is a set of rules on the members of the arbitral tribunal and the requirements and obligations they must meet

for losses,¹⁸ and protection related to transfers¹⁹ and expropriations.²⁰ These standards were already present in the 2005 BIT, but there are important changes in how they are regulated.

As in the 2005 BIT,²¹ the national treatment and MFN provisions expressly exclude free trade zones, customs unions and other kinds of economic integration from their scope.²² However, there are important changes regarding the MFN clause, particularly in regard to what will be considered a ‘measure’ that should be granted to investors without nationality-based discrimination. Bearing in mind that there is an ongoing debate as to whether or not treaty standards of treatment are a ‘measure’ for the application of the MFN clause, the 2021 BIT shuts down any possible use of this standard to ‘import’ treaty standards from other agreements that Spain or Colombia have signed. The MFN clause may not be used to override provisions related to definitions, denial of benefits or dispute settlement.²³

18 2021 BIT, Art 9.
19 2021 BIT, Art 10.
20 2021 BIT, Art 11.
21 2005 BIT, Art 3.
22 2021 BIT, Art 6.
23 2021 BIT, Art 5.

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The FET standard was barely regulated in the 2005 BIT,²⁴ which only stated that covered investors would be afforded fair and equitable treatment. In contrast, the 2021 BIT regulates the FET standard in detail, establishing that it is meant to protect against measures that constitute a denial of justice, an essential breach of procedural guarantees, manifest arbitrariness, discrimination for clearly unfair reasons, or abusive treatment of an investor. The provision also establishes that a 'diligent investor's' reasonable and objective expectations, along with any substantive obligations acquired vis-à-vis the investor, may be taken into account.²⁵

The full physical protection and security standard represents a change from the 2005 BIT, which referred to the full protection and security standard. With this change in name, any doubt as to whether or not it only applies to physical protection and security has been settled.²⁶

The standard of protection against expropriation is also addressed in detail.²⁷ It defines direct and indirect expropriations and lists the requirements for an expropriation to be compliant with the 2021 BIT. It also identifies categories of measures that should not be considered as an expropriation.

Furthermore, on the same date as the 2021 BIT, Colombia and Spain signed a statement ('Statement') clarifying how the FET, MFN and national treatment standards are to be interpreted.²⁸ This Statement establishes that when assessing whether justice has been denied, an arbitral tribunal must take into account whether the challenged conduct offends

²⁷ 2021 BIT, Art 11.

²⁸ 'Declaración Interpretativa Conjunta entre la República de Colombia y el Reino de España sobre el Acuerdo para la Promoción y Protección Recíproca de Inversiones entre la República de Colombia y el Reino de España (APPRI Colombia-España), suscrito el 16 de Septiembre de 2021' (16 September 2021) <<https://www.tlc.gov.co/acuerdos/a-internacional-de-inversion/conenido/acuerdos-internacionales-de-inversion-suscritos-1/espana/appri-colombia-espana-dic-16-09-21.aspx>> accessed 14 February 2022.

a sense of judicial propriety – echoing the denial of justice definition in *Loewen v USA*²⁹ – although the mere fact that the investor has received an unfavourable decision should not be treated as a denial of justice. It goes on to state that mere illegality or the incoherent or questionable application of a policy or procedure is not by itself arbitrary treatment, while conducts such as purposefully harming an investor or an investment are likely to constitute arbitrary treatment. The Statement also establishes that the MFN and national treatment standards are to be applied within the same economic sector.

Damage valuation

Article 12 of the 2021 BIT comprehensively addresses damage valuation (under the 2005 BIT there were only a few provisions on this topic, limited to the payment of compensation

²⁹ *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003), para 132.

for an expropriation³⁰), establishing that compensation will be equivalent to the fair market value of the investment and setting out several methods to ascertain this fair market value based on market information on comparable transactions or assets and commercial and administrative statements related to the value of the investment (e.g. tax statements, reports to shareholders).

Only simple interest can be imposed and must be set at the rate applicable to the State's sovereign debt instruments. This is an important addition as interest is seldom regulated in investment treaties and is usually left to be decided by arbitral tribunals.

Finally, there is an express provision on claims brought by investors on behalf of enterprises in which they have invested. In order to claim compensation in full, the other shareholders or affected enterprise must present a waiver.

Right to regulate and denial of benefits

In line with other recent international investment agreements, the 2021 BIT has specific provisions highlighting a State's right to regulate. The treaty acknowledges a State's right to regulate issues such as security, sustainable development, social security, privacy, data protection, cultural diversity, human rights, health, education, social services, consumer rights, natural resources and the environment, and provides that the

³⁰ 2005 BIT, Art 4.

