INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

NEUSTAR, INC AND VERCARA, LLC (FORMERLY SECURITY SERVICES, LLC D/B/A NEUSTAR SECURITY SERVICES)

Claimants

and

REPUBLIC OF COLOMBIA
Respondent

ICSID Case No. ARB/20/7

AWARD

Members of the Tribunal
Prof. Dr. Julian D.M. Lew, President
Prof. Dr. Kaj Hobér, Arbitrator
Prof. Yves Derains, Arbitrator

Secretary of the Tribunal
Veronica Lavista

Date of dispatch to the Parties: 20 September 2024

REPRESENTATION OF THE PARTIES

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REPRESENTATION OF NON-DISPUTING PARTY

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Advisory Committee	Advisory Committee created by MinTIC Resolution 999 of 2007
Addendum No [1]-[6]	Addendum to the 2020 Terms of Reference
AFILIAS	Afilias, Inc
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bill of Sale	Assignment and Assumption and Bill of Sale Agreement of 1 December 2021 among *inter alia* Data Solution Services LL, Security Services LLC, Neustar Information Services, Inc, Neustar Inc, etc (C-0143)
C-[#]	Claimant's Exhibit
CCAP	Colombian Code of Administrative Procedure
Memorial	Claimant's Memorial on Jurisdiction and the Merits dated 22 October 2023
Claimant's PHB	Claimant's Post Hearing Brief dated 9 June 2023
Rejoinder on SfC	Claimant's Rejoinder to Respondents Application for Security for Costs and Comments relating to Applicable Law on Jurisdiction dated 2 June 2023
Response on SfC	Claimant's Response to Respondent's Application for Security for Costs and Comments relating to Applicable Law on Jurisdiction dated 10 May 2023
Reply	Claimant's Reply Memorial on Jurisdiction and the Merits dated 29 July 2022
CL-[#]	Claimant's Legal Authority
.co domain	Top level domain name for Colombia

.Co Internet	.Co Internet S.A.S.
Consejo de Estado	Council of State of Colombia
Concession	Concession 0019 of 2009 signed between MinTIC and .Co Internet on 3 September 2009 (C-0017)
Ms. Sylvia Constaín	Minister of MinTIC from 7 August 2018, witness for the Respondent
Decision on Security for Costs	Tribunal's Decision on Security for Costs dated 27 September 2023
FET	Fair and Equitable Treatment as provided for in Article 10.5 TPA
GoDaddy	GoDaddy, Inc a Delaware corporation
Hearing	Hearing on Jurisdiction and the Merits held on 27-29 March 2023
IANA	Internet Assigned Names and Numbers
ICANN	Internet Corporation for Assigned Names and Numbers
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICJ	International Court of Justice
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ITU	International Telecommunication Union
ITU Report	Study on the **.co domain** lead by Mr. Jim Prendergast of May 2019
Law 1065 of 2006	Law 1065 of 2006, regulating the administration of domain name registration service for the **.co domain**

MFN	Most Favoured Nation treatment in accordance with Article 10.4 TPA
MinCIT	Ministry of Commerce, Industry and Tourism
MinTIC	Ministry of Information Technology and Communications of Colombia
MinTIC Claim	The claim in dispute in this Arbitration.
NDP	Non-Disputing Party (United States of America)
Neustar	Neustar, Inc a USA limited liability company 21575 Ridgetop Circle, Stirling, Virginia, USA which commenced this Arbitration
NAFTA	North American Free Trade Agreement
Notice of Intent	Notice of Intent of Neustar/.Co Internet to the Colombian Government of 16 September 2019
NT	National treatment in accordance with Article 4.3 TPA
PO [1][2][3][4]	Procedural Order Nos
R-[#]	Respondent's Exhibit
Application on SfC	Respondent Application for Security for Costs dated 19 April 2023
Counter-Memorial	Respondent's Counter-Memorial on Jurisdiction and Merits dated 25 February 2022
Respondent's PHB	Respondent's Post Hearing Brief dated 9 June 2023
Rejoinder	Respondent's Rejoinder on Jurisdiction and Merits dated 4 November 2022
Reply on SfC	Respondent's Reply to Security for Costs and Comments relating to Applicable Law on Jurisdiction dated 26 May 2023

RFP	Final Request for Proposals issued by Colombia Government on 13 December 2019 containing terms of reference that set out the requirements and conditions with respect to the tender process published through Resolution 3316 of 2019
RL-[#]	Respondent's Legal Authority
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Spin Out	Spin out of Neustar Security Services notified to the Tribunal on 29 July 2023
Tender Process	Tender Process 02 of 2009
Tr. Day [#] [language] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 21 April 2021
TPA or Treaty	Free Trade Agreement between the Republic of Colombia and the United States of America, which entered into force on 15 May 2012
UNCITRAL Rules	United Nations Commission on International Commercial Arbitration
UPA	Unit Purchase Agreement between Neustar Inc, Aerial Blocker Corp., Aerial Security Services Intermediate LLC, and Security Services LLC and GoDaddy Inc (C-0140)
USA	United States of America – non-disputing party in this Arbitration
Vercara	Vercara LLC, a company established in Delaware, USA, which received the security business of Neustar
WTO	World Trade Organization
2009 Terms of Reference	Terms of Reference of 2009 (C-0014)

2020 Terms of Reference	2020 Terms of Reference and accompanying documents for the Tender Process
2020 Contract	Contract entered into between MinTIC and .Co Internet executed on 22 May 2020, which entered into force on 5 October 2020

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes on the basis of the Trade Promotion Agreement between Colombia and the United States of America which entered into force on 15 May 2012 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966.

2. Claimant is Neustar Inc. ("Neustar" or "Claimant"), a company incorporated under the laws of Delaware, U.S.A. Following changes in corporate ownership and name changes, the case name was changed with ICSID to Vercara, LLC (formerly Security Services, LLC d/b/a Neustar Security Services, formerly Neustar, Inc.) ("Vercara"), a company incorporated under the laws of Delaware, U.S.A.[1] The Tribunal has concluded that Neustar remains the Claimant in this Arbitration: see §§ 519-524 below.

3. Respondent is the Republic of Colombia ("Colombia" or "Respondent").

4. Claimant and Respondent are collectively referred to as the "Parties". The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to Colombia's decision not to extend a Concession Agreement between Colombia and .Co Internet S.A.S., a company owned and controlled by the Claimant at the relevant time.

II. PROCEDURAL HISTORY

6. On 8 January 2020, ICSID received a complete copy of the Request for Arbitration dated 23 December 2019 from Neustar, Inc. and its enterprise .Co Internet SAS ("the Requesting

[1] The Request for Arbitration was presented by Neustar, Inc. On 29 July 2021, the Claimant informed it changed its name to "Security Services LLC, doing business as Neustar Security Services" as result of a transaction involving the sale of Neustar, Inc. to TransUnion and the spin out of Neustar Security Services to operate the Security Business as a standalone portfolio company (the "Spin Out"). On 7 April 2023, Claimant wrote to ICSID providing an update on its corporate name. It stated that on 4 April 2023 its name Security Services, LLC had changed to Vercara, LLC. See §§ 472-474

Parties") against Colombia (the "Request"). By letter of 2 March 2020, the Requesting Parties withdrew .Co Internet S.A.S. as a party to the dispute.

7. On 9 March 2020, the Secretary-General of ICSID registered the Request in relation to Neustar, Inc,[2] in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to inform ICSID of any agreed provisions as to the number of arbitrators and the method of their appointment in accordance with Rule 7(c) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings 2006.

8. On 11 August 2020, ICSID informed the Parties that in accordance with the ICSID Arbitration Rule unless the Parties took procedural steps before 9 September 2020, the Secretary-General would, after giving notice to the Parties, discontinue the proceeding.

9. On 31 August 2020, Claimant informed ICSID that the Parties had come to an agreement in relation to the number of arbitrators but not the method for their appointment.

10. On 21 April 2021, the Secretary-General, in accordance with Rule 6 of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date.

11. The Tribunal is composed of Professor Dr. Julian Lew, a British and Israeli national, President, appointed by agreement of the Parties; Professor Dr. Kaj Hobér, a Swedish national, appointed by Claimant; and Professor Yves Derains, a French national, appointed by Respondent.

12. On 22 April 2021, the Tribunal requested that, in accordance with ICSID Administrative and Financial Regulation 14(3), each Party make an advance payment of US$ 200,000 to cover the costs of the proceeding. ICSID received payment from both Parties.

[2] After ICSID conveyed questions to the Requesting Parties, they decided to withdraw .Co Internet S.A.S., as a Requesting Party to the dispute, leaving only Neustar, Inc as the Requesting Party.

13. On 23 April 2021, ICSID informed the Parties that Ms. Veronica Lavista would serve as Secretary of the Tribunal.

14. On 14 June 2021, Respondent informed the Tribunal that it had retained Hogan Lovells as its counsel in this proceeding.

15. In accordance with Rule 13(1) of the Arbitration Rules, the Tribunal held a first session with the Parties on 15 June 2021 by videoconference.

16. Following the first session, on 9 July 2021, the Tribunal issued Procedural Order No. 1 ("PO1") recording the agreement of the Parties on procedural matters. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. PO1 also sets out the agreed schedule for the merits phase of the proceedings, and the Parties' agreement to have a separate phase for damages.

17. On 29 July 2021, ICSID offered to facilitate the Parties' agreed process for the designation of non-disclosure information in the award as reflected in Sections 24 and 25 of PO1, to ensure that the three arbitrators may be paid any fees incurred in relation to redactions in the award. On 3 August 2021, the Parties confirmed their agreement.

18. On 15 October 2021, the Parties agreed to a revised procedural schedule.

19. On 18 October 2021, the Tribunal approved the revised procedural schedule.

20. In accordance with PO1, and the revised procedural schedule, on 22 October 2021, Claimant filed a Memorial on Jurisdiction and the Merits, together with Exhibits C-001 to C-0125 and Legal Authorities CL-001 to CL-082.

21. On 25 February 2022, Respondent filed a Counter-Memorial on Jurisdiction and the Merits, together with Witness Statement of Luisa Fernanda Trujillo Bernal dated February 23, 2022; Witness Statement of Sylvia Constaín dated February 23, 2022; Witness Statement of Iván Darío Castaño Pérez dated February 24, 2022; Exhibits R-0001 to R-0087; and Legal Authorities RL-001 to RL-0116.

22. On 18 March 2022, the Parties filed their respective requests for document production.

23. On 1 April 2022, the Parties filed their respective responses to the other Party's document production request.

24. On 15 April 2022, the Parties filed their respective replies to the respective responses to the other Party's document request.

25. On 6 May 2022, the Tribunal issued Procedural Order No. 2 ("PO2") concerning the Parties' document production requests.

26. By letter of the same date, the United States of America requested that the Tribunal set 13 May 2022 as the date for submissions from non-disputing Parties in this case pursuant to Article 10.20.2 of the TPA.

27. By letter of 11 May 2022, the Tribunal confirmed 13 May 2022 as the deadline for submitting non-disputing Party submissions.

28. On 13 May 2022, the USA filed a NDP submission.

29. On 10 June 2022, each Party produced the documents ordered by the Tribunal in accordance with PO2.

30. On 29 July 2022, Claimant filed a Reply on Jurisdiction and the Merits, together with Exhibits C-0126 to C-0138 and Legal Authorities CL-0083 to CL-0133.

31. Also by letter dated 29 July 2022, Claimant informed ICSID and the Tribunal it changed its name to "Security Services LLC, doing business as Neustar Security Services" as result of a transaction involving the sale of Neustar to TransUnion and the spin out of Neustar Security Services to operate the Security Business as a standalone portfolio company (the "Spin Out"). Under the terms of the Spin Out, "Security Services LLC, d/b/a/ Neustar Security Services," a limited liability company of the United States retained and continues to retain the rights to this Arbitration.

32. On 12 August 2022, Respondent requested that the name of the proceeding include a reference to "formerly Neustar, Inc.".

33. On 19 August 2022, the name of the proceeding was changed to "Security Services, LLC d/b/a Neustar Security Services (formerly Neustar, Inc.) v. Republic of Colombia".

34. By letter of 5 September 2022, Respondent requested that Claimant be ordered to produce certain documents in relation to Claimant's name change and the document production exchange (the "Respondent's Document Production Application").

35. By letter of 15 September 2022, Claimant filed its response to Respondent's letter of 5 September 2022.

36. On 28 September 2022, Respondent submitted its reply to Claimant's letter dated 15 September 2022.

37. By letter of 3 October 2022, Claimant submitted its response to Respondent's letter of 28 September 2022.

38. On 25 October 2022, the Tribunal issued Procedural Order No. 3 ("PO3") rejecting the Respondent's Document Production Application dated 5 September 2022.

39. On 27 October 2022, the Parties informed the Tribunal that they agreed to hold the hearing outside of Washington, D.C. On the same date, the Tribunal confirmed that London, United Kingdom would be the most convenient location for the Hearing.

40. On 4 November 2022, Respondent filed a Rejoinder on Jurisdiction and the Merits, together with Exhibits R-0088 to R-0094 and Legal Authorities RL-117 to RL-0191.

41. On 12 December 2022, the Tribunal requested that, in accordance with ICSID Administrative and Financial Regulation 14(3) and section 9 of PO1, each Party make an additional advance payment of US$ 200,000 to cover the costs of the proceeding for the next three to six months. ICSID received payment from both Parties.

42. On 6 February 2023, Claimant provided notification that it wished to cross examine Mr. Iván Darío Castaño Pérez, Ms. Luisa Fernanda Trujillo Bernal and Ms. Sylvia Constaín at the hearing scheduled for 27-29 March 2023.

43. On 20 February 2023, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference. The audio recording was made available to the Parties and the Tribunal on 22 February 2023.

44. On 28 February 2023, the Tribunal issued Procedural Order No. 4 ("PO4") concerning the organization of the hearing.

45. On 8 March 2023, the Tribunal informed the United States that the hearing was scheduled to take place on 27 to 29 March 2023 at the International Dispute Resolution Centre ("IDRC") in London, United Kingdom and invited it to indicate whether it wished to attend the hearing.

46. On 10 March 2023, each Party submitted its list of *dramatis personae* and chronology in relation to the dispute.

47. On 20 March 2023, the NDP confirmed that it would attend the hearing virtually and requesting the opportunity to provide a short oral submission.

48. The Hearing on jurisdiction and the merits was held at the IDRC in London from 27 March to 29 March 2023 (the "Hearing"). The following people were present at the Hearing:

Tribunal:

Prof. Dr. Julian D.M. Lew, KC	President
Prof. Yves Derains	Arbitrator
Prof. Dr. Kaj Hobér	Arbitrator

ICSID Secretariat:

Ms. Veronica Lavista	Secretary of the Tribunal

For Claimant:

Mr. Teddy Baldwin	Steptoe LLP
Mr. Thomas Innes	Steptoe International (UK) LLP
Ms. Chloe Baldwin	Steptoe LLP
Ms. Lindsay Dimond	Steptoe International (UK) LLP

Mr. Kevin Hughes	Neustar Security Services

For Respondent:

Ms. Ana María Ordoñez Puentes	Agencia Nacional de Defensa Jurídica del Estado
Mr. Camilo Valdivieso León	Agencia Nacional de Defensa Jurídica del Estado
Ms. Martha Lucia Zamora Ávila	Agencia Nacional de Defensa Jurídica del Estado
Ms. Elizabeth Prado	Agencia Nacional de Defensa Jurídica del Estado
Ms. Juliana de Valdenebro	Agencia Nacional de Defensa Jurídica del Estado
Mr. Giovanny Andrés Vega Barbosa	Agencia Nacional de Defensa Jurídica del Estado
Ms. Marcela María Silva Zambrano	Agencia Nacional de Defensa Jurídica del Estado
Mr. Laurent Gouiffés	Hogan Lovells
Mr. Daniel E. González	Hogan Lovells
Ms. Melissa Ordoñez	Hogan Lovells
Mr. Lucas Aubry	Hogan Lovells
Ms. Juliana de Valenebro	Hogan Lovells

Non-Disputing Party:

Mr. David M. Bigge	US Department of State
Mr. Alvaro J. Peralta	US Department of State

Court Reporters:

Ms. Diana Burden
Mr. Paul Pelissier

Interpreters:

Ms. Anna Sophia Chapman
Ms. Amalia de Klemm

49. During the Hearing no witnesses were presented by Claimant; the following witnesses presented on behalf of Respondent were examined:

Ms. Sylvia Cristina Constaín Rengifo
Ms. Luisa Fernanda Trujillo Bernal
Mr. Iván Darío Castaño Pérez

50. During the Hearing the NDP participated remotely and made an oral submission to the Tribunal.

51. On 28 March 2023, the Tribunal sent questions to the Parties to be answered on the last day of the Hearing.

52. On 31 March 2023, the Tribunal sent post-hearing instructions to the Parties.

53. On 7 April 2023, Claimant wrote to ICSID providing an update on its corporate name. It stated that on 4 April 2023 its name Security Services, LLC had changed to Vercara, LLC, and attaching Exhibit C-0139.

54. On 10 April 2023, the Tribunal invited Respondent to make any comments in relation to Claimant's request to update the record of the Arbitration.

55. On 17 April 2023, the Tribunal gave instructions to the Parties in relation to Respondent's intention to submit an application for Security for Costs and other post-hearing instructions.

56. On 19 April 2023, Respondent submitted its Application for Security for Costs together with RL-192 to RL-203. In addition, Respondent stated that it considered that the additional name change serves to heighten the doubts surrounding Claimant's approach to these proceedings and the need for security for costs. It also confirmed that the record may be updated for purely administrative purposes to *Vercara LLC (formerly Security Services LLC, formerly Neustar Inc) v. Republic of Colombia*.

57. On 24 April 2024, ICSID informed the Parties that it would proceed to update the record of the Arbitration unless either Party objected by 28 April 2023.

58. On 28 April 2023, the Parties submitted their joint proposed amendments to the hearing transcripts.

59. On 3 May 2023, ICSID updated the record of the Arbitration to *Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia*.

60. On 10 May 2023, Claimant submitted its Response on Security for Costs and Comments on Applicable Law, the Witness Statement of Ms. Megan Rodkin (CWS-1), Exhibits C-0139 to C-0158, Legal Authorities CL-0134 to CL-0168, and the Consolidated List of Filed Documents.

61. On 26 May 2023, Respondent submitted its Reply on Security for Costs and Comments Relating to Applicable Law to Jurisdiction and RL-204 to RL-205.

62. On 2 June 2023, Claimant submitted its Rejoinder on Security for Costs and Applicable Law on Jurisdiction, Legal Authority CL-0169, and its Consolidated List of Filed Documents.

63. The Parties filed simultaneous post-hearing briefs on 9 June 2023. Respondent also included Legal Authorities RL-206 to RL-208.

