Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement ("the Agreement")

The Free Trade Commission decides as follows:

Interpretation of Article 10.3 (National Treatment), Article 10.4 (Most-Favored-Nation Treatment), Article 10.5 (Minimum Standard of Treatment), Article 10.7 (Expropriation and Compensation), Article 10.11 (Investment and Environment), Article 10.16 (Submission of a Claim to Arbitration), Article 10.22 (Governing Law), Article 10.28 (Definitions), Annex 10-A (Customary International Law), and Annex 10-B (Expropriation)

1. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretations of Article 10.3 (National Treatment):

a. To establish a breach of Article 10.3, a claimant must establish that it or its investments were accorded "treatment," were in "like circumstances" with domestic investors or investments, and received treatment "less favorable" than that accorded to domestic investors or investments.

b. Article 10.3 prevents discrimination on the basis of nationality between domestic investors or investments, on the one hand, and investors or investments of the other Party, on the other hand, that are in "like circumstances." It does not prohibit all differential treatment among investors or investments, but rather ensures only that a Party does not treat investors or investments of the other Party that are in "like circumstances" with its own investors or investments less favorably based on nationality.

c. When determining whether an investor or its investment is "in like circumstances" with comparators, the investor or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Whether treatment is accorded in "like circumstances" under Article 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

2. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretations of Article 10.4 (Most-Favored-Nation Treatment):

a. To establish a breach of Article 10.4, a claimant must establish that it or its investments were accorded "treatment," were in "like circumstances" with investors or investments of a non-Party, and received treatment "less favorable" than that accorded to investors or investments of a non-Party.

b. A Party does not accord "treatment" within the meaning of Article 10.4 through the existence or substantive content of provisions in its other international agreements such as conditions to consent, procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards. However, treatment accorded by a Party could include measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

c. When determining whether an investor or its investment is "in like circumstances" with comparators, the investor or its investment should be compared to an investor or investment of a non-Party that is alike in all relevant respects but for nationality of ownership. Whether treatment is accorded in "like circumstances" under Article 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

3. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretations of Article 10.5 (Minimum Standard of Treatment) and Annex 10-A (Customary International Law):

a.

i. Annex 10-A to the U.S.-Colombia TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. To establish a breach of Article 10.5, a claimant must establish first, the existence and applicability of a relevant rule of customary international law that results from a general and consistent practice of States that they follow from a sense of legal obligation ("State practice and opinio juris"), and second, that a Party has engaged in conduct that violates that rule. Nothing in the Agreement delegates to arbitral tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and opinio juris.

ii. Examples of State practice may include relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject. Decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of State practice for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.

b. In application of the foregoing, the Parties affirm that Article 10.5 does not currently require States to provide the same level of due process rights in administrative decision-making as in judicial proceedings. The concepts of legitimate expectations, transparency, and good faith are also not currently component elements of "fair and equitable treatment" subject to Article 10.5. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of Article 10.5, even if there is loss or damage to the covered investment as a result; instead, something more is required. Non-discrimination is also not currently a component element of "fair and equitable treatment" subject to Article 10.5 outside the context of discriminatory takings and discriminatory access to judicial remedies or treatment by the courts. Arbitral tribunals may continue to examine State practice and

opinio juris that can be relied upon to determine whether a customary international law rule covered by Article 10.5 has crystallized.

c. In application of the foregoing, the Parties affirm with respect to the obligation at Article 10.5.2(a) "not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world":

> i. This obligation does not empower an arbitral tribunal, such as one established under Section B of Chapter Ten of the Agreement, to review the merits of a domestic court's application of domestic law.
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> ii. The international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.
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> iii. A domestic court decision that may be seen as erroneous, or as a misapplication or misinterpretation of domestic law, does not in itself constitute a denial of justice.
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> iv. The evolution or development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication does not in itself constitute a denial of justice.
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> v. The failure to satisfy requirements of domestic law does not necessarily violate international law, and therefore a departure from domestic law does not in-and-of-itself sustain a violation of this obligation.
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> vi. A denial of justice may occur in instances such as when the final act of a Party's judiciary constitutes a notoriously unjust or egregious administration of justice which offends a sense of judicial propriety, or where there is, for example, an obstruction of access to the courts, or failure to provide those guarantees which are generally considered indispensable to the proper administration of justice.
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> vii. Corruption in judicial proceedings, discrimination or ill-will against an alien plaintiff or defendant, or executive or legislative interference with the freedom or impartiality of the judicial process may also be instances of "denial of justice".

d. In application of the principles described above, the Parties affirm that the obligation at Article 10.5.2(b) to "provide the level of police protection required under customary international law" does not require a Party to prevent economic injury inflicted by third parties, provide for legal security, provide for stability of a Party's legal environment, or guarantee that aliens or their investments are not harmed under any circumstances.

4. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretations of Article 10.7 (Expropriation and Compensation) and Annex 10-B (Expropriation):

a. Whether an action or series of actions by a Party constitutes an expropriation shall be determined in accordance with Article 10.7.1 and Annex 10-B (Expropriation).

b. With respect to Paragraph 3(a)(i) of Annex 10-B, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as to support a conclusion that the property has been taken from the owner.

c. With respect to Paragraph 3(a)(ii) of Annex 10-B, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

5. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretation of Article 10.11 (Investment and Environment):

Article 10.11 informs the interpretation of other provisions of Chapter Ten, including Articles 10.5 and 10.7, and protects the right of either Party to adopt, maintain, or enforce any measure otherwise consistent with Chapter Ten to ensure that investment is undertaken in a manner sensitive to environmental concerns. Chapter Ten is not intended to undermine the ability of a Party to take measures that it considers appropriate to address environmental concerns, even when those measures may affect the value of an investment, if otherwise consistent with the Chapter.

6. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretations of Article 10.16 (Submission of a Claim to Arbitration):

a.

i. An investor may submit a claim under Article 10.16.1 only once the respondent Party "has breached" a relevant obligation, and the investor "has incurred loss or damage by reason of, or arising out of" (i.e., caused by) that breach. There can be no claim under Article 10.16.1 until an investor has incurred loss or damage from an alleged breach. The breach and loss or damage must have already occurred prior to the submission of a claim to arbitration.

ii. No claim based solely on speculation as to a future breach or future loss or damage may be submitted. As Article 10.16.1 does not cover such hypothetical claims, if the measures of which an investor complains have not yet been applied

to it, the claim is not ripe and may not be brought. An investor may recover only for loss or damage that is established on the basis of non-speculative evidence .

b. Articles 10.16.l(a) and 10.16.1(b) serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.16.l(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," the investor's injury is only indirect. Such claims must be brought, if at all, under Article 10.16.1(b).

c. Article 10.16 permits a claimant to submit to arbitration a claim that the respondent has breached a relevant obligation and that the claimant has incurred loss or damage "by reason of, or arising out of," that breach, which requires a claimant to establish the causal nexus between the alleged breach and the claimed loss or damage. That loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach, such as a claimant's failure to undertake reasonable mitigation measures.

7. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretation of Article 10.22 (Governing Law):

If an investor of a Party submits a claim under Section B of Chapter Ten, the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration, and that burden does not shift to the respondent. If a respondent raises any affirmative defenses, the respondent must prove such defenses. The standard of proof is generally a preponderance of the evidence.

8. Pursuant to Article 20.1.3(c), the Free Trade Commission issues the following interpretation of Article 10.28 (Definitions):

a.

i. Under Article 10.28, forms that an investment may take include an "enterprise", which is defined at Article 1.3 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." Forms that an investment may take also include "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."

ii. Such references to "applicable" and "domestic" law affirm that the protections in Chapter Ten only apply to investments made in compliance with that Party's domestic law at the time that the investment is established or acquired. As a general matter, trivial violations of the applicable law will not put an investment outside the scope of Chapter Ten.

b. An investor "attempts through concrete action to make" an investment for the purposes of the definitions of "investor of a non-Party" and "investor of a Party" when that investor has, for example, channeled resources or capital in order to set up a business, or applied for a permit or license.

9. For greater certainty, the issuance by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the Parties about other matters of interpretation of the Agreement.

10. This interpretation is effective as of the date of entry into force of the Agreement.

DONE, in English.

For the Republic of Colombia:

Luis Carlos Reyes Hernández
Minister of Trade, Industry and Tourism

JANUARY 15, 2025
DATE

For the United States of America:

Katherine Tai
United States Trade Representative

January 15, 2025
DATE