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²⁴ 2005 BIT, Art 3.

²⁵ 2021 BIT, Art 7.

²⁶ 2021 BIT, Art 8.

Once the 2021 BIT enters into force, the 2005 BIT will cease to have effect and be substituted by the 2021 BIT

mere fact that a measure negatively affects an investment or interferes with an investor's expectations does not mean it breaches the BIT.³¹

The 2021 BIT also contains a commitment by both countries not to diminish their labour, environmental or human rights standards to foster or promote investment.³²

Furthermore, it contains a new denial of benefits provision.³³ While this includes an already commonplace mechanism intended to avoid treaty shopping (i.e. denying benefits to corporate investors that are ultimately owned by third-party nationals or nationals of the host state), the 2021 BIT sets out an additional series of situations in which the host State may deny benefits to an investor: when in the previous ten years the investor has been convicted by an international court or a domestic court in Colombia or Spain for international crimes under the Rome Statute, or for sponsoring or financing organisations or persons who have committed international crimes or participated in terrorist activities.

31 2021 BIT, Art 14.

32 2021 BIT, Art 16.

33 2021 BIT, Art 18.

Settlement of disputes between covered investors and host States

While the 2005 BIT devoted one 12-paragraph Article to the settlement of disputes between a covered investor and its host state,³⁴ the 2021 BIT devotes 17 Articles to it.³⁵

Some noteworthy aspects include a three-year statute of limitations for claims³⁶ (which was already in place in the 2005 BIT³⁷), a requirement to discontinue or waive ongoing and future claims both in domestic and international fora,³⁸ and disclosure requirements for third-party funding.³⁹

The issue of transparency in arbitration is dealt with for the first time in the 2021 BIT, which explicitly adheres⁴⁰ to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Consequently, arbitrations under this BIT will mostly be public.

The 2021 BIT may pose challenges to nationality planning for investors, as it explicitly excludes instances where contracting parties consent to arbitration where changes to the ownership of the investment occur after the dispute took place or where this was highly foreseeable.⁴¹

34 2005 BIT, Art 10.

35 2021 BIT, Arts 19-35.

36 2021 BIT, Art 19.

37 2005 BIT, Art 10.

38 2021 BIT, Art 22.

39 2021 BIT, Art 22.

40 2021 BIT, Art 23.

41 2021 BIT, Art 24.

Another innovation is a set of rules on the members of the arbitral tribunal and the requirements and obligations they must meet.⁴² These rules prevent a sitting arbitrator from acting as counsel, expert witness or witness of fact in other investor-State arbitrations.⁴³ Challenges to arbitrators are to be decided by the President of the International Court of Justice.⁴⁴

The 2021 BIT also expressly authorises an arbitral tribunal to adopt interim measures, including security for costs.⁴⁵

The award itself is regulated by the new BIT.⁴⁶ Appeals are not permitted unless both Spain and Colombia agree otherwise. Article 33 provides guidance as to what legal issues the arbitral tribunal must consider proven in the proceedings and adopts the 'clear and convincing evidence' standard of proof. It sets out what types of remedies may be awarded by the tribunal and forbids any remedies for non-pecuniary injuries (i.e. moral damage). It further establishes that if the final award grants less than 50% of the monetary reparation claimed, a penalty will apply to the final amount awarded by discounting 2% of the difference between the amount requested and what was actually awarded.

42 2021 BIT, Art 25.

43 2021 BIT, Art 25.

44 2021 BIT, Art 25.

45 2021 BIT, Art 29.

46 2021 BIT, Art 33.

Treaty governance and other provisions

The 2021 BIT stipulates that Spain and Colombia will meet regularly through a Bilateral Investment Council with binding interpretative powers to assess its implementation.⁴⁷

It further provides for a link to a future multilateral investment treaty if both Spain and Colombia become parties to this proposed treaty.

Transition between the 2005 and the 2021 treaties

Discussions may arise before an arbitral tribunal over which of two potentially applicable treaties will regulate a particular dispute. For this reason, Article 40 of the 2021 BIT governs the transition between the 2005 and 2021 BITs.

Once the 2021 BIT enters into force, the 2005 BIT will cease to have effect and be substituted by the 2021 BIT. However, the 2005 BIT may still govern a dispute if the measures that are being challenged were adopted while the 2005 BIT was in force and fewer than three years have passed since the 2021 BIT entered into force. Disputes that were notified under the 2005 BIT will be governed by it.

The 2021 BIT will enter into force 60 days after Spain and Colombia notify each other that they have completed their internal ratification procedures.⁴⁸

47 2021 BIT, Art 37.

48 2021 BIT, Art 41.

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