64. On 27 September 2023, the Tribunal issued its Decision on Security for Costs.

65. The Parties filed their submissions on costs on 30 July 2024.

66. The proceeding was closed on 20 September 2024.

III. FACTUAL BACKGROUND

67. The facts as summarised below are largely agreed between the Parties or at least are uncontested and relevant to the dispute and claims in this Arbitration. They are taken from the Parties' written submissions and other evidence in the record.

68. From the mid-1980s, two categories of top-level domains ("TLDs"), intended to be at the top of the naming hierarchy of the domain name system, were progressively created by the academic institutions involved in the initial development of the Internet.

69. Seven generic top-level domains ("gTLDs") were created for general categories of organizations, such as .org, (intended for "*non-government organizations*") or .int (intended for "*organizations established by international treaties*"), the most famous undoubtedly being .com which was "*intended for commercial entities, that is companies*".

Country-code top-level domains ("ccTLDs") were created from 1985 onwards by Jon Postel and the coordination group of the management of the domain name system that he headed, the Internet Assigned Numbers Authority ("IANA").

70. This Arbitration and the dispute relate to the commercial expansion and administration of the ccTLD for Colombia, ".CO" (as in the domain name www.example.co). A ccTLD is a top-level domain name that is used to define the domain for a particular country or a geographical area, every country has a domain name reserved for it.[3] The internet's domain name system, including ccTLD's, is managed by a coordination group IANA and through a not-for-profit organization, the Internet Corporation for Assigned Names and Numbers ("ICANN"). The **.co domain** was initially delegated by IANA to the Universidad de los Andes ("the University") on 24 December 1991.[4]

71. In December 2001, at the request of the Minister of Communications, the Colombian Consejo de Estado, the supreme tribunal in administrative law jurisdiction and the supreme consultative organ of the State (the "*Consejo de Estado*") considered the status of the **.co domain** and concluded that the domain is of public interest, intrinsically related to communications, and by virtue of this the Ministry may put into action planning, regulation and control of the domain. Subsequently, the University terminated the commercialization process with respect to the domain.

72. On 7 May 2002, the Colombian Government issued Resolution 600 of 2002, "*on partial regulation of administration of the domain name .CO*". This Resolution noted that Law 72 of 1989 "*confers on the Ministry of Communications the authority to plan, regulate and control all services in the communications sector, including certain elements and resources necessary for the provision of such services*". It went on to resolve in part that the **.co domain** was recognized as a public asset in the telecommunication sector, of which the "*administration, maintenance and development shall be planned, regulated and controlled by the State*".[5]

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3 Memorial §§ 20-21
4 Memorial §§ 22-23; Counter-Memorial §§ 34-35
5 Memorial § 26; Counter-Memorial § 40

73. On 10 July 2002, the Consejo de Estado in Colombia ordered the Minister of Communications to take over administration of the **.co domain** from the University. Respondent contends that administration of the **.co domain** continued until 2009 in coordination with the Ministry of Information Technology and Communications ("MinTIC").[6]

74. On 14 January 2003 MinTIC launched a consultation process regarding the administration of the **.co domain**, in order to better understand the particularities of this recently recognized public interest asset.

75. On 29 July 2006, the Colombian Government enacted Law 1065 of 2006, regulating the administration of domain name registration service for the **.co domain**. As a matter of Colombian law, the **.co domain** is regarded as a public resource and MinTIC exercises a regulatory function as regards to its administration, maintenance, and development. In exercise of that regulatory function, the Ministry may appoint a private party as the administrator of the domain, in accordance with Article 2 of Law 1065.[7]

76. Article 2 of Law 1065 provides:

> *For all purposes, the administration of the register of names in the .co domain is an administrative function for which the Ministry of Communications is responsible, and its exercise may be conferred on private parties in accordance with the law. In this case, the duration of the agreement may be for up to 10 years, renewable on one occasion only, for a term equal to the original term.*[8]

77. In 2007 the Advisory Committee (Comité de Apoyo) for the implementation of the administration of the **.co domain** was established by MinTIC through Resolution 999 of 2007.[9] It provided that the Committee would be comprised of several directors of MinTIC, and could invite to its sessions experts as considered necessary.

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6 Memorial § 27; Counter-Memorial § 40
7 Memorial §§ 29-32; Counter-Memorial §§ 41, 42, 43
8 Counter-Memorial § 43
9 Resolution 999/2007 (R-0023)

78. In June 2007, representatives of ICANN met with representatives of the MinTIC, to encourage them to take an "'*open and transparent' bottom up consensus driven approach to selecting an appropriate trustee for the .CO domain*".[10]

79. In 2008 MinTIC decided to outsource the registration functions to a private entity (Resolution 284 of 2008). It recognized that its own role was that of regulator (Resolution 1341 of 2008), whereas a concessionaire would be responsible for the management and promotion of the top-level **.co domain**, a "*totally exclusive outsourcing model*".[11]

80. On 30 July 2008, MinTIC issued Resolution 1652 on the basis of the recommendations of the Advisory Committee. This set out the general framework of the total outsourcing model, including that there would be no geographical limitation to the commercialization of the **.co domain**. This Resolution also defined the financial model of the contract to be concluded, under which the third-party would pay MinTIC a percentage of the income generated by the sale of domain names.[12]

81. On 19 May 2009, MinTIC launched Tender Process 02 of 2009 for the attribution of a contract for the administration and operation of the **.co domain**.[13] On 30 July 2009, the definition of the legal framework for the **.co domain** concluded with the enactment of Law 1341 of 2009, which clarified MinTIC's policy-setting role in respect of the **.co domain**. The 2009 Terms of Reference had certain technical requirements for qualification and required tenders to submit a technical proposal as well as a financial proposal.

82. On 13 August 2009, MinTIC announced that .Co Internet (then a joint venture between Arcelandia S.A. and Neustar) had been selected as the successful bidder.[14] It was ultimately the only qualified bidder in the 2009 Tender Process.[15] At that time Neustar held a 1%

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10 Memorial § 36
11 Memorial § 40; Counter-Memorial § 48
12 Counter-Memorial §§ 51, 52
13 2009 Terms of Reference, § 2 (C-0014)
14 Memorial § 45
15 Counter-Memorial § 60

shareholding in .Co Internet and it was to serve as the back-end provider of registry services and infrastructure support for the **.co domain**.[16]

83. On 3 September 2009, MinTIC and .Co Internet signed Concession State Contract 0019 of 2009 (the "Concession") for the promotion, administration, technical operation and maintenance of the **.co domain** and to provide such additional services as required by the Concession.[17]

84. The remuneration of .Co Internet was 94% of the proceeds for the range of 0 to 1,700,000 domains registered (with 6% royalty going to MinTIC); and for the range of 1,700,001 to 3,500,000 domains, 93% of the proceeds were remuneration for .Co Internet (with 7% royalty going to MinTIC);[18] when registrations exceed 3,500,001 royalty would increase to 45%. (This did not happen during the period of the Concession so is in effect moot).

85. Clause 4 of the Concession provided:

> *Validity Period and Term Agreed. The present concession contract will have a term of ten (10) years that will commence from the date of the authorization given by ICANN to the CONCESSIONAIRE for carrying out the activities of the domain, provided that by such time, the Universidad de los Andes, in cooperation with the concessionaire, will have carried out in a timely and adequate manner each and every one of the activities required in the transition process.*
>
> *The agreed term may be renewed in the manner and terms established by the legislation in force at the time of the renewal.*[19]

86. The Concession also included a dispute resolution clause, providing for Bogotá seated arbitration [Art. 19], and distinguished between acts taken by MinTIC in its capacity as a contractual party and its capacity as a sovereign. This was in the following terms [Art. 17]:

> *ADMINISTRATIVE ACTS: the decisions taken by the GRANTOR, within the limits of its competence, in accordance with the legal framework, qualify as administrative acts that bind the CONCESSIONAIRE only when these acts are of an exceptional nature. Any other acts will solely be considered as acts of contractual execution. Normal judicial remedies under the Code of Administrative*

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16 Counter-Memorial § 58
17 Memorial § 46
18 Counter-Memorial § 63
19 Concession (C-0017); Counter-Memorial § 67 (Respondent's translation). See also Memorial § 47 (Claimant's translation)

> *Litigation and other applicable norms will be available against the administrative acts taken by the GRANTOR.*[20]

87. The Concession entered into effect on 7 February 2010. Following an initial registration period open to eligible trademark holders and those interested in high-priority domain names, general availability began on 20 July 2010.

88. On 3 February 2014, Colombia and .Co Internet agreed Amendment No. 3 to the Concession. This Amendment authorized an additional investment from Neustar in .Co Internet, by permitting Neustar to own up to 100% of its shares. Also, a new requirement was added that the Concessionaires had to organize a minimum of two events per year to support MinTIC programs.[21]

89. On 14 April 2014, Neustar purchased Arcelandia's shares in .Co Internet and became the sole shareholder of .Co Internet. Total consideration for this purchase included a cash consideration of US$ 113.7 million, of which US$ 86.7 million was paid at closing and US$ 27 million was deposited into escrow. Respondent authorized Neustar's purchase of these shares and registered its investment in the Colombian Central Bank. As disclosed in its 2014 financial statements, Neustar may have been obliged to make an additional USD 6 million contingent payment to Arcelandia in the first quarter of 2020.[22]

90. Claimant contends that the **.co domain** (TLD) has become particularly valuable in that it has come to represent the world's single, most credible alternative to the generic .com domain for worldwide commercial use. It is the 20th largest TLD in the world (out of approximately 1,500) and the second largest in Latin America.[23]

91. In late 2017, MinTIC started to carry out an evaluation of the 2009 contract and the options open to Colombia for the future administration and operation of the **.co domain**, though the work was limited in scope due to the upcoming elections in 2018.

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20 Counter-Memorial § 69
21 Memorial § 51
22 Memorial § 53; Counter-Memorial § 74
23 Memorial § 60; Counter Memorial § 71

92. In July 2018, the Colombian Government released a report on the **.co domain**.[24] The Parties dispute its content and recommendations. Claimant states that the report recognized the viability of extending the .co Concession for a further ten years. Respondent states that it described that MinTIC had an option either to (i) engage in negotiations with the current concessionaire for the renewal of the 2009 Contract, or (ii) carry out a new Tender Process.[25]

93. On 7 August 2018, the new President and administration in Colombia assumed office. Ms. Sylvia Constaín was appointed as the new Minister of MinTIC.[26]

94. On 20 September 2018, .Co Internet wrote to the MinTIC Minister. According to Claimant, the purpose of the letter was to express .Co Internet's intention to formalize the extension of the Concession for a further period of ten years, in exercise of its rights under Colombian Law 1065 of 2006 and Article 4 of the Concession.[27] Respondent argues that the letter mentioned no 'right' to a renewal; but emphasized that it would be ready to discuss a modification of the financial terms of the Contract.[28]

95. On 22 November 2018, MinTIC replied to .Co Internet's letter of 21 September 2018 referring to the terms of Law 1065, stating that Colombian law provided them with the authority to decide whether to extend the Concession.[29]

96. On 3 December 2018, MinTIC issued Resolution 3278 of 2018 modifying the composition of the Advisory Committee on the **.co domain**. .Co Internet was no longer permanently invited to the sessions but permitted to attend meetings to which it was specifically invited.[30] Respondent contends that the resolution intended to focus the Advisory Committee on the elaboration of a decision for the future of the **.co domain**.[31]

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24 Vice Ministry of Digital Economy, Analysis with respect to the Administration, Promotion, Technical Operation and Maintenance of the .CO Domain in Colombia, July 2018 (C-0027)
25 Memorial § 65; Counter-Memorial § 82
26 Counter-Memorial § 81
27 Memorial § 66
28 Counter-Memorial § 84
29 Memorial§ 67; Counter-Memorial § 85
30 Memorial § 74
31 Counter-Memorial § 92

97. According to Claimant, on 10 December 2018, the Advisory Committee decided not to extend the Concession. According to Respondent, the session considered the July 2018 Report and started structuring Colombia's decision-making process for the future of the **.co domain**.[32]

98. In December 2018 MinTIC decided to recruit International Telecommunication Union ("ITU") experts who had experience advising States in regard of domain name-related questions, in furtherance of the Advisory Committee's recommendations. They were also tasked with starting to prepare the preliminary documents for a potential new Tender Process. External consultants were also recruited.

99. On 27 December 2018, .Co Internet reiterated its desire to extend the Concession and proposed commencing discussions to that end with MinTIC. This request was accompanied by a legal opinion in relation to the renewal of the Concession.[33] On 11 February 2019, a meeting took place between management of Neustar and .Co Internet, the Vice-Minister of Digital Economy, and MinTIC officials.[34] According to Claimant, the Vice-Minister and his officials indicated at the meeting that MinTIC would be putting in place a simultaneous process of negotiating an extension to the Concession with the .Co Internet and preparing for a potential tendering process. Respondent argues that MinTIC reminded .Co Internet that the potential renewal contemplated by the Concession Contract was only one of the alternatives that the Ministry was in the process of analysing.[35]

100. On 15 February 2019, MinTIC responded to .Co Internet's communication referring to an analysis being undertaken by the Ministry of the Concession to come to a decision on the best option for the future of the ccTLD .co administration.[36]

101. In a letter of 6 March, but only received on 8 March 2019, MinTIC wrote to .Co Internet requesting that it produce by 15 March a plan for the transition of the **.co domain** in light of a possible new concessionaire being appointed. On 15 March 2019, .Co Internet

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32 Memorial § 75; Counter-Memorial § 94
33 Counter-Memorial § 100
34 Memorial § 68; Counter-Memorial §§ 100-102
35 Counter-Memorial § 102
36 Counter-Memorial §§ 101-102

responded that it had not been supplied with sufficient details in order to provide the requested transition plan. It also highlighted that MinTIC was required to first negotiate the terms of an extension to the existing concession before taking steps to make way for a new concessionaire.

102. On 17 March 2019, the Presidential Advisor for Innovation and Digital Transformation tweeted that the President would announce that the public tender for the **.co domain** would take place during the second half of 2019.[37]

103. On 18 March 2019, the Advisory Committee met to consider the results of the investigations carried out until then by MinTIC and its external consultants. According to Respondent, the Advisory Committee recommended continuing with the structure of a selection process to choose the operator for the administration of the **.co domain**.[38]

104. In March 2019, at the annual meeting of the Colombian Chamber of Computing and Telecommunications, the President of Colombia announced that he had decided to launch a public tender for a new concession for **.co domain.**

105. On 10 April 2019, MinTIC wrote a letter to .Co Internet asserting that it had the "*sole and exclusive power*" to evaluate and decide as to whether to extend the Concession or to instead commence a new tendering process. It also asserted that the decision to continue with the structuring of the selection process to choose the operator for the administration of the **.co domain** by MinTIC's Advisory Committee on 18 March 2019.

106. In May 2019, Colombia received a study on the **.co domain** from the ITU group of consultants led by Mr. Jim Prendergast (the Claimant refers to it as the ".CO Domain Study" Respondent refers to it as the "ITU Report").[39]

37 Memorial § 81
38 Counter-Memorial § 107
39 Memorial § 103; Counter-Memorial § 116

107. On 21 May 2019, MinTIC announced its action plan to commence the public tendering process to select a new concessionaire, the .CO Domain Selection Process Action Plan (the "Plan").[40]

108. On 21 May 2019, .Co Internet proceeded with a unilateral offer as a basis to negotiate the extension of the Concession, offering *inter alia* the anticipated payment of USD 50 million to MinTIC.[41]

109. On 30 May 2019, the .co Advisory Committee met to discuss the 22 May 2019 Offer.[42]

110. On 5 June 2019, MinTIC demanded that .Co Internet provide it with a plan for the transition of the **.co domain** to a new concessionaire.

111. On 7 June 2019, Neustar notified MinTIC and the Ministry of Commerce, Industry and Tourism ("MinCIT") of the existence of an investment dispute between it and Colombia under the TPA.[43]

112. On 13 June 2019, MinTIC informed .Co Internet that it had three months to consider and respond to the 22 May offer.[44]

113. On 14 June 2019, MinCIT scheduled a meeting to discuss Neustar's complaints.[45]

114. On 18 June 2019, Neustar expanded on its prior notification requesting as a precondition to the discussions that Colombia revoke "*the measures which lead to the expropriation of the 2020-2030 term of Contract 019 of 2009*".[46]

115. On 21 June 2019, MinTIC reiterated that it had decided to proceed with a Tender Process.[47]

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40 Memorial § 104
41 Counter-Memorial § 110
42 Memorial, § 109; Counter-Memorial § 111
43 Memorial § 112; Counter-Memorial § 161
44 Memorial § 110
45 Counter Memorial § 161
46 Counter-Memorial § 163
47 Memorial § 111; Counter-Memorial § 111

116. On 25 June 2019, .Co Internet sent a further communication to MinCIT in response to the MinTIC's 21 June 2019 letter.

117. On 26 June 2019, executives from Neustar flew to Bogota to meet with MinCIT's then Director for Foreign Investment, Services and Intellectual Property, as well as others.[48]

118. On 27 June 2019, MinTIC signed a service contract with the law firm Durán y Osorio to assist with the legal aspects of the tender process.

119. On 4 July 2019, .Co Internet provided a plan for the transition of the **.co domain** to a new concessionaire.

120. On 23 July 2019, Neustar met with MinTIC and other government officials at the offices of the MinCIT.

121. On 25 July 2019, Law 1978 was issued providing MinTIC with the authority to administer the use of the internet domain name under the ccTLD corresponding to Colombia .co.

122. On 26 July 2019, MinTIC requested once more the provision of a complete transition report. On the same date Neustar and .Co Internet met again with Respondent's representatives.

123. On 29 July 2019, MinTIC presented a request for a final transition report stating that the Concession was to end on 7 February 2020.[49] On 6 August 2019, .Co Internet reiterated that it had already provided the requested information on 4 July and their availability to discuss any questions or doubts in relation to the report of 4 July; additionally it indicated that discussions as to termination of the Concession take place in the context of the negotiations under the TPA.

124. On 26 August 2019, MinTIC once again demanded that a final transition plan be provided.

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48 Memorial § 112

49 Memorial § 118

125. In September 2019, MinTIC hired Mr. Orlando Garcés, through his advisory firm GACOF Consulting as a local consultant to integrate MinTIC's external consultant team.

126. On 16 September 2019, Neustar/.Co Internet provided the Colombian Government with their Notice of Intent to submit the investment dispute between them to arbitration in accordance with the provisions in the TPA.

127. On 17 September 2019, MinTIC informed .Co Internet that Respondent would not extend the Concession.

128. On 18 September 2019, both .Co Internet and Neustar submitted requests for provisional measures to the Consejo de Estado, requesting the Consejo de Estado order MinTIC to formalize the renewal of Concession 019 of 2009 until 2030.

