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## Navigating Uncharted Waters: Changes to the United States-Colombia Trade Promotion Agreement

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The [United States-Colombia Trade Promotion Agreement](#) (“**TPA**”), in force since 15 May 2012, has been interpreted through a 15 January 2025 decision ([Decision No. 9](#)) issued by the Free Trade Commission of the TPA (the “**FTC Decision**”), which introduced new binding interpretations of the treaty’s investment protection standards (Article 10.22.3). While much of the FTC Decision reflects established interpretations of investment protections, certain aspects fundamentally alter the scope and nature of investor rights under the TPA —raising critical questions about their implications.

This article examines these changes and their potential impact on investment arbitration.

### National Treatment and Most Favored Nation

Although it is somewhat accepted by commentators and arbitral tribunals that the Most-Favored-Nation (“**MFN**”) standard applies to substantive provisions, a [longstanding debate](#) persists over whether it extends to procedural or dispute settlement provisions. The FTC Decision directly addresses this issue, adopting a restrictive interpretation of the TPA’s MFN clause (Article 10.4) that excludes MFN treatment from dispute settlement-related mechanisms, including: conditions of consent, multi-step pre-arbitration provisions, and umbrella clauses.

While foreign investors may perceive this as a limitation to their ability to rely on MFN treatment to bypass procedural hurdles or access more favorable dispute settlement mechanisms found in other treaties, in practice, tribunals have already been adopting this restrictive approach—even in the absence of such clarifications (see [Seda v. Colombia](#) ¶¶796-799). Thus, the FTC Decision reflects a broader trend of states seeking to reassert control over investment arbitration and limit expansive interpretation of MFN clauses.

### Minimum Standard of Treatment (“**MST**”)

Article 10.5 and Annex 10-A of the TPA mandate each party to accord covered investments treatment consistent with customary international law (“**CIL**”), including fair and equitable

treatment (“**FET**”) and Full Protection and Security (“**FPS**”). In defining these obligations, the FTC Decision clarifies that “*decisions of international courts and arbitral tribunals [...] are not themselves instances of State practice for purposes of evidencing [CIL].*” This means that arbitral decisions, while potentially persuasive, do not constitute independent evidence of State practice necessary to establish the content of the CIL standard. Instead, the determination of FET and FPS under the TPA must be grounded in the general (widespread) and consistent practice of States, undertaken with a sense of legal right or obligation (*opinio juris*).

For foreign investors, this interpretation imposes substantial challenges.

*First*, it raises the evidentiary burden in investment disputes, requiring investors to prove not only that a host State’s conduct breached FET or FPS but also that the specific standard they invoke is firmly established in CIL. This is an arduous task, as demonstrating State practice and *opinio juris* often requires extensive historical evidence, diplomatic records, and governmental statements—sources that are not always publicly available or easily accessible.

*Second*, uncertainty remains regarding both in terms of the nature of the conduct and the number of States whose practice and *opinio juris* would be necessary to establish CIL. One option is bilateral custom (see *Right of Passage*, p. 37), but even then, the contracting parties may uphold different State practice and *opinio juris* on FET and FPS. If the treaty parties lack a consistent understanding of these standards, how can investors reasonably ascertain the applicable protections?

The alternative is general custom, but this poses an even greater challenge. Since investors can no longer rely on a well-developed body of precedent to delineate the scope of these protections, they must engage in a case-by-case analysis of State practice, which may diverge significantly across jurisdictions. Proving a general customary norm requires a level of uniformity that may not exist in practice, further diminishing the predictability and consistency of FET and FPS interpretations.

Aside from the above, regarding the content of FET, the FTC Decision expressly excludes frustration of legitimate expectations (protection already restricted under the MST approach), transparency, and good faith as elements of the standard (§3.b). A Party’s actions or omissions that may contradict an investor’s expectations will not constitute a breach of MST, even if they result in loss or damage to the covered investment. As a result, investors can no longer rely on objective commitments from States, such as government representations, specific investment commitments, or regulatory stability as a basis for their claims of frustration of legitimate expectations. This is the case even if an investor manages to establish that a particular standard is recognized as CIL, as the existence of an express provision in the treaty takes precedence.

