

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

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The Colombia-US 2025 joint interpretation: clarifying investment standards or quietly reshaping investor protections?

by

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On January 15, 2025—during the last week of the Biden administration—[Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement](#) was [issued](#). This joint interpretation (JI) raises questions regarding its scope and influence beyond the treaty at hand. The recent US non-party submission in [Sea Search-Armada v. Colombia](#), largely relying on the JI, confirms its immediate relevance.

The [US-Colombia Trade Promotion Agreement](#), in force since 2012, contains standard investment protections—such as the minimum standard of treatment and the most-favored-nation-treatment standard—and an arbitration clause. Since its entry into force, five claims have been filed against Colombia and none against the US. The timing of this JI is notable for both parties.

While this is the first binding JI adopted by the US since the [2001 NAFTA Notes of Interpretation](#), both states downplay its significance. Published among a wave of last-minute administrative actions, the JI risks failing to influence arbitral practice beyond tribunals established under this treaty. The impact and persuasive force of JIs on third-treaty arbitrations is contingent to their publicity and retrievability.

The JI introduces several noteworthy elements:

- *Scope.* It deals not only with substantive rules, but also with investor-state dispute settlement (ISDS) and evidence rules.
- *Timing of claims.* The JI specifies that “a breach or loss must occur prior to the filing of the claim” (point 6(a)(i)). This narrower understanding of the harm, excluding

“*speculative claims*” (point 6(a)(ii)), could significantly impact damages valuation, particularly for the loss of future profits.

- *Standard of proof.* The JI establishes preponderance of evidence as the default standard (point 7). The general application of this standard could lead to interpretative challenges, especially if it contradicts established practices for specific evidentiary matters.
- *Retroactive application.* Effective from the treaty’s entry into force (point 10), the JI could influence pending cases. However, its retroactive application is legally contentious. The [Infinito Gold](#) tribunal warned that an interpretative agreement postdating the commencement of arbitration could threaten due process.

The JI claims not to alter investor rights, yet certain aspects suggest a restrictive shift:

- The assertion that decisions of international courts and tribunals on customary international law are “*not themselves instances of State practice for purposes of evidencing customary international law, although such decision can be relevant for determining State practice when they include an examination of such practice*” (point 3(a)(ii)) aligns with prevailing doctrine. However, the explicit exclusion of ISDS case law may be seen as a restrictive interpretation. While tribunals do not treat arbitral awards as state practice *per se*, they often use them as a subsidiary means for the determination of custom, as in the [Lone Pine](#) case, for instance, where consistent arbitral jurisprudence was used as a relevant guiding consideration.
- On the minimum standard of treatment, the JI aligns with the 2001 NAFTA Notes of Interpretation and recent US treaty practice, but introduces two key limitations, purporting to interpret not only the treaty, but the actual content of customary international law:
 - The explicit exclusion of good faith from the fair-and-equitable-treatment standard (point 3(b)), as a component of the minimum standard of treatment, under customary international law is notable. While tribunals have exhibited inconsistency in treating good faith as a stand-alone element of fair-and-equitable treatment, they often consider it implicitly, as in the [Tecmed](#) or [Occidental](#) cases, for instance.
 - Narrowing the non-discrimination aspect of fair-and-equitable-treatment under customary international law to discriminatory takings and discriminatory access to justice (point 3(b)) appears as a notable restriction with regard to discriminatory regulatory treatment, for instance, as in [Siemens](#) or [Parkerings](#). Notably, the [Waste Management II](#) tribunal defined the minimum standard of treatment as prohibiting conduct that is “*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice.*”

- On most-favored-nation treatment, the JI states that protection is not accorded “*through the existence or substantive contents*” of other treaties (point 2(b)) but could extend to measures implementing such obligations. Although in line with modern US treaty practice, this contradicts number of investment awards, like in [EDF](#) or [SAUR](#).

This JI, alongside the [EU’s recent submission](#) of a draft JI clause to UNCITRAL Working Group III, signals a [previously noted](#) growing interest in JIs as a tool for shaping international investment law. However, this also raises familiar concerns about their impact and legitimacy, as evidenced by the [Pope & Talbot](#) tribunal’s critical view of the [NAFTA Interpretation Notes](#): it deemed them exceeding the scope of permissible interpretation although reluctantly accepting them.

All in all, while this JI favors state regulatory space, its restrictive approach to the minimum standard of treatment, most-favored-nation treatment and ISDS jurisprudence, as well as its application to pending cases, may trigger tribunal pushback. If viewed as overstepping permissible interpretation, it could fail to shape future jurisprudence, turning a potential milestone into a missed opportunity.

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