129. On 19 September 2019, MinCIT acknowledged receipt of the Notice of Intent.[50]

130. On 25 September 2019, .Co Internet wrote to MinTIC in relation to its letter of 17 September 2019, requesting that Colombia discontinue the tender process, and negotiate to formalize the extension to the Concession.[51]

131. On 2 October 2019, MinTIC wrote to .Co Internet requesting it to engage with the law firm Durán & Osorio regarding the preparation of the transition.[52]

132. On 9 October 2019, the Minister of Information and Communication Technologies, Sylvia Constaín, announced that Colombia had decided not to extend the Concession.[53] In addition, the Consejo de Estado[54] denied the request for interim measures for procedural reasons of .Co Internet.[55]

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50 Counter-Memorial § 173
51 Memorial § 121
52 Memorial § 122; Counter-Memorial § 138
53 Memorial § 124
54 Colombia's apex court with administrative jurisdiction
55 Counter-Memorial § 171

133. On 29 October 2019, Neustar and .Co Internet met with Respondent to discuss an extension of the transition period requested by MinTIC.[56]

134. On 30 October 2019, Neustar's request for provisional measures was denied by the Consejo de Estado for procedural reasons.[57]

135. On 5 November 2019, MinTIC proceeded to publish the draft 2020 Terms of Reference and accompanying documents for the Tender Process.[58]

136. On 6 November 2019, MinTIC convened a special meeting in Montreal on the premises of the annual session of ICANN where AFILIAS was invited, but Neustar was not, to discuss the terms of the **.co domain** selection process.[59]

137. On 14 November 2019, Neustar appealed the Consejo de Estado's decision of 30 October 2019.[60]

138. On 25 November 2019, Neustar and .Co Internet sent another letter to Respondent repeating the concerns raise on 29 October 2019. Including formally protesting the exclusive and discriminatory method in which MinTIC had acted against .Co Internet.[61]

139. By 27 November 2019, .Co Internet submitted three sets of comprehensive comments to the draft terms of reference, in accordance with the procedure.[62]

140. On 27 November 2019, .Co Internet submitted a complaint to Minister Constaín for the *de facto* exclusion from participating in the tendering process for a new concession period.[63]

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56 Memorial § 125
57 Counter-Memorial § 171
58 Counter-Memorial §126
59 Memorial § 132
60 Counter-Memorial § 172
61 Letter from .Co Internet to MinTIC of 25 November 2019 (C-0092); Memorial § 125
62 Counter-Memorial § 126
63 Memorial § 137

141. On 2 December 2019, Colombia's National Legal Defence Agency responded to Neustar and .Co Internet's Notice of Intent concluding that the dispute resolution mechanism under the TPA had been properly initiated.[64]

142. On 6 December 2019, MinTIC issued a 126-page document responding to the observations and explaining the reasons for which MinTIC decided to adopt or reject the suggested modifications to the draft terms of reference.[65]

143. On 12 December 2019, .Co Internet received a letter from the National Legal Defence Agency in which it purported to reject the validity of the Notice of Intent.

144. On 13 December 2019, Respondent issued the final Request for Proposals ("RFP"). The RFP contained terms of reference that laid out the requirements and conditions with respect to the 2020 Terms of Reference, published through Resolution 3316 of 2019.[66]

145. On 18 December 2019, MinTIC organized a public hearing where interested parties could submit comments to the 2020 Terms of Reference, which were then answered in writing by MinTIC. Representatives of .Co Internet and Neustar participated in this public hearing.[67]

146. On 23 December 2019, Neustar filed its Request for Arbitration ("RFA") at ICSID.[68]

147. On 26 December 2019, MinTIC indicated to .Co Internet that, should .Co Internet continue refusing to engage with MinTIC, the latter would be forced to implement a unilateral modification of the contract in order to guarantee the continuity of service.[69]

148. .Co Internet submitted more than 40 pages of observations and comments to the 2020 Terms of Reference to MinTIC by 3 January 2020, which was the deadline for this.[70]

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64 Counter-Memorial § 174
65 Counter-Memorial § 127
66 Memorial § 127; Counter-Memorial § 128
67 Counter-Memorial § 131
68 Counter-Memorial § 175
69 Counter-Memorial § 139
70 Counter-Memorial § 132

149. On 10 January 2020, Amendment 4 to the Concession was executed, under which .Co Internet accepted to continue operating the **.co domain** after the expiry of the initial term of the 2009 Contract on 6 February 2020, for a minimum of 240 days and up to 365 days.[71]

150. On 24 January 2020, Neustar transferred the shares it held in .Co Internet to Registry Services LLC, a wholly-owned subsidiary.[72] On the same date MinTIC issued Addendum No. 1 to the 2020 Terms of Reference making some modifications to the process and the requirements for the bidders.

151. On 5 February 2020, MinTIC issued Resolution 161 which confirmed the switch from the previous total outsourcing model to a partial outsourcing model.[73]

152. On 7 February 2020, Addendum No 2 to the 2020 Terms of Reference was issued.

153. On 18 February 2020, Addendum No 3 to the 2020 Terms of Reference was issued.

154. MinTIC set the deadline for presentation of offers to be on 24 February 2020. According to this, proponents were required to submit their technical proposal publicly on the dedicated government platform, the financial proposal should be presented in person in a sealed envelope. Three interested companies submitted proposals: Nominet UK, Consorcio Dotco and .Co Internet.[74] On the same date, .Co Internet announced to MinTIC that on 24 January 2020 Neustar transferred its registry division, including .Co Internet, to Registry Services, a Delaware incorporated company.[75]

155. On 3 March 2020, Colombia submitted a communication to the ICSID Secretariat requesting Neustar clarify the situation of .Co Internet following the transfer of shares to Registry Services. Neustar confirmed that Registry Services remained wholly owned and controlled by Neustar.[76]

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71 Memorial § 141; Counter-Memorial § 140
72 Counter-Memorial § 148
73 Counter-Memorial § 136
74 Counter-Memorial § 135
75 Counter-Memorial § 149
76 Counter-Memorial § 150

156. In its preliminary report of 9 March 2020, the evaluation committee found that Nominet UK had not complied with one of the requirements as it had failed to submit a bank guarantee.[77]

157. On 12 March 2020, the Consejo de Estado denied Neustar's appeal on the merits, holding *inter alia* that Neustar had failed to prove a *prima facie* case of breach of the standards of protection in the TPA.[78]

158. On 26 March 2020, Addendum No 4 to the 2020 Terms of Reference was issued.

159. On 2 April 2020, the evaluation committee confirmed that Nominet UK would be excluded from the Tender Process; .Co Internet and Consorcio Dotco remained as the only two eligible proponents.[79]

160. On 3 April 2020, MinTIC carried out the adjudication hearing which was broadcasted live. While Consorcio Dotco offered to retain a 36% share of the proceeds, .Co Internet offered to retain only a 19% share and was therefore selected as the new operator for the **.co domain**.[80] This was granted through Resolution 649 of 2020, at the close of the hearing .Co Internet and Neustar representatives expressed their satisfaction with the results of the 2020 Tender Process.[81]

161. On 6 April 2020, Neustar announced to Colombia the sale of its registry business, including .Co Internet, to GoDaddy.[82]

162. On 27 April 2020, Addendum No 5 to the 2020 Terms of Reference was issued.

163. On 7 May 2020, Addendum No 6 to the 2020 Terms of Reference was issued.

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77 Counter-Memorial § 144
78 Counter-Memorial § 172
79 Counter-Memorial § 144
80 Counter-Memorial § 145
81 Counter-Memorial § 146
82 Counter-Memorial § 148

164. On 22 May 2020, Addendum No 7 to the 2020 Terms of Reference was issued. On the same date MinTIC and .Co Internet executed the 2020 Contract, which entered into force on 5 October 2020.[83]

165. Respondent contends that under the new ownership of GoDaddy, the general performance of the **.co domain** improved, and the proceeds received by Colombia also increased exponentially.[84]

166. In August 2020, the sale between GoDaddy and Neustar closed for a reported purchase price of USD 220 million.

167. On 1 December 2021, a Unit Purchase Agreement ("UPA") was signed between Neustar, Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC. The Parties have differing interpretations of the effect of the UPA on the claim.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

A. CLAIMANT'S REQUESTS FOR RELIEF

168. In its Request for Arbitration Claimant requested that the Tribunal issue an award in its favour:[85]

> *(a) Finding and declare that Colombia has breached its obligations under the TPA;*
>
> *(b) Finding and declare that Colombia has breached its obligations under the Investment Agreement (i.e. the Concession);*
>
> *(c) Finding and declare that such breaches have cause Neustar and. CO Internet to suffer loss and/or damage;*
>
> *(d) Ordering Respondent:*

83 Counter-Memorial § 155
84 Counter-Memorial § 158
85 RFA § 141

(i) to provide Neustar and its enterprise[86] .CO Internet restitution and to pay them such additional compensation and damages as is necessary in order to wipe out all the consequences of Colombia's unlawful conduct; or

to provide other relief that may be necessary to wipe out the consequences of Colombia's wrongful actions.

(ii) in lieu of such restitution, or if such restitution is not made within a reasonable period to be determined by the Tribunal, to pay Neustar and its enterprise (.CO Internet) full compensation and damages in accordance with the applicable law for the breaches pleaded above, in an amount to be established in the proceeding, but which Neustar presently estimates to be in excess of US$350 million;

(e) In the alternative to the preceding paragraph, ordering Respondent to pay Neustar and its enterprise (.CO Internet) full compensation and damages in accordance with the applicable law for the breaches pleaded above, in an amount to be established in the proceeding, but which Neustar presently estimates to be in excess of US$350 million;

(f) In any event, ordering Respondent:

(i) to pay all sums awarded by the tribunal gross up of any taxes that may be imposed by Colombia on or affecting such sums;

(ii) to pay Neustar pre- and post-award compound interest on all sums awarded by the tribunal until the date of payment in accordance with the applicable law;

(ii) to pay Neustar all of its legal and other costs and expenses in respect of the arbitration, plus compound interest thereon;

(iv) to bear in full the arbitration costs (including the fees and disbursements of the arbitrators and the costs of the Centre), including by ordering Colombia to pay to Neustar any share paid in advance by it in respect of such costs, plus compound interest thereon; and

(g) Ordering such further or additional relief as may be appropriate in the circumstances under the applicable law.

169. In its Memorial, Claimant requested the Tribunal render an Award ordering:[87]

(a) that Respondent has violated the TPA and customary international law;

(b) Respondent to pay compensation and damages in the amount to be determined;

(c) Respondent to pay pre- and post-award interest;

(d) Respondent to pay all legal fees and costs associated with this arbitration; and

86 As required by Article 10.26.2 of the TPA

87 Memorial § 271

(e) such other relief that the Tribunal may deem appropriate.

170. In its Reply, Claimant requested relief in the same terms as in the Memorial. [88]

171. In its Post Hearing Brief, Claimant requested: "*The Respondent's wrongful measures violate the TPA and principles of international law. As has been shown, its attempts to create post-hoc rationalizations for purposes of this dispute are unavailing, and contradicted by the evidence. Consequently, the Claimant maintains its requests for relief as set out in its Memorial and Reply*".[89]

B. RESPONDENTS REQUEST FOR RELIEF

172. In its Counter-Memorial, Respondent requested that the Tribunal:[90]

> *(a) Decline jurisdiction in the present proceedings;*
>
> *(b) In the alternative, dismiss all Claimant's claims in finding that Respondent has not breached its obligations under the TPA or under international law;*
>
> *(c) Order Claimant to pay all costs incurred in connection with these arbitration proceedings, including Respondent's legal fees, expert fees, administrative fees and the fees and expenses of the Tribunal, together with pre-award and post-award interest on the amount so ordered;*
>
> *(d) Such other and further relief as the Tribunal, in its discretion, considers appropriate.*

173. In its Rejoinder and in its Post Hearing Brief, [91] Respondent requested the same reliefs as in its Counter Memorial.[92]

V. OBJECTIONS TO JURISDICTION

174. Claimant submits that the Tribunal has jurisdiction over this dispute by virtue of Chapter 10 of TPA and Article 25 of the ICSID Convention. Specifically, Claimant contends that

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88 Reply § 365
89 Claimant's PHB § 56
90 Counter-Memorial § 460
91 Rejoinder § 324; Respondent's PHB § 78
92 However, one difference is that in the PHB the Respondent refers to Neustar, Inc and/or Security Services/Vercara instead of "Claimant" in relation to the payment of costs.

this jurisdiction is "*based on the consent expressed by Respondent in the TPA which Neustar and .Co Internet hereby accept by filing this Request for Arbitration*."[93]

175. Respondent submits that the Tribunal has no jurisdiction to hear Neustar's claims, and/or that such claims are inadmissible.[94] Respondent raises the following arguments in respect of Claimant's relief sought in this Arbitration.

- First, Claimant made a final forum selection under Annex 10-G of the TPA by introducing the Consejo de Estado proceedings in September 2019 (**Section A**).[95]

- Second, Claimant then failed to comply with the preliminary requirements established in Article 10.16 of the TPA in its haste to bring this Arbitration before announcing the sale of .Co Internet to GoDaddy (**Section B**).[96]

- Third, Claimant breached its waiver obligation under Article 10.18 of the TPA by continuing the Consejo de Estado proceedings concurrently with this Arbitration (**Section C**).[97]

- Fourth, Claimant failed to show it has standing to bring any claims before the Tribunal in light of its sale of .Co Internet to GoDaddy **(Section D)** and committed an abuse of process by doing so (**Section E**).[98]

- Further, Respondent contends that Neustar's claims fall short of constituting potential treaty breaches and are instead pure contractual claims stemming from Colombia's contractual decision not to renew the 2009 Contract, for which this Tribunal lacks jurisdiction **(Section F**).[99]

176. Additionally, Respondent submits that Neustar has transferred its "MinTIC Claim" to another entity, Security Services LLC, which it intended to have replace Neustar as

93 RFA § 85
94 Counter-Memorial § 177
95 Counter-Memorial § 178
96 Ibid
97 Ibid
98 Counter-Memorial § 179
99 Counter-Memorial § 180

claimant in the present proceedings.[100] The fact that Respondent was not timely informed and did not consent to this change further calls into question the adequacy of Claimant's claims and whether the Tribunal has or should exercise jurisdiction (**Section G**).[101]

177. The Tribunal summarizes below the Parties' respective positions regarding these various jurisdictional and admissibility issues in the order outlined above, and then provides its analysis and conclusions.

A. DID CLAIMANT MAKE A DEFINITIVE FORUM SELECTION UNDER ANNEX 10-G OF THE TPA BY BRINGING THE CONSEJO DE ESTADO PROCEEDINGS?

(1) The Parties' Positions

a. Respondent's Position

178. Respondent contends that the Tribunal has no jurisdiction because Claimant had already selected a forum under Annex 10-G TPA by commencing the Consejo de Estado proceedings on 19 September 2019 and alleging the same TPA breaches as those claimed in this Arbitration.[102]

179. Respondent states that it is uncontested that before the Consejo de Estado, Neustar and .Co Internet requested that MinTIC be ordered to "*formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .Co Internet*".[103] This request clearly exceeds the permitted scope of Article 10.18(3) because (i) its purpose goes far beyond the sole purpose of preserving rights "*during the pendency of the arbitration*", and (ii) if ordered, it would have been virtually impossible to unwind and therefore akin to a decision on the merits.[104] The Consejo de Estado proceedings exceeded the scope of interim injunctive relief because Neustar requested that

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100 As noted above, following the Hearing, on 7 April 2023 Claimant advised that it had "*changed its name*" again, this time to Vercara LLC: § 53 above. This is further discussed at §§ 469-526 below.

101 Rejoinder §§ 19-35

102 Counter-Memorial § 181

103 Respondent's PHB § 44

104 Respondent's PHB § 45

MinTIC be ordered not only to suspend the 2020 tender process but also to renew the 2009 Contract.[105]

180. Respondent argues that Annex 10-G is essentially a fork in the road provision which allows the US investor to choose between arbitration under the TPA and domestic litigation; once such choice is made, it is definitive. Further, Respondent contends that the parties to the Treaty conditioned the "definitive" election on three cumulative conditions. First, the wording "*investor or the enterprise*" is broad enough to cover any allegation brought by an investor or an enterprise without requiring a strict identification of the parties. Second, the wording of Annex 10-G does not require an exact identification of the cause of action when a claim is made. Rather, it covers any breach that has been alleged before the local courts. Third, for the forum selection to be effective, the breach must have been alleged in the context of "*proceedings before a court or administrative tribunal of* [the respondent State]".[106]

181. The above three requirements trigger the definitive forum selection for the purposes of Annex 10-G.[107] To this end, Respondent submits that Claimant's commencement of the Consejo de Estado proceedings meets these three criteria, for the following reasons:

a. the Parties to those proceedings are the same as in the present Arbitration, confirming the duplication of the requests before both *fora*.

b. the TPA breaches alleged by Claimant in the Consejo de Estado proceeding are the same as the breaches brought before this Tribunal. Claimant's alleged breaches had already been decided by the Consejo de Estado on 12 March 2020, which denied Neustar's requests.

c. the Consejo de Estado is an "*administrative tribunal*" of Colombia. Therefore, those proceedings were "*before a court or administrative tribunal*" as required under Annex 10-G.

105 Tr. Day 1 [ENG] 145:23-146: 6
106 Rejoinder § 56
107 Rejoinder § 57

182. Consequently, by initiating the proceedings before the Consejo de Estado and bringing the same alleged TPA breaches as brought before this Tribunal, Claimant made a definitive forum selection for the purposes of Annex 10-G.[108] Thus, this Tribunal has no jurisdiction to deal with Claimant's claims as they have already been determined by the Consejo de Estado.

b. Claimant's Position

183. Claimant contends that Respondent's jurisdictional objection under Annex 10-G fails for two main reasons. First, Claimant's application to the Consejo de Estado was a request for interim relief under Article 10.18(3) TPA. It was not for a remedy for an alleged breach of obligation under Section A TPA. Second, and in the alternative, even if the Tribunal is not persuaded that the purpose of the proceedings was the request for an interim measure, Respondent has failed to demonstrate that Claimant made a "*definitive forum selection*" under Annex 10-G.