This raises questions about how this affects ongoing cases in which investors are claiming legitimate expectations, such as *SSA v. Colombia*. For instance, can Colombia submit a revised defense to argue that claims based on legitimate expectations are no longer legally viable under the treaty? Will tribunals reassess the merits of such claims in light of the FTC Decision? Additionally, if an investor has already established a reliance on government commitments, how will tribunals reconcile this with the treaty’s explicit exclusion of legitimate expectations from FET? These uncertainties highlight the potential procedural and substantive implications of the FTC Decision on pending disputes.

Regarding FPS, the FTC Decision adopts a restrictive interpretation, limiting the obligation to physical protection. This interpretation aligns with the majority view of FPS, clarifying that “*the*

*level of police protection required under [CIL]*” does not extend to preventing economic harm by third parties, ensuring legal security, maintaining regulatory stability, or guaranteeing investors remain unharmed.

## Expropriation and Compensation

The FTC Decision limits indirect expropriation claims to cases where government actions interfere with distinct and reasonable investment-backed expectations (§4(c)), defined strictly as: (i) binding written government assurances and (ii) the nature, extent, and foreseeability of regulation in the relevant sector.

By limiting investment-backed expectations to explicit written government assurances and foreseeable regulation, the decision reduces the likelihood that general regulatory changes—particularly in highly regulated sectors—will qualify as expropriation. This restrictive framework could discourage claims based on evolving policy measures, particularly in areas like environmental and public health regulation, where governments frequently adjust legal frameworks in response to changing circumstances. However, its practical impact will depend on how arbitral tribunals interpret and apply these limitations in future disputes (See *Eco Oro v. Colombia* §§ 588-590).

## Investment and Environment

The FTC Decision reinforces that the TPA’s investment protections do not restrict a Party’s ability to adopt environmental measures, even if they impact investment value, as long as they comply with the treaty (§5). While this provision is intended to limit compensation claims arising from environmental regulations and guide arbitral tribunals’ interpretation of the MST and expropriation standards, its practical impact remains uncertain. Its circular nature contravenes any sense of efficacy, as it carves out the TPA’s protections if the State complies with the TPA’s provisions.

It is relevant to note that, despite the FTC Decision’s explicit carve-out for environmental measures, tribunals may not necessarily uphold it in practice. A key precedent is *Eco Oro v. Colombia*, where the Canada-Colombia BIT contained a similar carve-out, and both States submitted a joint interpretation affirming its applicability. However, the tribunal ultimately disregarded this interpretation, procured in the pendency of the case, and still found Colombia liable. This raises concerns about the legal certainty of such provisions, as past cases suggest that carve-outs alone do not guarantee protection from investment claims. It remains to be seen how tribunals will apply the FTC Decision in practice.

## Arbitrable claims

The FTC Decision clarifies that claims are permissible only after an alleged breach has occurred and the investor has suffered actual loss or damage, thereby excluding claims for future harm. It also distinguishes between claims under Article 10.16.1(a) and (b), preventing double recovery from claims brought directly by foreign investors and on behalf of their local enterprise.

By defining when a claim becomes “ripe” for arbitration, the FTC Decision seeks to prevent speculative claims. However, it remains to be seen how tribunals will apply this standard, particularly in cases where damages—though not yet materialized—are imminent. This—compounded with the strict three-year limitation period in Article 10.18, which bars claims filed after the investor first knew or should have known of the breach and resulting damage—could further complicate cases involving creeping expropriation, where harm materializes progressively over time.

## Conclusion

Issuing joint interpretative notes has become standard practice for Colombia, particularly after the Constitutional Court’s landmark rulings (C-252/19 and C-254/19), which conditioned the ratification of certain treaties on those clarifications. These decisions led to the adoption of interpretative declarations, as seen with the [Israel-Colombia FTA](#) and the [France-Colombia BIT](#).

For the U.S., the [Office of the U.S. Trade Representative](#) has confirmed that the FTC Decision reflects longstanding U.S. positions on interpretative standards, which “*are already reflected in the updated investment provisions of U.S. agreements*”.

Either way, the FTC Decision represents a pivotal shift in the interpretation of the United States-Colombia Trade Promotion Agreement. By providing binding interpretations of National Treatment, MFN, MST, Expropriation, among other standards, the FTC Decision significantly reshapes the scope of investment protections. Moving forward, investors will need to carefully adapt their litigation strategies to these changes.

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