184. With regard to the first argument, Claimant contends that Article 10.18(3) allows Claimant to "*initiate or continue an action that seeks interim injunctive relief*" without involving the payment of monetary damages "*before a judicial or administrative tribunal of the respondent*". However, this is only for the "*sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration*".[109] This action is also permissible under ICSID Arbitration Rule 39(6). Article 10.18(3) (footnote 9) confirms that the law applicable to determine actions for interim injunctive relief is local law first and foremost.[110]

185. Claimant's application to the Consejo de Estado in Colombia was a request for interim measures under Article 10.18(3) TPA and ICSID Rule 39(6). The request was filed under Articles 230 and 231 of the Colombian Code of Administrative Procedure ("CCAP") (within the "Precautionary Measures" chapter) for "*the sole purpose of preserving the claimant's… rights and interests during the pendency of the arbitration*".[111] Article 234

108 Counter-Memorial § 191; Rejoinder § 69
109 Reply § 22
110 Tr. Day 1 [ENG] 57:4-9
111 Reply §§ 24, 27

confirms that if the requirements are fulfilled, a court may adopt urgent precautionary measures.[112] Specifically, the Consejo de Estado was requested to suspend the tender process and order Respondent to negotiate in good faith during the remainder of the consultation and negotiation stage under Article 10.15 FTA.

186. Claimant contends that it never submitted a claim for breach of Section A TPA to the Colombian courts or made any request for damages relating to such breach.[113] Rather, the references to the TPA in its request were made for the purpose of seeking protection of its investment; no substantive violations of the TPA were alleged.[114]

187. This is also confirmed by the Consejo de Estado's judgment of 12 March 2020 (denying Neustar's request for review) which briefly addressed this question (as opposed to thorough examination). The consideration was hardly a detailed analysis of Claimant's claims.[115] Further, the Consejo de Estado noted in the 30 October 2019 ruling that because the RFA had not yet been filed (only the Notice of Intent had been issued) the request for interim measures to preserve the rights in the arbitration was not yet admissible.[116] This was also reaffirmed by Claimant's follow up request to the Consejo de Estado to review this decision. Claimant requested the Consejo de Estado to prevent MinTIC from taking actions to aggravate the dispute and to maintain the investment during the 90-day time period after filing the Notice of Intent, in order for Claimant to file its RFA, as required under the TPA.

188. Moreover, because interim measures ordered under Chapter 11 of the CCAP are not permanent, and may be revoked or modified at any time, it would make little sense for Claimant to elect to use this mechanism as a final means to address the merits of its claim against Respondent. The requested measures fell squarely within the scope of Article 230 of the CCAP which refers to precautionary measures. The Claimant's rights would not

112 Tr. Day 1 [ENG] 57:22-24
113 Reply §§ 31-33
114 Reply § 33
115 Tr. Day 1 [ENG] 61:11-16
116 Reply § 28

have been effectively preserved if the Respondent were able to tender the Concession to a new entity during the pendency of the proceeding.[117]

189. Finally, Claimant's request for interim relief was submitted after it had already submitted its Notice of Intent to Respondent seeking to protect its rights and to request Respondent to engage in good faith with the arbitration process set out under the TPA.

190. With regard to the second argument, if the Tribunal does not consider the proceedings before the Consejo de Estado to constitute a request for an interim measure under Article 10.18(3), Claimant contends no "*definitive forum selection*" under Annex 10-G had been established.

191. Claimant contends that other tribunals applying fork-in-the-road clauses (such as the one in Annex 10-G) have relied on the triple identity test. This provides that in order for a fork-in-the-road provision to apply, the subsequent proceedings must concern the same parties, involving the same legal and factual issues. Claimant submits that although the parties are the same, the other two criteria are not met. First, the claims in this Arbitration are not the same as the requests made to the Consejo de Estado, as explained above. Second, there is no duplication of proceedings here, and no prospect of conflicting decisions in light of the limited nature of Claimant's request for provisional measures before the Consejo de Estado.

192. Accordingly, Claimant contends the Tribunal has jurisdiction and should determine the issues in this Arbitration.

(2) The Tribunal's Analysis

193. The Tribunal notes the Parties agreement with respect to the nature and purpose of Annex 10-G, i.e. being a "fork-in-the road" provision aimed at avoiding "*duplication of proceedings and conflicting decisions*". It is also agreed that once a "definite" forum is selected for the determination of the dispute, the same dispute cannot be submitted

[117] Claimant's PHB § 8

elsewhere.[118] There are two issues of disagreement between the Parties discussed and determined by the Tribunal below:

a. whether Claimant's proceedings before the Consejo de Estado concerned only a request for interim relief under Article 10.18(3) (as contended by Claimant), or included the issues raised in this Arbitration (as contended by Respondent); and

b. whether by bringing proceedings before the Consejo de Estado, Claimant made a "definitive" choice of forum under Annex 10-G.

a. Substance of the proceedings before the Consejo de Estado

194. Annex 10-G of Chapter 10 to the TPA, entitled "*Submission of a Claim to Arbitration"*, provides:

> *1. An investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A either:*
>
> *(a) on its own behalf under Article 10.16.1(a), or*
>
> *(b) on behalf of an enterprise of a Party other than the United States that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),*
>
> *if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.*
>
> *2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.*

195. Thus, in order for an investor to have made a "*definitive*" selection of a forum under Annex 10-G, it must have submitted a claim alleging violation of an obligation under Section A in a "*court or administrative tribunal*" in a jurisdiction, other than the United States. Section A of the TPA sets out the protections to be afforded to investors under Chapter 10, including a prohibition on national and most-favoured-nation ("MFN") treatment (Articles 10.3 and 10.4), and requirements of the minimum standard of treatment (Article 10.5).

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[118] Counter-Memorial §§ 183, 184; Reply §§ 43, 44

196. The Tribunal notes that three out of the four requirements of Annex 10-G are not disputed, i.e. (i) the Claimant is an "*investor*" for the purposes of 10-G, (ii) who had submitted a claim to a "*court or administrative tribunal*", (iii) in a jurisdiction other than the United States. However, the fourth requirement is disputed, i.e. whether the specific claims and reliefs sought by Claimant in the Consejo de Estado proceedings are the same as Claimant's claims brought in this Arbitration.

197. Determination of whether the Consejo de Estado proceedings involved the same claims as those raised in this Arbitration, or whether Claimant sought only interim measures, requires an analysis of the applicable laws and rules, and a review of Claimant's claims in the different fora, i.e. the Consejo de Estado and in this Arbitration.

198. With respect to the applicable law and rules, under both Article 10.18(3) of the TPA and ICSID Rule 39(6), Claimant was allowed to initiate an action for the purpose of seeking interim relief in the Consejo de Estado.

199. Article 10.18(3) provides:

> *Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration. (emphasis added)*

200. ICSID Rule 39(6) provides:

> *Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests. (emphasis added)*

201. In the Tribunal's view, both these provisions permit Claimant to initiate an action for interim relief provided "*the sole purpose*" of that action is the "*preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration*". Further, the said action should not seek *"the payment of monetary damages*" and may be initiated

"*prior to or after the institution of the proceedings, for the preservation of their respective rights and interests*".

202. Claimant initiated the Consejo de Estado proceedings on 18 September 2019, i.e. 6 days after it had submitted its Notice of Intent to arbitrate on 13 September 2019, starting the process for a claim under Section B of the TPA.

203. The Notice of Intent described Claimant's complaints which included the allegations that:

> *A. Colombia failed to comply with its obligation under the FTA to offer Neustar/.CO Internet, a minimum standard of treatment and fair and equitable Treatment;*[119]
>
> *B. Colombia did not comply with its obligation not to discriminate under the FTA*[120]*; and*
>
> *C. Colombia indirectly expropriated the investments made by Neustar/.CO Internet.*[121]

204. Therefore, to avoid proceeding to arbitration Neustar sought "*full reparation of the damages caused by the Colombian Government*"[122] and asked Respondent specifically:

> *i. To revoke all the acts and measures aimed at taking forward the tendering process for the administration of the .CO Domain.*
>
> *ii. Take forward negotiations in good faith to extend the Concession Contract until 2030.*
>
> *iii. That, as a consequence of the formerly mentioned point, the Government submits a counter proposal in good faith to the offer submitted by .CO Internet.*
>
> *iv That the government approves the guarantees and signs the document extending the Contract in good faith until the year 2030.*
>
> *v. That upon the completion of the formalization, the extension of the Concession is granted until the year 2030.*[123]

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119 Notice of Intent §§ 67-76 (C-0004)
120 Ibid §§ 77-80
121 Ibid §§ 81- 83
122 Ibid § 84
123 Claimant stated if this relief was not granted, the damages suffered would amount to no less than USD 350 million plus interest: Ibid §87.

205. In the cases brought before the Consejo de Estado, .Co Internet and Neustar[124] requested "*the following urgent provisional measures in order not to aggravate the dispute*":

> *… while the arbitration under the FTA is pending and until a decision is taken on the merits of the dispute notified on 7 June 2019 in accordance with Section B of Chapter 10 the FTA, order the Colombian State not to aggravate the international investment dispute, to preserve the concession until the end of the international investment dispute, so as not to render meaningless the enforcement of a favourable award…*[125]

206. Accordingly, Claimant requested the Consejo de Estado to:

> *(a) [Order MINTIC] to suspend the Roadmap for the selection process of the .co domain (sic) and the suspension of the decisions and actions to initiate an administrative process of objective selection for the hiring of a new administrator of the .CO Domain as of the year 2020.*
>
> *(b) suspend the administrative act for the opening of the objective selection process" in case the "administrative act for the opening of the selection of a new administrator has been issued.*
>
> *(c) suspend all contracts, acts and measures issued, which have the purpose of advising, studying, analysing or structuring, (sic) the objective selection process for the hiring of a 'new administrator' of the .CO Domain as of the year 2020, or a similar.*
>
> *(d) refrain from making public statements to the media and social networks… that may generate a negative public judgment or exposure against the investors in the media…*
>
> *(e) negotiate in good faith (sic), during the remainder of the consultation and negotiation stage under Article (sic) 10.15 of the FTA; the proposed improvement to the financial terms [of the 2009 Contract], and as a consequence to review the investors' offers and submit its own counterproposals in good faith, to cooperate in good faith without making use of its position of power as a public authority.*[126]

207. Claimant further stated:

> *The measures, behaviours, acts and decisions of the Colombian State described below aggravate the status quo of the current dispute; they threaten to hinder or render impossible the subsequent enforcement of a favourable final award on the dispute, and entail a disregard by the Colombian Government of its obligations*

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124 The decisions of the Consejo de Estado are in almost identical terms and in exhibits R-0008 and R-0009 respectively.

125 Decision of the Consejo de Estado of 30 October 2019 on Neustar's request for interim measures of 18 September 2019 § 6 (R-0009). There is similar language in R-0008 which was the Consejo de Estado Decision dated 9 October 2019 in respect of .Co Internet SAS.

126 Ibid

> *under the FTA concluded with the United States of America, signed in Washington, D.C., on 22 November 2006 and approved on 4 July 2007 through Law 1143.*[127]

208. The Tribunal notes that the Consejo de Estado did acknowledge at paragraph 7.1 that the Claimant's request is one for "*provisional measures… with respect to investment disputes*" as allowed under Article 10.18.3 TPA and Rule 39(6) of the ICSID Convention, on which Claimant relied.

209. The Consejo de Estado decision further noted at paragraph 7.2:

> *The substantive arguments for requesting the measure are based on the right that, in its opinion, the concessionaire had for the renewal of the concession contract No. 19 of 2010, which [Claimant] sets out in extenso.*[128]

210. In light of the above, the Tribunal considers that Claimant requested the Consejo de Estado to order preliminary measures for the purpose of preserving the concession until the dispute in the present Arbitration is resolved. This is evident first from the Claimant's own requests to the Consejo de Estado, and second, from Consejo de Estado interpretation of those requests. The Consejo de Estado explicitly noted that it was asked to issue "*preliminary measures*" as allowed under the TPA and the ICSID Rules. More importantly, the legal basis of the Claimant's request were Article 234 of the Code of Administrative Procedure and Article 589 of the General Code of Procedure which deal exclusively with the Consejo de Estado's power to order provisional measures. Thus, Consejo de Estado was neither asked to, nor did it discussed any questions of substance be it those raised in this Arbitration or otherwise.

211. Furthermore, the Consejo de Estado specifically acknowledged that "*the substantive arguments*" submitted by Claimant was in support of its request for provisional measures, i.e. explaining why the requested measures should be granted in the circumstances of that dispute. Claimant did not ask the Consejo de Estado to determine those substantive arguments.

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127 Ibid § 6.2

128 Decision of the Consejo de Estado of 9 October 2019 on .CO Internet's request for interim measures (case No. 64831) (R-0008)

212. On 14 November 2019, Neustar filed an appeal requesting the Consejo de Estado to review its decision, revoke the order of 30 October 2019 and issue interim measures in order to protect Neustar's investment. In its Decision on the Appeal, the Consejo de Estado noted:[129]

> *By order of 30 October 2019, Judge Carlos Alberto Zambrano Barrera, rejected the petition due to the fact that a request for precautionary measures under Article 10.18.3 of the TPA is only admissible when the claims are subject to arbitration and not when the State has only been notified of the intention to submit a claim to arbitration. Since in the present case the applicant had only notified the intention to submit the dispute to arbitration and had not yet submitted it to this dispute settlement mechanism, the request was considered inadmissible.*
>
> *In addition, in accordance with Article 589 of the CGP, which allows the request, decree and practice of precautionary measures outside the process, it is required that there be a request for the practice of extra procedural evidence, which is not the case here.*

213. In its appeal for review Neustar requested[130]

> - *…the order in the sense that the request for urgency is also to protect the asset consisting of the Concession, that it is entitled to the renewal until the year 2030 in accordance with international and local law.*
> - *Revoke the order and order the urgent provisional measures of international character.*
> - *Order MinTIC not to proceed with any act that would lead to the early termination and liquidation of the Concession.*

214. The Consejo de Estado then reviewed in detail Neustar's substantive claims and rejected them essentially for two reasons. First, the Consejo de Estado stated that "*Neustar has not demonstrated prima facie that it is entitled to the renewal for an additional 10-year term, on the basis of the provisions of the contract and the law governing it*".[131]

215. This was for several reasons, including that there was "*no evidence in the proceedings that the Colombian Government, since the opening of the tender that led to the conclusion of*

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129 Decision of the Consejo de Estado of 12 March 2020 on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures (case No. 64832) § 4 (R-0080)

130 Ibid § 5

131 Ibid § 18

the Contract, has committed to extend it for a term equal to the initial term, or that it has guaranteed such renewal in any way".[132]

216. After reviewing the applicable law and Contract terms, the Consejo de Estado stated:[133]

> *A simple textual analysis of what was agreed in the Contract does not permit to infer that the State entity Grantor had the obligation to renew the contract and the concessionaire had acquired the right to obtain such renewal; neither does it permit to infer that the only condition for the concessionaire's right to arise was the fulfilment of the <<formalities>> related to the renewal of the guarantees and the subscription of a document stating the reasons. In the stipulations, both of the contract and of the law, it is textually stated that the agreed term <<may>> be renewed, which implies considering that the Government had the possibility of renewing or seeking another alternative to continue with the provision of the service at the expiration of the term of the concession.*

217. After having noted that, in 2014, almost 5 years after the execution of the Contract, Addendum No. 3 was agreed and recorded, the Consejo de Estado added:

> *… Neustar obtained 100% of the shareholding in the Concessionaire and that, effectively, such shareholding was given with the purpose of making a greater investment and positioning of the .co domain; this intention is evidenced by the background recorded in the Amendment. Notwithstanding the foregoing, the term of the Contract and the rules of the renewal were not subject to any modification, so it is clear that the asset of Neustar, acquired from that moment, was the execution of a contract that had 5 years of validity, given that the first 5 years of the total term of 10 years had already been executed.*
>
> *It is emphasized that there is no evidence in the aforementioned addendum that allows to assert, or at least infer, that the Government committed to renew the term of the Contract for 10 more years, and it is clear that the investor was in charge of evaluating the terms of the concession at that time, before making the investment.*
>
> *Thus although the request and the appeal refer to the right of the Concessionaire to have the contract renewed, to the fact that it had a preferential right to renewal and the right to have the Government negotiate the offer it made, it does not appear that this right has any legal, contractual or conventional basis. The renewal of the contract was an option, that the Government did not choose.*[134]

218. Second, the Consejo de Estado also determined that there was no basis to show a violation of Neustar's rights under the TPA. After considering different questions relating to

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132 Ibid § 21
133 Ibid § 24
134 Ibid §§ 27-29

Neustar's standing as an investor and the potential "*holder of the right to the renewal*", as well as its legitimate expectations, the Consejo de Estado found:[135]

> *… no evidence was provided in the proceedings to prove that the Government has promised or guaranteed the renewal. Therefore, the violation of the principle of good faith has not been proven.*
>
> *It has not been demonstrated that [Neustar] has been given unfair, inequitable (TPA article 10.5:1) or discriminatory treatment. On the contrary, as can be seen in the report published on the MinTIC's web page, .CO Internet S.A.S, submitted an offer in the tender process and is participating to date on equal terms with the other competitors. The standard of fair and equitable treatment established in Article 10.5 does not imply giving privileged treatment with respect to that granted to others.*
>
> *Neither is it proven that [Neustar] has been granted a treatment << less favorable than that it accords, in like circumstances, to its own investors >> (rule 10.3). On the contrary, the State's decision to open a tender in which .CO Internet S.A.S. participated, is indicative that it has been granted equal treatment to domestic investors.*
>
> *For the same reason, no violation of rule 10.4 of treatment less favourable than investors of any other Party can be observed.*

219. Whilst refusing the application for preliminary relief, the Consejo de Estado concluded:[136]

> *For the reasons indicated above, there is no appearance of good right [prima facie case] derived from the violation of the rights guaranteed by the TPA as an investor of the United States.*

220. It is clear from the above that the Consejo de Estado did consider some of Claimant's substantive arguments raised in support of its request for preliminary measures. The Consejo de Estado also expressed its views on their merits under the TPA and Colombian law – which are the issues in this Arbitration. However, the Tribunal considers that these are not the same claims as those raised in this Arbitration, and in any event this cannot be considered as Claimant's "*definitive*" choice of forum. This is for the following reasons.

221. First, in its request for appeal, Claimant specifically requested the Consejo de Estado to revoke its earlier Decision and Order the "urgent" provisional measures which Claimant had been seeking. Claimant did not request the Consejo de Estado to determine any

135 Ibid §§ 39, 40
136 Ibid § 41

substantive arguments. In fact, in its submission, Claimant provided various reasons as to why its request for provisional measures "*satisfied the requirements of Article 231 of the CPACA*" (the Colombian Procedural Code). None of these reasons involved or related to issues of substance. Rather, they all provided Neustar's justifications for the granting measures such as "*the preservation of the status quo during the process and to the non-aggravation of the dispute*" and to avoid the risk of having "*the effects of the arbitration award would be null and void*".[137] The only place in which details relating to the substantive arguments were mentioned was to satisfy the requirement under Article 2 of the Law 1065 of 2006 of the presence of a "*prima facie case*".[138]

222. Second, the Consejo de Estado decided, on its own initiative, to express an opinion on Claimant's substantive arguments, which were provided as justification for granting the requested provisional measures. It was not requested by Claimant.

223. Third, Claimant's substantive claims in this Arbitration are different from the arguments raised before the Consejo de Estado, despite the substantial factual overlap. In particular, Claimant alleges that Respondent breached its international obligations under the TPA by (i) violating Article 10.5, i.e. failing to provide fair and equitable treatment to Claimant, (ii) violating of Articles 10.3 and 10.4, i.e. by treating Claimant in a discriminatory way, and (iii) violating Article 10.14 or Article 4 of the Swiss-Colombia BIT.

224. In contrast, the Consejo de Estado proceedings involved the determination of the Claimant's request for preliminary measure submitted pursuant to Article 234 of the Code of Administrative Procedure and Article 589 of the General Code of Procedure. Thus, this action was also in compliance with Article 10.18.3 of the FTA and ICSID Rule 39(6). Claimant did not seek determination of the substantive issues in dispute between the Parties.

225. Accordingly, the Tribunal has concluded that the claims submitted by Claimant before the Consejo de Estado were not the same claims as those raised and are to be determined in

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137 Decision of the Consejo de Estado of 12 March 2020 on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures (case No. 64832) § 3.19 (R-0080)

138 Ibid § 3.19(v)

this Arbitration. In any event, the views expressed by the Consejo de Estado in the context of determining and refusing the application for preliminary measures did not determine Claimant's claims in this Arbitration.

b. "Definitive" Selection of Forum

226. The Tribunal accepts that application of the fork-in-the road clauses involves a determination of the triple identity test, i.e. that the subsequent proceedings must involve the same parties and concern the same legal and factual issues.

227. In the present case, the Parties in the Consejo de Estado proceedings are the same as those in this Arbitration. The factual background is also the same; the legal issues whilst overlapping are not directly to be determined. The relief sought before the Consejo de Estado and in this Arbitration are different, and the legal bases for the reliefs sought are different.

228. As found above, in the Consejo de Estado proceedings, Claimant sought provisional measures pending the determination of the substantive claims in this Arbitration under Chapter A of Annex 10 of the TPA. The conditions on which the Consejo de Estado would decide whether to grant provisional measures was subject to the domestic law of Colombia, but also depended on the Consejo de Estado's view of the nature and *prima facie* merits of the substantive claims to be determined in this Arbitration for the purpose of issuing injunctive relief pending a decision of the Tribunal. By contrast, this Tribunal's mandate and jurisdiction, and the relief sought in the RFA, depend on the merits of Neustar's claims which are subject to the TPA and the underlying contract between the Parties.

229. When Claimant sought a review of the Consejo de Estado Decision in respect of the request for preliminary measures, the decision involved a detailed review of the basis for which the preliminary measures requested were refused. The key element in those proceedings was whether Neustar had the right to an extension of the Concession for a further ten years or even for a lesser period. The Consejo de Estado was clear in its conclusion that there was no such right and the provisional measures sought there were refused. However, this Decision was issued on 12 March 2020, two-and-a half months after the RFA was filed

with ICSID. Further, and in any event, the conclusions reached there are not binding on this Tribunal.

230. In contrast, in the present Arbitration, although the underlying action leading to Claimant bringing this Arbitration is the same, i.e. the non-renewal of the Concession, Claimant's substantive legal claims are different. In particular, in this Arbitration, Claimant has alleged that by not renewing the Concession, Respondent acted in an arbitrarily and discriminatory manner in breach of due process and to the detriment of Claimant's investment in Colombia as a whole.

231. Hence, in this Arbitration, Claimant has requested the Tribunal to find that in its capacity as a sovereign state Respondent has breached its obligations under the TPA and the investment agreement; and to award damages in favour of Claimant for the alleged breaches. The Tribunal is not persuaded that the Consejo de Estado proceedings constituted a "*definitive*" forum selection on the part of Claimant for the resolution of its dispute with Respondent as stipulated under Annex 10-G. Rather, the Tribunal has found that Claimant sought to preserve the *status quo* through interim measures of protection, which were in fact refused by the Consejo de Estado while its investment dispute with Respondent is determined in the present Arbitration.

232. For these reasons, the Tribunal has hereby dismissed this jurisdictional objection.

B. DID CLAIMANT FAIL TO COMPLY WITH THE PRELIMINARY REQUIREMENTS UNDER ARTICLE 10.16 OF THE TPA?

(1) The Parties' Positions

a. Respondent's Position

233. Respondent states that Article 10.16 allows an investor to submit to arbitration claims arising from an "*investment dispute*" under Section B of Chapter 10 TPA, subject to the fulfilment of several steps. Respondent contends that Claimant's failure to comply with the mandatory requirements under Article 10.16 precludes Respondent's consent to arbitration being engaged under Article 10.17.[139] In particular, Claimant failed to comply with the

[139] Rejoinder § 112

requirements of Article 10.16 in two main aspects: first, the alleged "*investment dispute*" between the Parties had not crystallized at the time Claimant submitted its Notice of Intent and its RFA; and second, Claimant's Notice of Intent was defective in several aspects.[140] Respondent adds that the investor has to have incurred loss or damage.[141]

234. At the time of the RFA, Claimant did not know whether it would be awarded the new contract because the tender process was ongoing, even they had offered to re-negotiate the financial terms. Also, the Consejo proceedings where they were requesting an extension of the 2009 Contract was pending so it was completely speculative.[142]

235. As "investment dispute" is not specifically defined under the TPA or the ICSID Convention, Respondent makes reference to other arbitration decisions.[143] According to those decisions, a dispute is "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*"…;[144] the events which have led to the dispute are not proof of a dispute. Respondent refers to the dissenting opinion of Professor Emanuel Gaillard in *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*[145] in which he stated that a dispute "*presupposes the existence of the factual and legal framework on which the disagreement is based*", as such, it "*cannot arise until the entirety of such constituent elements has come into existence*".

236. Respondent argues that the Notice of Intent and the RFA were speculative because they contained an alleged expropriation claim, which was ultimately dropped in the Memorial. Numerous other changes in Claimant's factual allegations and claims between the Notice of Intent, RFA, and Memorial also confirm the lack of crystallization of the dispute, as well as the uncertain and speculative quantum claim. Accordingly, Claimant's Notice of Intent and RFA did not meet the requirements to formalize Respondent's consent to arbitration.

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140 Counter-Memorial §§ 194, 195

141 Respondent's PHB § 48

142 Tr. Day 1 [ENG] 148:19-149: 5

143 Respondent relied on several previous arbitration cases in which tribunals have defined "*investment dispute*". See Counter-Memorial § 197, citing Exhibit RL-003, Exhibit RL-004, Exhibit RL-005, Exhibit RL-006

144 Counter-Memorial § 197, citing Exhibit RL-003, Exhibit RL-004, Exhibit RL-005, Exhibit RL-006

145 *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017 § 6 (RL-009)

237. Second, Respondent contends that Claimant's Notice of Intent was defective because it failed to comply with Article 10.16(2). Although the Notice of Intent was submitted in accordance with the deadline provided in Article 10.16(2), Claimant failed to specify the "*factual and legal basis*" of its claims as required, the facts and claims put forward were highly speculative, and in many instances did not materialize. Such failure to comply with this condition precedent precludes Respondent's consent to arbitrate under the TPA and therefore affects the Tribunal's jurisdiction.

238. Further, Respondent contends that although Claimant put considerable emphasis on an expropriation claim in its Notice of Intent and RFA, Claimant was ultimately awarded the 2020 Contract and dropped the expropriation claim from its Memorial. Claimant also failed to identify all claims it put forward in this Arbitration in its Notice of Intent. Specifically, the Notice of Intent did not mention:

a. Respondent's failure to protect Claimant's investment against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT.

b. Respondent's failure to protect confidential business information under Article 10.14 of the TPA, in violation of Article 10.16(2).

c. the basis for the approximate amount of compensation claimed in the Notice of Intent, or the causation between Colombia's alleged breaches and the alleged "*total loss of Neustar's/.Co Internet's assets*".[146] In any event, these damages were speculative given that Claimant was able to submit a proposal in the 2020 Tender Process.

239. Given the mandatory nature of Article 10.16(2) Respondent submits the Tribunal should exclude Claimant's claims for breach of Article 10.16 TPA and breach of the Swiss-Colombia BIT as Claimant failed to include those claims specifically in its Notice of Intent and RFA; they were raised for the first time in Claimant's Memorial.

146 Counter-Memorial § 219, citing Exhibit C-0004 § 87

240. Under the TPA the investor must own the investment at the time the dispute is submitted to arbitration. In the present case, at the time of the RFA and when it was registered, no dispute had crystallized yet. When Neustar filed its Memorial on 22 October 2021, Claimant finally presented its actual claims and supporting factual allegations, but by that time Neustar had already disposed of its investment through the sale of .Co Internet to GoDaddy.[147]

b. Claimant's Position

241. Claimant rejects Respondent's contention that its right to bring these proceedings should be determined at the date of the Memorial. It states that it notified Respondent of the existence of a dispute in its trigger letter of 7 June 2019 and then on 13 September 2019 when it formally submitted its Notice of Intent. In the 36-page Notice of Intent,[148] Claimant set out its claims against Respondent for violations of the TPA, identifying Respondent's "*wrongful measures*" under Chapter 10 of the FTA and customary international law, as well as the damages that Claimant suffered as a result of these violations.

242. Respondent never replied to the Notice of Intent. The Parties met on 26 June 2019 so Claimant could present its complaints and discuss the issues of disagreement with Respondent and reach an amicable settlement. However, this meeting failed to resolve the differences between the Parties. Respondent also ignored Claimant's attempts for amicable settlement during the 90-day period following the Notice of Intent, i.e. 13 December 2019 when the validity of the Notice of Intent was disputed by Respondent. Consequently, Claimant contends that Respondent's silence and Notice of 13 December 2019 should be read as a denial of Claimant's claim and therefore confirmation of the existence of a legal dispute between the Parties as of that date. Hence, Claimant argues the dispute between the Parties had crystallized by the time Claimant filed the RFA on 23 December 2019.

243. In any event, Claimant contends "*a dispute certainly existed at the time of registration of the dispute by ICSID on 3 March 2020*".[149] Claimant refers to Respondent's letters of 30

147 Tr. Day 1 [ENG] 151:7-22
148 Claimant's PHB § 12
149 Reply § 93

January and 3 March 2020 to the ICSID Secretariat opposing the registration of the dispute and disputing Claimant's case.[150]

244. In addition, Claimant argues that Respondent's wrongful conduct had properly been identified by Neustar as early as June 2019 when the trigger letter was issued. Thus, by the time the Notice of Intent was filed on 13 September 2019, Neustar had a clear basis of dispute. Claimant raised the additional claims and arguments in the RFA and the Memorial (regarding the Tender Process) because of Respondent's ongoing wrongful actions beyond that date.

245. Claimant also rejects Respondent's assertions that the Notice of Intent was speculative. Claimant acted in good faith when it notified Respondent of the dispute setting out the provisions which it considered had been breached. The fact that Claimant did not advance the expropriation claim does not mean that the dispute had not crystallized at the time of filing the Notice of Intent or the RFA; it is normal for the issues of dispute to be narrowed, and the Parties are entitled to amend their pleadings accordingly. In fact, Claimant was entitled to develop its case in its pleadings under ICSID Rule 31.

246. Claimant further argues that the Notice of Intent complied with the requirements of Article 10.16(2). The purpose of a Notice of Intent is to provide a respondent State with sufficient detail "*to engage in constructive and informed discussions with the investor to enable*" and potentially allow for the amicable resolution of the dispute.[151] Further, crystallization of a dispute does not depend on the existence of a full quantum analysis; Article 10.16(2) TPA simply requires that the Notice of Intent specify the "*relief sought and the approximate amount of damages claimed"* which is what Claimant did.[152] In its Notice of Intent, Claimant set out the damage caused by Respondent's identified breaches and sought compensation in the approximate amount of USD 350 million.[153]

247. Claimant further argues that although it did not expressly identify Article 10.14 in the RFA, it did identify the factual basis underpinning its concerns regarding Respondent's

150 Reply § 93, citing Exhibit RL-003
151 Reply § 107, citing Exhibit CL-023
152 Reply § 101, citing Exhibit C-0002, Article 10.16.2(d)
153 Reply § 111, citing Exhibit C-0002, Article 10.16.2(d)

obligation under this provision to protect "*any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment*".[154]

248. Finally, Claimant submits that in any event claims advanced after the RFA must be considered under the applicable arbitral rules. Specifically, Rule 40 ICSID Arbitration Rules allows a party to submit "*an incidental or additional claim*" which arises "*directly out of the subject-matter of the dispute"* and should be "*within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre*". Also, it should be presented *"not later than in the reply*."[155] Claimant further argues that it was entitled to develop its case in its pleadings under ICSID Rule 31.

249. For these reasons Claimant submits that the Tribunal has jurisdiction to hear its claims in this Arbitration.[156] Further, Claimant's claims arise directly out of the subject-matter of this dispute and it is entitled to seek remedies for Respondent's alleged ongoing wrongful conduct including under Article 10.14.

(2) The Tribunal's Analysis

250. Article 10.16 provides the conditions when an investment dispute may be submitted to arbitration. It provides in pertinent part:

> *In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) an investment agreement;*

154 Reply § 120
155 Reply § 121
156 Reply § 121, citing Exhibit CL-114

and

(ii) that the claimant has incurred loss or damage by reason of, or rising out of, that breach; and

…

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

251. Article 10.16(2) provides:

> *At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:*
>
> *(a) The name and address of the claimant …;*
>
> *(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*
>
> *(c) the legal and factual basis for each claim; and*
>
> *(d) the relief sought and the approximate amount of damages claimed.*[157]

252. It is a common ground between the Parties that there must be an "*investment dispute*" in existence for a claim to be submitted to arbitration under the TPA and under the ICSID Convention. Since neither the TPA nor the ICSID Convention define "*investment dispute*", the Tribunal adopts the definition of the PCIJ in the *Mavrommatis* case, as agreed by the Parties. The tribunal in that case defined "*investment dispute*" as "*a disagreement on a point of law or fact, a conflict of legal views or of interests between*" the Parties at the time when the arbitration is commenced. In this respect, for the purpose of bringing proceedings under the TPA and the ICSID Rules, the Tribunal accepts and agrees in the context of this case, the definition of Professor Gaillard that a dispute exists "*at the moment a disagreement is formed between the parties over points of law or fact"* and *"is formed once*

[157] Complying with the requirements of Article 10.16 is important as the parties' consent to the submission of claims to arbitration is dependent on such compliance. In view of the Tribunal's conclusion on this point (see § 258 below) this issue is moot.

the claims or positions of one of the parties over those points of law or fact are contested or ultimately ignored by the other".[158]

253. While the Parties disagree as to the merits of the dispute, the Tribunal considers that the legal and factual issues are clear to both Parties and the damages sought by Claimant, if any, are to be determined. This is evident through the correspondence, meetings, the Notice of Intent and the subsequent submissions filed in this Arbitration. The details and scope of the dispute is now clear: it is set out and described in the Memorial and the Reply to the Counter-Memorial; the claim is responded to and rejected in the Counter-Memorial and the Rejoinder. Both Parties have provided their evidence in support of their respective positions.

254. The issue here is whether when Neustar issued its Notice of Intent (on 13 September 2019) and when it commenced this Arbitration by serving its RFA (23 December 2019), the dispute had crystallized, i.e. the scope and details of the complaints and claims were clear and had come into existence (without prejudice to the merits of the complaints and claims). This is also relevant to Respondent's contention that the Notice of Intent was defective because it does not comply with the mandatory criteria set out in Article 10.16(2).

255. The Tribunal has found the following brief back history on the underlying Contract and the developments leading to this Arbitration relevant and helpful in determining when the dispute crystalised in this case.

a. On 3 September 2009, the Concession was signed between MinTIC on behalf of the Respondent, the Colombian Government, and representatives of .Co Internet SAS for 10 years for "*the promotion, administration, technical operation, maintenance and other activities related to the nature of the ccTLD .co".* Pertinent to a substantive issue in this Arbitration,[159] Article 4 of the Concession Agreement provides:

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158 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017 § 6 (RL-009)

159 § VI(A)(2)(b)

> *… the agreed term may be renewed in the manner and terms established by the legislation in force at the time of the renewal. The term [of the renewal] may not be inferior to the term initially agreed for which the renewal and renewal of the guarantee(s) and the previous subscription of a document that so provides, that indicates the circumstances that motivated it.*[160]

b. As the Concession was due to end on 7 February 2020, both MinTIC and Neustar and .Co Internet began to look for the ongoing period. MinTIC considered whether to renew the Contract or to introduce a tender. Meanwhile, Neustar stated that it had already provided a transition plan on 4 July 2019.[161] As early as 18 March 2019 the Advisory Committee recommended that MinTIC launch a new tender for the **.co domain** concession.[162] In early 2019 it became clear to MinTIC "*that it might be more beneficial for Colombia to structure a new tender process*".[163] On 30 March 2019 President Duque announced that there would be a tender for the **.co domain**.[164]

c. Neustar and .Co Internet were aware of these developments which they considered ignored their contractual right to an extension of the Concession in accordance with Article 4 of the original Concession.[165] After various discussions and communications between the Parties, on 21 June 2019 MinTIC stated that it had decided not to extend the Concession.

d. Following various communications between Neustar, .Co Internet and MinTIC, on 7 June 2019 Neustar and .Co Internet sent a notice of dispute to MinTIC requesting that the plans for a tender be stopped and the Parties enter into negotiations for renewal of the Concession (*trigger letter)* sent to MinTIC.[166]

e. There was continuing correspondence between the Parties concerning their differences over the new tender process and Neustar's and .Co Internet's

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160 Concession (C-0017). This was pursuant to Article 2 of Law 1065 of 2006 which provided that "*duration of the agreement may be for up to 10 years, extendable, only once, for a period equal to that of the initial term*".

161 Memorial §118, see C-0081

162 C-0039

163 Witness statement of Luisa Fernanda Trujillo Bernal § 9 (RWS 03)

164 C-0041; this followed a "tweet" of the President's Advisor on 17 March 2019 that a tender for the **.co domain** would be held in the 2019 (C-0040)

165 Memorial §§ 81-86

166 Notice of Dispute from .CO Internet to Ministry of Commerce and MinTIC of 7 June 2019 (R-0006)

entitlement to a renewal of the Concession. This included a letter dated 18 June 2019[167] from the General Manager of .Co Internet to the Director of Foreign Investment and Services at MinTIC requesting that MinTIC stop activities for "*the roadmap for the selection process of the new operator of the .CO domain, described in the MinTIC's website*", cancel the press conference convened to discuss this issue, cease making statements that MinTIC will continue the selection process for the administrator of the **.co domain**, and "*revoke the measures that lead to the expropriation of the 2020- 2030 term of the 2009 Contract*".

f. On 26 June and 23 and 26 July 2019, representatives of the Parties met specifically to discuss their different positions, including MinTIC's intention to proceed with the tender process, and Neustar/.Co Internet's wish for a renewal of the 2010 Contract.

g. On 13 September 2019, Neustar and .Co Internet sent to MinTIC the Notice of Intent pursuant to Section B of Chapter 10 of the TPA.[168] The letter stated Neustar/.Co Internet's *"willingness to resolve the dispute through amicable negotiations, taking into account US$ 200 million offer it submitted on 22 May 2019",* and described:

> *... the wrongful actions and omissions […] adopted and maintained by the Colombian Government against the investors, Neustart/.CO Internet, and their investments, measures which i) prevented the enjoyment of the investor's rights under the Concession Contract and ii) frustrated good faith and transparent negotiations).*

The Notice of Intent further made clear Neustar/.Co Internet's position that:

> *Colombia's wrongful measures have breached the rights of Neustar/.Co Internet under Chapter 10 of the FTA and* customary *international law, which protect economic rights and foreign interests and which generate an obligation on the part of Colombia to make reparations to Neustar/.CO Internet in conformity with international law*.

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167 Letter from .CO Internet to Ministry of Commerce of 18 June 2019 (R-0079). See also letter of 25 June 2019 (R-0073)

168 Notice of Intent (C-0004)

The Notice of Intent further identified a series of actions and omissions on part of Colombia, which Neustar/.Co Internet argued that amounted to a violation of its obligations under the FTA and international law. These included, *inter alia*:

> *i. by refusing to constitute a team of experts in September 2018 when .CO Internet requested for the commencement of the Contract extension negotiations;*
>
> *ii. by not initiating the internal negotiation administrative procedures in a competent and professional manner;*
>
> *iii. by not submitting a proposal to amend the contract to be able to discuss its extension;*
>
> *iv. by not responding on the substance to the financial and technical offer submitted by .Co Internet;*
>
> *v. by announcing the launch of a new tender process, without holding prior negotiations following the notification of the dispute;*
>
> *vi. by persistently concealing [Colombia's] intention not to continue the Concession;*
>
> *vii. by putting forward erroneous technical and legal reasons to justify the launch of the tender process;*
>
> *viii. by preventing .CO Internet from having access to documents that recommended the opening of a new bidding process, thus neglecting the right to the extension and without its prior negotiation;*
>
> *ix. by revoking the international, contractual and legal right of Neustar/.CO Internet to the extension of the Contract for its execution until the year 2030.*
>
> *x. by revoking Neustar's/.CO Internet's legal, contractual and international right to negotiate better terms for the State during the extension and until 2030.*
>
> *Xi. by aggravating the dispute after having been notified on June 7, 2019, through media dissemination of the decision to open the tender.*

h. The letter also complained that the Government "*hindered the possibility of … a fair and equitable extension of the Concession, and expropriated Neustar/.Co Internet's rights to the extension, also, in a discriminatory manner".* In the letter, the Claimant further contends that the "*option to extend the contracts and the conditions of such agreements are underpinned by objective factors*" under the Law 1065 of 2006 and general principles. Hence, it is not a "*decision that abides by the discretion of the contracting entity*".

i. On 13 December 2019, MinTIC formally launched the 2020 Tender Process by publishing the final 2020 Terms of Reference and the tender timetable through Resolution 3316 of 2019.[169] This was followed by a public hearing on 18 December 2019 at which all interested parties were allowed to make comments until 3 January 2020.[170]

j. On 23 December 2019 Neustar filed the RFA with ICSID and with Respondent setting out its claims and the reliefs sought. The claims included:

   i. wrongful actions and omissions by intentionally depriving Neustar/.Co Internet of their rights in relation to the Concession and the fair and transparent participation in a tender process, among other things.

   ii. breaches of the TPA including (1) breach of the minimum standard of treatment, including fair and equitable treatment (Article 10.5); (2) breach of the national treatment standard (Article 10.3); and (3) breach of the most-favoured-nation treatment standard (Article 10.4).

   iii. The Claimant also contended that Respondent (i) had expropriated its investments "*without regard to the obligations imposed by Article 10.7,* [and] *breached the observation of obligations clause, as found in the Swiss-Colombia BIT and which protection the Claimant invoke here through the* [most-favoured-nation treatment] *clause of the TPA*".

k. On 24 February 2020 the tender closed. MinTIC then held meetings with interested parties; it eventually selected three successful candidates to go to the next phase, one of which was .Co Internet. A public hearing was held with the three shortlisted entities. One of the candidates did not fully meet the Colombian Government criteria; the other one's offer was not as good as .Co Internet's proposal. At the end of the meeting on 3 April 2020 MinTIC awarded the 2020 Contract to .Co Internet.

169 Resolution 3316 of 13 December 2019 (R-0052)
170 Witness statement of Luisa Fernanda Trujillo Bernal § 27 (RWS 03)

l. On 6 March 2020, ICSID registered the RFA and this Arbitration formally commenced.

m. Following the RFA, MinTIC sought to prevent ICSID from registering the RFA and establishing the arbitration tribunal for this matter on the basis that the arbitration was premature and giving explanations that Neustar and .Co Internet claims were unjustified.[171]

256. This summary of the communications and meetings between the Parties shows clearly that MinTIC had decided to change the basis for appointing the administrator of the **.co domain** in Colombia and to offer the next concession period for tender. Neustar and .Co Internet were aware of this decision, making clear their view that they were entitled to a renewal of the Contract for a further period and on the same or similar terms as the 2009 Contract, and their opposition to the proposed tender process which breached their rights under the Contract and the TPA. To this end, the Tribunal is not persuaded that the Notice of Intent is defective as argued by Respondent. As stated above, in the Notice, Neustar/.Co Internet begin by describing the reason for the dispute, giving the necessary factual background, identifying specific actions and omissions taken by the Government (or not), and identifying the legal provisions which according to them had been violated. They also give details as to how and when their rights have been violated and the damage they may suffer. Thus, for the purposes of Article 10.16, the Notice of Intent has satisfied the necessary criteria irrespective of whether there was merit to Claimant's claim. The bottom line is that there was a clear dispute between the Parties regarding the construction of certain terms of the 2009 Contract, as well as the effect of this on Claimant's rights and investments in Colombia.

257. Further, the fact the Claimant may have withdrawn or narrowed down its claims since the Notice of Intent or the RFA is not evidence that the dispute had not crystallised. It is quite normal in international arbitrations that disputes between parties are narrowed and refined during the arbitration process, and specifically as the parties exchange submissions, present

171 See letters from Colombia to ICSID of 30 January 2020 (R-0083) and 3 March 2020 (R-0070), and Neustar letters to ICSID Secretariat of 2 and 6 March 2020 (R-0084 and R-0071)

their evidence and after documents are produced following the document production process. In such cases, pleadings may be amended according to the arbitration rules applicable and where necessary with the permission of the tribunal. In this case, some of Claimant's claims have been narrowed and the expropriation claim has been withdrawn after the RFA was filed, and there is no mention of it in the Memorial. In the Tribunal's view that does not mean that the claim was speculative or that the dispute between the Parties had not crystalized when the Notice of Intent and the RFA were filed.

258. For these reasons the Tribunal has determined that the Notice of Intent was neither premature nor defective and that the dispute between the Parties had crystalised at the time this Arbitration was commenced.

C. DID CLAIMANT BREACH ITS WAIVER OBLIGATION UNDER ARTICLE 10.18 OF THE TPA?

(1) The Parties' Positions

a. Respondent's Position

259. Respondent contends that Claimant breached the waiver requirements imposed by Article 10.18(2) TPA. As a result, Respondent's consent to arbitrate could not have crystallized. Respondent states that the purpose of the waiver "*is to shield the State from the risk of multiple proceedings*".[172]

260. Respondent argues that Claimant's waiver is defective in two respects: it seeks to limit the waiver to Colombian courts, while failing to waive Neustar's rights to initiate or continue proceedings before the United States courts; and it fails to waive its right to "*continue*" proceedings before Colombian courts.

261. Respondent further submits that Article 10.18(2) also requires that the party's conduct be "*coherent*" with the waiver. By continuing the Consejo de Estado proceedings it had initiated on 19 September 2019 (after the submission of RFA on 23 December 2019) and which lasted until 20 March 2020, Claimant adopted conduct contrary to its waiver.

[172] Counter-Memorial § 224

b. Claimant's Position

262. Claimant submits that its waiver complies with Article 10.18(2). It specifically waived "*any right*" before "*any administrative tribunal or court under Colombian law or other dispute settlement procedures*" relating to "*any proceeding with respect of the measures alleged to constitute a breach referred to in the arbitration*".[173] Claimant contends that this includes any United States proceedings (not just Colombian proceedings) even to the extent that such proceedings were available or applicable.

263. Claimant further argues that its waiver and confirmation in the RFA was "*clear, explicit and categorical*" and it "*operates to renounce any rights to initiate claims before any tribunal or court in a domestic forum with respect to any proceeding relating to the measures in this arbitration*".[174] There are no material defects arising from the execution of the Claimant's written waiver, requests for interim measures are permissible under Article 10.18.3 of the TPA.[175] There were also no reservation of rights in Claimant's waiver and it did not limit or condition its waiver in any way.[176]

264. In relation to Respondent's argument that the alleged continuation of the Consejo de Estado proceedings amounts to a material defect of the waiver requirement, Claimant argues this position fails to account for Article 10.18 on interim measures.[177]

c. Non-Disputing Party Submission

265. In its non-disputing party submission, the United States referred to the waiver requirements under Article 10.18.2(b) as being the basis upon which the parties (to the Treaty) have conditioned their consent in Article 10.17. An effective waiver is a precondition to the parties' consent to arbitrate claims.[178]

266. The waiver requirement seeks to give the respondent certainty, from the very start of arbitration, that the claimant is not pursuing and will not pursue proceedings in another

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173 Reply § 57
174 Tr., Day 1 [ENG] 63: 20-24; Claimant's PHB § 10
175 Claimant's PHB § 11
176 Tr. Day 1 [ENG] 65:2-7
177 Tr. Day 1 [ENG] 65:8-20
178 Non-Disputing Party Submission § 3

forum with respect to the measures challenged in the arbitration.[179] The purpose is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of conflicting outcomes and legal uncertainty.[180]

267. For a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly controls the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a Chapter Ten breach.[181]

268. In order for the waiver to be effective and engage the respondent State's consent to arbitration or the Tribunal's jurisdiction *ab initio* under the Agreement, all formal and material requirements under Article 10.18.2(b) must be met. A tribunal has no authority to remedy an ineffective waiver. Where a claimant files a waiver subsequent to the constitution of the tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration.[182]

269. The narrow carve-out in Article 10.18.3 is intended solely to preserve the *status quo* until the investment dispute before a Chapter 10 tribunal can be fully adjudicated. The interim injunctive relief must not involve the payment of monetary damages or go beyond that which is necessary to preserve the *status quo ante* during the pendency of the arbitral proceedings.[183]

(2) The Tribunal's Analysis

270. The issue here is whether the Neustar/.Co Internet waiver complied with the requirements under Article 10.18.2, and if yes, whether Claimant breached that waiver by initiating and continuing with the Consejo de Estado proceedings. For the reasons below, the Tribunal considers that Claimant has complied with the waiver requirements under Article 10.18.2.

179 Non-Disputing Party Submission § 5
180 Non-Disputing Party Submission § 8
181 Non-Disputing Party Submission § 9
182 Non-Disputing Party Submission § 10
183 Non-Disputing Party Submission § 12

Accordingly, Respondent's acceptance of jurisdiction has crystallised by Neustar's complying with the waiver requirements.

271. Article 10.18(2) TPA provides:

> *No claim may be submitted to arbitration under this Section unless:*
>
> *(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and*
>
> *(b) the notice of arbitration is accompanied,*
>
> *(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and*
>
> *(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers*
>
> *of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.*

272. Thus, in order for a waiver to be compliant with the requirements of Article 10.18(2), it must be in writing, it must waive "*any right to initiate or continue*" proceedings before "*any administrative tribunal or court under the law of any Party, or other dispute settlement procedures*". This includes "*any proceeding with respect to any measures alleged to constitute a breach referred to in Article 10.16*". Article 10.16 TPA refers to a breach "*of an obligation under Section A*", i.e. Claimant's claims with regard to Respondent's violations of the minimum standard of treatment under Article 10.5, as well as discriminatory treatment obligations under Articles 10.3 and 10.4.

273. Claimant's consent to this Arbitration and its waivers were submitted with the RFA on 23 December 2019.[184] Paragraph 118 of the RFA provided as follows:

> *Additional conditions precedent are established by Article 10.18.2. As required by sub-paragraph (a) thereof, Neustar has consented in writing to arbitration in accordance with the procedures set out in the TPA. Further, as required by subparagraph (b), provided with this Request for Arbitration are Neustar's and its enterprise's (.CO Internet's) written waivers of any rights to initiate or continue*

[184] Neustar's Written Consent and Waivers under Articles 10.18.2(a), 10.18.2(b), 10.19.4(b) and 10.19.4(c) of the TPA (C-0007/RFA-7)

> *before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16. However, Neustar and.CO Internet reserve their rights to initiate or continue such actions as are permitted by Article 10.18.3. The written consent and waivers required by Article 10.18.2 are provided at Annex RFA-7.*[185]

274. The Parties' consent was recorded in paragraphs 119-120 RFA as follows:

> *119. Both Neustar and .CO Internet consent to the submission of this dispute to the jurisdiction of the Centre by the filing of this Request for Arbitration.*
>
> *120. Respondent's consent to arbitration by way of the TPA and Neustar's filing of this Request for Arbitration thus form the agreement to arbitrate between the parties to the dispute.*

275. Neustar's waiver attached to the RFA provides in pertinent part as follows:

> *Approval of Waiver to Initiate Dispute Settlement Procedures before Colombian Courts*
>
> *Whereas, there is a dispute between the Corporation and the Republic of Colombia ("Colombia"), which was notified to Colombia on September 13, 2019, in relation to the investments made by the Corporation in Colombia that are protected by the Republic of Colombia and the United States of America Trade Promotion Agreement entered into force on May 15, 2012 (the "FTA");*
>
> *Whereas; article 10.18.2 of the FTA provides that a claimant must waive its rights to commence or continue any claim according to the law of the respondent;*
>
> *Resolved, that the waiver of any right to <u>initiate</u> before any administrative tribunal or court under the Colombian law, or other dispute settlement procedures, any proceeding with respect of the measures alleged to constitute a breach referred to in the arbitration (but not included the interim injunctive relief filed before the Consejo de Estado) be, and hereby is, approved…*[186]

276. The Tribunal acknowledges that Claimant's waiver specifically provides "*before any administrative tribunal or court under the Colombian law*", rather than "*under the law of any Party*" as Article 10.18(2) requires. By specifically adding the words "*under the*

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185 RFA § 118

186 .Co Internet SAS filed a similar waiver as annex 8 to RFA as follows: WRITTEN WAIVER TO INITIATE DISPUTE SETTLEMENT PROCEDURES BEFORE COLOMBIAN COURTS OF THE PRESIDENT OF .CO INTERNET S.A.S, dated 18 December 2019, which provides in pertinent part: *"IT IS HEREBY DECIDED: to waive any right to initiate before any administrative tribunal or court under the Colombian law, or other dispute settlement procedures, any proceeding with respect of the measures alleged to constitute a breach referred to in the arbitration. This does not include the interim injunctive relief filed before the Consejo de Estado*".

Colombian law" Claimant had implicitly excluded any courts which do not operate under Colombian law, including the United States courts. However, the Tribunal is not persuaded that the failure to expressly refer to the exclusion of United States courts effectively means they are not excluded. This is because this particular wording should not be read in isolation but together with the remaining wording of the waiver and taken into account along with Claimant's conduct and submissions in this Arbitration.

277. In particular, although the first part of the last paragraph of the waiver specifies "*court under the Colombian law*", the rest proceeds to state "*or other dispute settlement procedures, any proceeding with respect of the measures alleged to constitute a breach referred to in the arbitration*". Thus, this includes all fora (including United States courts) irrespective of country or applicable law, as long as it concerns the claims raised in this Arbitration.

278. Therefore, in the Tribunal's view the intent and language of the waivers were clear: the dispute between the Parties was to be determined in an arbitration under the ICSID Rules, and not in the national courts of Colombia or the United States.

279. Further, the Tribunal accepts Respondent's argument that Claimant has waived only the right to "*initiate*" proceedings before the Colombian courts, but not to "*continue*" them as the language of Article 10.18(2) provides. However, this does not necessarily invalidate the waiver or means that Claimant has reserved any right in that respect for two reasons. This is because, as also confirmed by Claimant, at the time of submitting its waiver, there were no pending proceedings in the sense of Article 10.18(2) with regard to which Claimant had to waive its right to "*continue*". The waiver in Article 10.18(2) applies to proceedings "*with respect to any measure alleged to constitute a breach referred to in Article 10.16"*; it does not apply to requests for provisional measures which are explicitly allowed under Article 10.18(3) TPA.

280. As established above, the Consejo de Estado proceedings were initiated for the purpose of non-aggravating the dispute which was already submitted for determination before this Tribunal. Claimant simply sought to protect its right to arbitration through interim measures. Thus, by reserving its right to continue these proceedings, which were pending

at the time the waiver was submitted, Claimant did not violate Article 10.18(2) nor was Claimant required to waive its right to continue these proceedings.

281. For the same reasons, the Tribunal does not consider that Claimant's "*follow up*" with respect to the Consejo de Estado proceedings, i.e. seeking a review of the earlier decision, is a breach of its own waver or Article 10.18(2).

282. The Tribunal further does not consider these to be "*formal*" or "*substantial*" defects invalidating the waiver. It is clear from the wording of paragraph 118 of the RFA that Claimant intended to continue with its request for interim measures of protection in the Consejo de Estado but had no expressed intention to bring proceedings in any other national court. Taking this action for a limited basis under Articles 230 and 231 of the CCAP is clearly allowed and as determined above was not a definitive choice of forum.

283. The Tribunal accepts Claimant's argument that even if its waiver was defective, it was "*remedied*" by its RFA and the wording of paragraph 118.[187] Further, Claimant has also confirmed this position throughout its submissions in this Arbitration. Accordingly, the Tribunal considers that to the extent there is discrepancy between the wording of the Claimant's waiver and Article 10.18(2), this has been resolved through the Claimant's categorical position in its submissions in this Arbitration.

284. Further, the Tribunal also agrees with the warning of the tribunal in *Thunderbird v. Mexico* regarding "*excessive formalism*", and that the "*requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings*". The purpose of the "consent" and "waiver" requirements is to "*prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure*".[188] This Arbitration falls clearly within this example.

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187 Reply § 67

188 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 §§ 117, 118 (CL-059)

285. In the present proceedings, Claimant has waived its right to initiate proceedings alleging breach of Article 10.16 in other fora. If Claimant does initiate proceedings during or even after this Arbitration alleging the same violations raised in this Arbitration, then it would be for Respondent to invoke Claimant's waiver and prevent it from having this dispute decided twice. However, for the time being, this Arbitration is the only forum in which Claimant has initiated proceedings to resolve the dispute between the Parties with respect to Colombia's alleged breaches of the TPA with respect to Claimant's investment. Thus, there is no risk of "multiple" proceedings at the moment.

286. Accordingly, the Tribunal has concluded that Claimant did not breach the waiver requirements and that the waiver is not defective and therefore invalid. This jurisdictional objection is therefore dismissed.

D. DID THE CLAIMANT LACK STANDING TO BRING CLAIMS BEFORE THE TRIBUNAL?

(1) The Parties' Positions

a. Respondent's Position

287. Respondent argues that the dispute in this Arbitration had not crystallized either when Neustar submitted its RFA on 23 December 2019, or when ICSID registered Neustar's RFA on 6 March 2020. This is for the following reasons:

288. First, the 2009 Contract was still in force and the 2020 Contract had not yet been awarded. The TPA requires that the investor had "*incurred loss or damage by reason of, or arising out of [the alleged breach*]" at the time of submitting a claim to arbitration. In December 2019 and March 2020, it was still uncertain whether the differences between the Parties would actually create any damage to Claimant.

289. Second, no dispute crystallized until Claimant's Memorial was filed on 22 October 2021. This is clear from the numerous changes to Claimant's position from the time of the Notice of Intent (13 September 2019) to the substantive amendments to its claims between the RFA and its Memorial filed on 22 October 2021. These changes include Respondent trying to change the Parties to the dispute before ICSID registered the RFA, abandoning certain claims such as Colombia's alleged breach of Article 10.7 TPA (expropriation), introducing

claims on behalf of .Co Internet, and the claims raised under Articles 10.16(1)(a)(i)(C) and 10.16(1)(b)(i)(C) of the TPA.[189] These changes are significant and go beyond a simple "*modification*" of arguments as argued by Claimant.

290. Third, only in its Memorial did Claimant introduce, for the first time, claims based on Colombia's alleged failure to protect Neustar's investments against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT, and Colombia's alleged failure to protect confidential business information under Article 10.14 of the TPA.[190]

291. Respondent contends that both factual and procedural elements confirm that the dispute had not crystallized before the Memorial was filed. Accordingly, Claimant's standing to bring its claims must be assessed upon the filing of this submission.

292. Further, Respondent contends that for a claimant to have standing under an investment protection agreement, it is required to own or control an investment when it submits the dispute to arbitration.[191] Respondent argues that Neustar did not own or control the investment when it initiated this Arbitration.[192] In particular, Claimant closed the sale of its registrar business to GoDaddy, including .Co Internet, in August 2020.[193] This is not disputed by Claimant. Hence, on 22 October 2021 when it filed its Memorial Claimant no longer owned or controlled the investment at stake. Respondent further submits: "*Even if, par extraordinaire, this Tribunal were to find that the Claimant had standing, such standing is necessarily limited*".[194]

b. Claimant's Position

293. Claimant rejects Respondent's contention that the initiation of the present proceedings is Neustar's filing of its Memorial. Claimant argues that Respondent has provided no support for this proposition and that each of the cases it had relied on also show that the relevant

189 Counter-Memorial § 257
190 Counter-Memorial § 257; Rejoinder § 121
191 Counter-Memorial §§ 259, 261, citing Exhibit RL-011; Exhibit RL-045
192 Counter-Memorial § 262
193 The negotiations between Neustar and GoDaddy of the sale started in at least April 2019, and the announcement was delayed pending the results of the 2020 Tender Process, the transaction was officially signed on 3 April 2020 and closed on 20 August 2020. See Rejoinder § 122; Respondent's PHB § 51
194 Counter-Memorial § 263, fn. 413

date to determine the commencement of proceedings is the request for arbitration. According to Claimant, this is true for ICSID cases, and cases heard before the International Court of Justice and other arbitration cases under the UNCITRAL, ICC and SCC Rules.

294. Claimant submits that at the time it filed its Notice of Intent on (13 September 2019) and its RFA (23 December 2019), it held investments under the TPA through, *inter alia*, its 100% shareholding in .Co Internet. Events subsequent to the filing of a RFA do not affect a court or tribunal's jurisdiction. There is therefore no basis for this jurisdictional objection and it should be dismissed out of hand. Claimant contends that it is not disputed that the Claimant was a protected investor under the TPA, with a protected investment, at the time it filed its RFA.[195]

295. Claimant contends that Respondent's argument that "*the existence of a crystallized dispute*" is a jurisdictional requirement to be satisfied when the arbitration is initiated has no support under the TPA or the ICSID Convention, nor under general principles of international law.[196] ICSID tribunals have concluded that a "legal" dispute is considered to exist if the claimant has (i) identified violations of substantive or procedural guarantees owed to the investor by the host State, and (ii) sought legal remedies. Neustar did this on 7 June 2019 (by its trigger letter), and again on 13 September 2019 (in its Notice of Intent) and again on 23 December 2019 (in the RFA). Further, Respondent's opposition to Claimant's position throughout this period is a confirmation of a legal dispute as of this date. Thus, the dispute had "crystallized" when Neustar filed its RFA.

296. Finally, Claimant rejects Respondent's contention that Neustar does not have standing because it amended some of its pleadings between the RFA and the Memorial. Claimant argues that it "*was entitled to develop its pleadings from its initial filing*" under Rule 31 of the ICSID Arbitration Rules.[197]

195 Claimant's PHB § 15
196 Reply § 134
197 Reply § 138, citing Exhibit CL-108

(2) The Tribunal's Analysis

297. It is common ground between the Parties that a "dispute" must be in existence in order for a party to have standing and bring arbitration proceedings under the TPA and the ICSID Convention. The Parties also agree that the relevant date for determining the existence of such dispute is the "*initiation of proceedings*".[198]

298. There are two issues relevant to whether Claimant had standing to initiate the present Arbitration: (i) Was there a "dispute" at the time Claimant filed the RFA and/or when the claim was registered by ICSID? (ii) Did Claimant "own" or "control" its investment at the time it filed the RFA?

a. The Existence of a Dispute

299. Both the TPA and the ICSID Convention require that a dispute be in existence in order for an investor to initiate arbitration proceedings validly.

300. Article 10.16(1) TPA sets out when a claim can be submitted to arbitration under the TPA. It provides in pertinent part:

> *In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) and investment agreement;*
>
> *and*
>
> *(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.…*

198 Reply § 126; Counter-Memorial § 255

301. Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre extends to "*any legal dispute arising directly out of an investment*".

302. In its RFA, Claimant submitted that the dispute "*primarily concerns the commercial expansion and administration of the country-level top-level domain ("ccTLD") for Colombia, '.CO'*".[199] In 2009, .Co Internet was awarded the concession for the promotion, administration, technical operation and maintenance of the **.co domain** (the Concession). In 2014, Neustar purchased .Co Internet (becoming its sole shareholder), following which Respondent registered Claimant's investment in the Colombian Central Bank.

303. Neustar states that on 21 September 2018, .Co Internet expressed its intention to extend "*the Concession for a further period of ten years, in exercise of its rights under Colombian Law 1065 of 2006 and the Concession*".[200] Despite the Government's "*initial signs*" that it would comply with these requirements, "*the President of Colombia abruptly announced in March 2019 that he had decided to not extend the Concession and instead launch a public tender, thus ignoring the Concession extension process entirely*".[201] Neustar argues that this decision was "implemented" through MinTIC, acting in its capacity (under Colombian law) as regulator of the **.co domain**. Neustar also contends that Respondent interfered with the "*propriety and regularity of the tender process*" aiming to "*exclude*" Neustar and .Co Internet and to "*favour*" its competitors.[202]

304. Accordingly, Neustar submits that the Government's decision not to extend the Concession agreement and the follow up actions with respect to the tender process itself amounted to a breach of .Co Internet's rights under the Concession and Law 1065, and the rights of Neustar and .Co Internet under the TPA.

305. In contrast, Respondent contends that Claimant's Notice of Intent was prematurely filed since no dispute had crystalised in September 2019. The 2020 tender process started officially on 13 December 2019 by the Resolution 3316 of 2019.[203] Accordingly,

199 RFA § 10
200 RFA § 18
201 RFA § 18
202 RFA § 20
203 Resolution 3316 of 13 December 2019 (R-0052)

Respondent argues that when Claimant filed the RFA in December 2019 and when it was registered by ICSID in March 2020 the dispute also had not crystalised. Rather, the dispute crystalised only at the time Claimant filed its Memorial on 22 October 2021. Respondent raises two main arguments in this respect:

306. First, from a factual perspective, the 2009 Contract was still in force in late 2019 – early 2020, and the 2020 Contract had not yet been awarded. Therefore, it was still unclear whether the differences between the Parties would have caused Claimant to incur any damages as required under the TPA.

307. Second, from a procedural perspective, Neustar's numerous changes to its position introduced between its Notice of Intent, RFA, its supplemental letters to ICSID to have its RFA registered and the Memorial, were further "*evidence that there was no crystallized dispute*" until the Memorial was filed.[204]

308. In the Tribunal's view it is clear there was a legal dispute between the Parties at the time of the Notice of Intent and the RFA as required under Article 10.16 TPA and Article 25 ICSID Convention. Claimant's Notice of Intent of 13 September 2019 sets out specifically that the dispute concerns whether Neustar was entitled to an extension of the Concession Agreement, and whether Respondent's refusal to extend the Concession constituted a violation of Claimant's investment rights. In particular, the Notice of Intent variously described Claimant's claims, and provided in pertinent part:

> *The dispute arises from the wrongful actions and omissions (the measures) adopted and maintained by the Colombian Government against the investors, Neustar/.CO Internet and their investments, measures which i) prevented the enjoyment of the investor's rights under the Concession Contract and ii) frustrated good faith and transparent negotiations …*[205]
>
> *Colombia's wrongful measures have breached the rights of Neustar/.CO Internet under Chapter 10 of the FTA and customary international law, which protect economic rights and foreign interests …*[206]
>
> *The [Colombian] Government hindered the possibility of generating transparent, efficient, effective and technical opportunities to negotiate a fair and equitable*

204 Counter-Memorial § 257
205 Notice of Intent § 5
206 Ibid § 6

extension of the Concession, and expropriated Neustar/.Co Internet's rights to the extension, also in a discriminatory manner.[207]

… the outright rejection to have a dialogue and negotiate the extension impedes Neustar's/.Co Internet's business plans from being fulfilled, for their development to be frustrated, for their market position to be eroded, for the capacity to generate benefits to be destroyed and for the value of their investments to be reduced to nothing. All of this has generated damages to Neustar's Investments of no less than USD 350 million.[208]

309. The RFA sets out Claimant's claims in the following terms:

This dispute primarily concerns the commercial expansion and administration of the country-level top-level domain ("ccTLD") for Colombia, ".CO" ….

On 21 September 2018, .CO Internet expressed its intention to formalize the extension of the Concession for a further period of ten years, in exercise of its rights under Colombian Law 1065 of 2006 and the Concession. Despite making initial signs that it would comply with Colombian law formalities and the terms of the Concession, the President of Colombia abruptly announced in March 2019 that he had decided to not extend the Concession and instead launch a public tender, thus ignoring the Concession extension process entirely. […][209]

Respondent's tender was designed to exclude .CO Internet and Neustar and to favor Neustar's competitor. Specific requirements in the original Terms of Reference included qualifications that .CO Internet and Neustar could not meet, despite the fact that .CO Internet has been successfully and unquestionably managing and promoting the domain for ten years and surpassed the plan presented to the government in 2009 by 150%. […][210]

Troublingly, Respondent has included with the tender an opaque and subjective qualification criteria, thereby creating a significant risk of improper conduct in connection with the tender.[211]

Thus, the Government's decision and the resulting actions arising therefrom were in breach of .CO Internet's rights under the Concession and Law 1065, and of Neustar/.CO's rights under the TPA.[212]

310. Thus, the Tribunal rejects Respondent's contention that no dispute had crystalized prior to the filing of the RFA. The fact that the 2009 Contract was still in force, and the 2020 tender process had not begun is not determinative or relevant. This is because the issue of

207 Ibid § 8
208 Ibid § 9
209 RFA § 18
210 RFA § 21
211 Ibid § 22
212 Ibid § 23

disagreement between the Parties at the time was Neustar's alleged right to an extension of time of the 2009 Contract which was inevitably coming to an end. In this regard, the communication exchange between .Co Internet/Neustar and the representatives of MinTIC is informative as to when the claim crystalized, the scope of the dispute between the Parties became known and the content of the Notice of Intent and the RFA.

311. In particular, the "*origin*" of the dispute goes back to 20 September 2018 when .Co Internet informed the Colombian Minister of Information Technology and Communications of its intention to "*formalize the extension*".[213] The Parties exchanged various communications in relation to this,[214] with MinTIC not making a determinative decision on Claimant's request until early 2019.

312. The record shows that on 11 February 2019, a meeting took place between the Vice Minister of Digital Economy and "*other MinTIC officials*" and Neustar and representatives of .Co Internet. Neustar submits that during this meeting it reiterated again its intention to extend the Concession. In response the Vice Minister and "*his officials indicated that MinTIC would be putting in place a simultaneous process of negotiating an extension to the Concession with .CO Internet and preparing for a potential tendering process in case those negotiations were unsuccessful*".[215]

313. Following further correspondence[216] and a meeting of the Advisory Committee[217] in March 2019 discussing the Concession,[218] on 30 March 2019, President Iván Duque Márquez announced that he had decided to launch a public tendering process for the administration

213 Letter from .Co Internet to MinTIC of20 September 2018, MinTIC Reference No. 935805 (C-0028)

214 See e.g. Letter from MinTIC to .Co Internet of 22 November 2018, Response to Submission No. 935805 of 21 September 2018 MinTIC Reference No. 1246985(C-0029); .Co Internet replied to this letter on 27 December 2018, see Submission from .Co Internet to MinTIC, Submission No. 955263, of 27 December 2018 (C-0030); Letter from MinTIC to .Co Internet of 15 February 2019, Response to Submission No. 955263 of 27 December 2018, MinTIC Reference No. 192011188 (C-0031); Letter from .Co Internet to MinTIC of 5 March 2019, Response to Letter No. 192011188 of 15 February 2019 and Specific Petition, MinTIC Reference No. 191010681 (C-0032)

215 Memorial § 69

216 Letter from .Co Internet to MinTIC (15 March 2019), MinTIC Reference No. 191012761, C-0034

217 This is the advisory committee set up under MinTIC to review the performance of .Co Internet, the ccTLD**.CO Domain** Policies Advisory Committee. See Reply § 234

218 MinTIC, Minutes No. 2 of Advisory Committee Meeting (18 March 2019) (C-0039)

of the **.co domain**.[219] On 21 June 2019, MinTIC informed Neustar that the Concession would not be extended.[220]

314. These events clearly show that there was an issue of disagreement between .Co Internet/Neustar and MinTIC, even if the extent of such disagreement was not fully particularised until March 2019, when it became clear that Claimant would not be awarded an extension of the Concession. Claimant's Notice of Intent was then filed on 13 September, and the RFA on 23 December 2019, after further communication between the Parties and unsuccessful settlement discussions.

315. Although this Tribunal is not bound by previous tribunals' decision in other ICSID cases, they do provide a persuasive authority as to how the term "dispute" under Article 25 ICSID Convention should be interpreted. This Tribunal accepts that a legal dispute is present the moment a claimant alleges violations of substantive and/or procedural guarantees which it claims are owed to the investor by the host State, and for which it seeks legal remedies, whereas the host State denies and opposes such claims.[221] As stated by the tribunal in *Maffezini v. Spain:*

> *there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter*

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219 The President made his announcement at the annual meeting of the Colombian Chamber of IT and Telecommunications, with the announcement subsequently reported by the Colombian press. See Ernesto Rodriguez, "Beware of Monopolies" (30 March 2019) EL NUEVO SIGLO (C-0041)

220 Letter from MinTIC to .Co Internet (21 June 2019), MinTIC Reference No. 192050579 (C-0072)

221 This view has also been reached by other tribunals. See, e.g., *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal, 8 December 1998 § 47 (CL-099); *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction,26 April 2005 §§ 40-47 (CL-100); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction,11 May 2005 § 55 (CL-101); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction,11 May 2005 §§ 67, 68 (CL-102); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, 17 June 2005 §§ 20-23 (CL-103); *Bayindir Inşaat Turizm Ticaret Ve Sanayi A. Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 §§ 124, 125 (CL-010); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 § 74 (CL-005); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 §§ 93-97 (CL-011); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 § 62 (CL-106)

> *stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.*[222]

316. Accordingly, the Tribunal considers that the legal dispute between the Parties, i.e. whether Claimant had an "automatic" right to extension of the Concession under Colombian law and the 2009 Contract, and whether the Respondent was entitled to offer the **.co domain** in an open tender in Colombia, had "crystalized" prior to the filing of the RFA. The fact that the 2009 Contract was still in force does not change this; since Claimant was seeking extensions prior to the end of the Contract and sought to protect what it considered it was entitled to; without prejudice to the merits there was a dispute between the parties.

317. Further, the Tribunal is not persuaded by Respondent's arguments that the changes Claimant made to its pleadings from the RFA to the Memorial prove that a dispute had not crystalized. The fact that .Co Internet withdrew from the proceedings, or that Neustar decided to withdraw certain claims initially raised in the RFA does not in itself suffice to prove that no dispute had crystalized. In general, parties are allowed to amend their pleadings as long as no new claims are introduced (after a certain stage). Further, the withdrawal of certain arguments did not affect Claimant's core claim, i.e. Respondent's alleged failure to accord Claimant and its investment the protections provided for under the TPA which thereby violated the TPA.

318. Finally, the Tribunal accepts that Article 10.16(1) of the TPA also requires that the investor sets out the "*loss or damage*" it has "*incurred … by reason of, or arising out of that breach*",[223] i.e. the alleged breach. The Tribunal is satisfied that Claimant had done so in the Notice of Intent, for the purposes of identifying its claim to Respondent, and in its RFA for the purposes of this Arbitration.

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222 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 § 96 (RL-007)

223 Counter-Memorial § 256, citing Exhibit C-0002

319. Specifically, in the Notice of Intent, Claimant submits that "*the damages suffered would equate to an amount of no less than USD $350 million plus interest up to the date of actual payment*".[224]

320. Similarly, in the RFA, Claimant submits that Respondent's breaches "*have and will continue to cause Neustar/.CO loss and damage, in an amount to be established at the proper stage of the proceeding, but which Neustar/.CO presently estimates to be in excess of US$350 million*".[225]

321. In the Tribunal's view, the fact that Claimant's damages claim is set out in general terms does not mean that no dispute had crystalised. First, the "crystallization" of a dispute is not dependent on the damages/losses potentially incurred as a result of it. Second, the requirement under the TPA is for Claimant to provide it has incurred certain damages/losses as a result of Respondent's alleged breach; not to quantify them or provide detailed analysis.[226]

322. For the above reasons, the Tribunal is satisfied that the dispute between the Parties had crystalized prior to the filing of the RFA on 23 December 2019.

b. Claimant's ownership and/or control over its investment

323. To have standing under an investment protection agreement, a claimant is in principle required to own or control an investment when submitting the dispute to arbitration. This applies in the present case: Article 10.16(1) TPA allows a claimant to initiate arbitration proceedings only if there is "*an investment dispute*" which "*cannot be settled by consultation and negotiation*".

324. Claimant initiated this Arbitration when it filed the RFA on 23 December 2019; the case was registered by ICSID on 6 March 2020. At the time, Claimant held investments in Colombia through its 100% shareholding in .Co Internet. This included the Concession and the subcontracts stemming from it as well as any monetary claims and activities, the

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224 Notice of Intent § 87

225 RFA § 125

226 Article 10.16(2)(d) of the TPA provides that in the "notice of intent", Claimant should set out "*the relief sought and the approximate amount of damages claimed*".

tangible and intangible assets constructed and developed during the performance of the Concession, and Claimant's "*expectations concerning earnings and profits resulting from its activities resulting from the Concession*".[227] All of these fall within the definition of investment in Article 10.28 TPA. This does not seem to be disputed by Respondent.

325. Respondent submits that Claimant no longer owned or controlled the investment at stake "*when it introduced effectively the dispute, which* […] *only occurred upon the filing of its Memorial on 22 October 2021*".[228] However, the relevant period for determining the Claimant's standing in this Arbitration and this Tribunal's jurisdiction over its claims is at the beginning of these proceedings, i.e. when its RFA was filed on 23 December 2019, not at the time it filed its Memorial. This is for two reasons.

326. First, it is common ground between the Parties that:

> *[i]t is well established under international law that a tribunal must assess whether it has jurisdiction over a given case, including whether a claimant has standing to bring its claim, upon the initiation of the proceedings.*[229]

327. As found above, the "*initiation of the proceedings*" was Claimant's filing of the RFA, when the dispute between the Parties crystalised.

328. Second, Article 10.16(4) TPA explicitly provides that "*[a] claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration")* […] *is received by the Secretary-General*".[230] Thus, the relevant date to determine Claimant's standing in this Arbitration is either 8 January 2020 (when the RFA was filed), or at the latest on 9 March 2020 when the RFA was registered by ICSID.[231]

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227 Memorial § 167
228 Counter-Memorial § 263; Rejoinder § 122
229 Counter-Memorial § 252; Reply § 126
230 The complete Request was received on 8 January 2020
231 The Request was registered on 9 March 2020. See Notice of Registration

329. This general rule has been recognized in many cases.[232] In *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic the* tribunal stated:

> *[i]t is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.*[233]

330. In April 2020, Neustar announced that it had reached an agreement with GoDaddy for the sale of its registry business, which included .Co Internet. The sale closed in August 2020. Thus, the sale took place after this Arbitration had already been started.

331. Respondent contends that the negotiations between Neustar and GoDaddy must have started in "*at least April 2019*", and that "*the announcement had been delayed pending the results of the 2020 Tender Process; […] the transaction was officially signed on 3 April 2020 and closed on 20 August 2020*".[234] Even if correct, this fact is irrelevant to Claimant's standing in this Arbitration given that the transaction concluded after the proceedings had been initiated. As stated by the tribunal in *Vivendi v. Argentina (I)*, "*events that take place before that date* [the request for arbitration] *may affect jurisdiction; events that take place after that date do not*".[235]

332. As determined above, at the times when Claimant filed the RFA, when the RFA was registered by ICSID (and even at the time of the Notice of Intent), Neustar owned and/or

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232 This position has been accepted in many ICSID cases. See, e.g., *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 §§ 84, 86 (RL-037); *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011 §§ 269, 270 and 339 (RL-038); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005 § 60 (RL-042); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 § 256 (RL-043); *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 § 267 (RL-046)

233 *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 § 31 (RL-041)

234 See Rejoinder § 122

235 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005 § 61 (RL-042)

controlled its investment in Colombia made under the TPA. Thus, Claimant had standing when it initiated this Arbitration.

333. Respondent further submits in a footnote that if this Tribunal were to find that Claimant had standing, "*such standing is necessarily limited*".[236] However, in making this argument Respondent relies on *Mobil v. Argentine Republic*, in which the tribunal determined that the "*transfer from an investor to a third party had the effect that the initial investor had lost its standing to claim for possible damage or harm affecting the investment after that date*".[237] The tribunal in that case found that the claimant lost its standing to claim for "*damages or harm affecting that investment after that date*", and not that the claimant had lost legal standing to bring its claims to arbitration. For these reasons, the Tribunal does not consider this case to be helpful to Respondent's position.

334. For the above reasons, the Tribunal rejects Respondent's jurisdictional objection with respect to Claimant's legal standing. Neustar was the owner of and controlled .Co Internet at the time the RFA was filed with and registered by ICSID.

E. DID CLAIMANT COMMIT AN ABUSE OF PROCESS BY BRINGING FORWARD THESE PROCEEDINGS?

(1) The Parties' Positions

a. Respondent's Position

335. Respondent contends that Claimant "*tried to fabricate the appearance of standing by having the recourse to arbitration at a time when the dispute had not crystallised in light of its impending sale of .CO Internet to GoDaddy, and keeping deliberately silent on this sale*".[238] This is an abuse of process because Claimant artificially tried to create standing "*to sue in the wake of its sale of .Co Internet to GoDaddy*".[239] Claimant also sought to use these proceedings, as well as the related Consejo de Estado proceedings, to exert undue pressure on the Republic of Colombia and MinTIC not to launch a tender process. Further,

236 Counter-Memorial § 263, fn. 413, citing Exhibit RL-046
237 Counter-Memorial § 413, fn. 413, citing Exhibit RL-046
238 Respondent's PHB § 52 ; Tr. Day 1 [ENG] 153:10-22
239 Counter-Memorial § 265

Claimant's failure to produce the relevant documents with respect to the sale of .Co Internet to GoDaddy and the timing of the filing of the RFA confirms that Claimant acted in bad faith and committed an abuse of process when it initiated these proceedings. Accordingly, the Tribunal should decline jurisdiction over Claimant's claims, since the issue of abuse of process also affects a tribunal's jurisdiction as well.

336. On 24 January 2020, Neustar completed the transfer of .Co Internet to Registry Services LLC, and notified MinTIC on 24 February 2020. On 6 March 2020, after Colombia raised before ICSID observations regarding this transfer and was seeking clarifications, Neustar explained to ICSID that the Registry Services transfer was just to satisfy the tender requirements, and made no mention of the GoDaddy sale.[240]

337. Respondent submits that determining whether there has been an abuse of process involves assessment of whether Claimant's restructuring took place at a time when the dispute was foreseeable or a reasonable prospect.[241] Respondent contends that at the time Claimant filed the RFA or its registration with ICSID, the dispute had not yet crystallized, i.e. Claimant had not incurred anything more than speculative damages, the 2009 Contract was still in force and the 2020 Tender Process was ongoing.

338. Respondent argues that these actions are an abuse of process because Claimant engaged in a particular conduct to gain access to jurisdiction. According to Respondent, the following several factors support this conclusion.[242]

339. "*Neustar and GoDaddy started negotiating the sale of the registry business, including .CO Internet, at least one year prior to the announcement of the sale on 6 April 2020*".[243] Although the deal between Neustar and GoDaddy had in practice already been sealed before Neustar filed its RFA, it was kept secret abusively to maintain the appears of jurisdiction *ratione personae*. Neustar deliberately kept silent about this transaction despite having had a number of opportunities to disclose it.

240 Tr. Day 1 [ENG] 154:19-155:11
241 Counter-Memorial §§ 273-276
242 Counter-Memorial §§ 277, 278
243 Rejoinder § 134

340. Claimant did not deny nor did it submit evidence showing that no sale was agreed prior to 6 April 2020. Rather, Claimant produced just four heavily redacted documents which contained no relevant information about the negotiations at all. In light of Neustar's failure to comply with its disclosure obligations, and in line with POs 1, 2 and 3 as well as the IBA Guidelines, Respondent requests that the Tribunal draw adverse inferences to the effect that had these documents been produced, they would have shown that the main terms of the sale contract had been agreed prior to the filing of the RFA on 23 December 2019 and/or (even more importantly) prior to its registration of this Arbitration by ICSID on 9 March 2020. This shows that Neustar was delaying formal finalisation and announcement of the sale .Co Internet to GoDaddy simply to preserve artificial standing in this Arbitration.

341. Respondent further contends that Claimant sought to use the present proceedings to exert undue pressure on Colombia for the renewal of the 2009 Contract and/or the awarding of the 2020 Contract, as well as to get compensation for Respondent's alleged failure to renew the 2009 Contract. This was despite Claimant knowing that it had no entitlement to renew the Contract and also because it had sold .Co Internet to GoDaddy.

342. In support of its allegation that Claimant committed an abuse of process Respondent relies on the following factual elements:

a. Claimant started to threaten arbitration in June 2019; when it filed its Notice of Intent "*the dispute was far from having crystallized*".[244] The purpose of this approach was to disrupt preparation of the 2020 Tender Process and force MinTIC to renew the 2009 Contract.

b. Claimant continued the Consejo de Estado proceedings in parallel to this ICSID Arbitration, thereby multiplying proceedings for the resolution of the same dispute to increase its chances of success.

c. The variation of Claimant's claims and requests for relief, and Claimant's changing position on whether the renewal of the agreement was contractually and/or legally

[244] Counter-Memorial § 286; Rejoinder § 142

compulsory or not, are indications of bad faith regarding Neustar's initiation of the present Arbitration.

d. The fact that Claimant is still pursuing this Arbitration although .Co Internet was awarded the 2020 Contract also shows bad faith.

b. Claimant's Position

343. Claimant rejects Respondent's abuse of process allegations and the facts on which it is based, and argues that these are not supported by legal principles. Claimant denies that the RFA was filed prematurely to secure standing, and that it used this Arbitration to exert undue pressure on Respondent. To this end, Claimant also submits that Respondent bears, and has not met, the high burden of proof to demonstrate an abuse of process, giving rise to very exceptional circumstances.[245] In any event, Claimant contends these allegations if proven may affect the question of admissibility, not jurisdiction.

344. Claimant contends that the abuse of process doctrine does not apply in this dispute because there is no legal support for Respondent's position. The abuse of process doctrine has been considered in two circumstances in investment arbitration cases: (a) where a claimant has engaged in corporate restructuring to *gain* jurisdiction after a dispute between the parties has become foreseeable; and (b) where a vertically integrated claimant seeks to bring the same claim under multiple investment treaties using different entities in the corporate chain.[246] Neither of these two situations is present in this case. "*[P]reserving rights is not an abuse of process but rather a necessary and prudential step for any entity or person"*.[247]

345. Claimant rejects Respondent's assertion that because the dispute between the Parties was "*foreseeable*" Claimant used a "*scheme to secure jurisdiction*". The dispute between the Parties arose (at the latest) on the RFA's filing date. At the time the proceedings were instituted, Claimant was a protected investor under the TPA, and subsequent corporate transfers did not affect this standing. Claimant therefore asks why would a claimant who

245 Claimant's PHB § 17
246 Reply § 145
247 Reply § 143

already had standing to bring a claim under the TPA engage in conduct to gain jurisdiction?[248]

346. Claimant submits that Respondent has failed to prove that Neustar's sale of .Co Internet to GoDaddy, after this Arbitration had commenced, constitutes an abuse of process.

347. Claimant states negotiations for the sale to GoDaddy were ongoing when the RFA was filed and registered with ICSID. There was no guarantee that the deal would close. Therefore, Claimant did not publicly disclose the potential sale of .Co Internet. Had Claimant disclosed the negotiations with GoDaddy it could have violated the US Securities and Exchange Commission's rules and regulations regarding disclosure of "*material non-public information*".[249] Further, the transaction encompassed a number of interests, and not just the sale of .Co Internet; this is evident on the face of the UPA between Neustar and GoDaddy. The finalization of the UPA and its subsequent announcement was solely based on commercial considerations and was not linked to this Arbitration.

348. Claimant contends that Respondent has failed to show that the alleged standard of "*using proceedings for purposes other than genuine dispute resolution*" forms part of the abuse of rights doctrine and, even if it did, whether it exists on the facts of this case. Claimant affirms that its claims are not designed to exert undue pressure on Respondent to renew the 2009 Contract and/or award the 2020 Contract to .Co Internet.

349. Claimant made several attempts to avoid this situation by trying to convince Respondent to abide by its obligations. The trigger letter was meant to notify the relevant Colombian ministries of the existence of a dispute, identifying the legal basis of the dispute, and seeking consultations; not to disrupt the 2020 Tender process. Equally, the Notice of Intent and the RFA could not have disrupted the 2020 Tender Process because at that time, the 2020 Tender Process had not even been formally announced. Further, the RFA was filed on 23 December 2019 following a 90-day period requirement under Article 10.16(2) TPA

248 Tr. Day 1 [ENG] 77:5-1413-16

249 Reply § 156; Claimant's PHB § 19

which expired on 15 December 2019 (two days after the announcement of the 2020 Tender Process on 13 December 2019).

350. Claimant also submits that its interim measures request was filed with the sole purpose of protecting its investment while the dispute between the Parties was being resolved by arbitration under the TPA. Respondent has failed to show how this proceeding was to multiply proceedings to increase Claimant's chances of success and was "*abusive*".[250]

351. Respondent's novel claim that Claimant has interfered with genuine dispute resolution has no basis, the examples referred to are inapposite to the circumstances of this case.[251]

352. Finally, Claimant states there is no support for Respondent's allegations of bad faith because Claimant is not "*using*" the present proceedings for any purpose but to remedy the international wrongs committed by Respondent.[252] Nothing prevents a party from modifying its arguments during the proceedings, particularly when this is caused by Respondent's own wrongful conduct.[253] Further, the 2020 Concession Contract awarded to .Co Internet is for a shorter period and on less advantageous terms than the 2009 Concession and does not compensate for the many breaches of the TPA conducted by Respondent and suffered by Claimant.

(2) The Tribunal's Analysis

353. The Tribunal is not persuaded that Claimant's actions amount to bad faith and/or an abuse of process when it initiated this Arbitration and continued the various proceedings in this context as alleged by Respondent.

354. The Tribunal considers below (a) the meaning of abuse of process relevant to this Arbitration, and whether (b) the alleged non-crystallization of the dispute, (c) the alleged use of undue pressure and (d) the alleged existence of bad faith in pursuing this Arbitration, if proven, amounted to an abuse of process by Neustar.

250 Reply § 167
251 Claimant's PHB § 20
252 Reply § 169
253 Reply § 168, citing Exhibit CL-108; Exhibit CL-023

a. Abuse of process

355. Professor Gaillard stated that while the abuse of process doctrine "*does not violate any hard and fast legal rule and cannot be tackled by the application of classic legal tools*",[254] it can serve multiple purposes contrary to the genuine exercise of rights by a claimant. This includes "*artificially securing international jurisdiction, delaying the proceedings, and frivolous purposes where the party wants to gain a benefit inconsistent with the purpose of the procedure*."[255] It is in this context that Respondent contends that the doctrine of abuse of process is applicable in this dispute.

356. Claimant does not dispute that the abuse of process doctrine is a "*well-established principle of public international law that prohibits the exercise of a procedural right in contravention of the purpose for which it was established*".[256] However, Claimant disputes the application of this doctrine as alleged here arguing that no such behaviour has taken place.

357. In the Tribunal's view, for a certain conduct to amount to an abuse of process, it must be done for the purpose of "*artificially gaining jurisdiction*" and/or where a party seeks to "*gain a benefit inconsistent with the purpose of the procedure*". The question in this case is whether Claimant's actions in bringing this Arbitration come within this definition of abuse of process and if so, what is the effect on this Arbitration.

b. Crystallization of dispute

358. The Tribunal has discussed crystallization previously at §§ 254-258 above and concluded that the dispute between the Parties was in existence prior to and at the latest when the RFA was filed. The Tribunal endorses and confirms those conclusions here.

359. For good order the Tribunal confirms that the essential nature of the dispute in this Arbitration was known by both Parties before this Arbitration commenced. In particular, the issues of disagreement between the Parties were set out in the Notice of Intent sent to

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254 E. Gaillard, 'Abuse of Process in International Arbitration', ICSID Review - Foreign Investment Law Journal 32(1) (2017), p. 2 (RL-056)

255 Counter-Memorial § 270 relying on E. Gaillard, 'Abuse of Process in International Arbitration', ICSID Review-Foreign Investment Law Journal 32(1) (2017), pp. 3, 6 and 10 (RL-056)

256 Reply § 144; Counter Memorial § 266

Respondent, i.e. whether .Co Internet had a right to an automatic extension of the Concession for a further period on similar terms to the 2009 Contract, and whether Respondent was entitled to hold another tender to decide on the entity to maintain and manage the **.co domain**.

360. Further, the Tribunal is not persuaded that Claimant used a "*scheme to secure jurisdiction*" by virtue of its corporate restructuring. At the time the RFA was filed, Claimant was a protected investor under the TPA with any rights due thereunder. There was a legal dispute between the Parties arising out of that investment, as required under the TPA. Claimant's subsequent corporate restructuring when it sold .Co Internet to GoDaddy did not change any of the rights existing at the time the RFA and the claim was filed. In any event, Respondent has failed to provide evidence showing that the sole or predominant purpose of Claimant's internal restructuring was to gain access to arbitration.[257] In fact, Respondent argues the opposite in this Arbitration, i.e. that by selling .Co Internet to GoDaddy, Claimant lost standing in this Arbitration since it no longer "*owned or controlled*" the investment in this case.[258]

c. Undue pressure

361. Respondent contends that Claimant used the present proceedings and the Consejo de Estado proceedings to exert undue pressure on Respondent and MinTIC to renew the 2009 Contract for a further period.

362. The Tribunal has concluded, after careful consideration and review of the relevant facts and evidence in the record, that Claimant did not exert undue pressure on Respondent to achieve a renewal of the Contract and not to proceed with a new tender process.

363. First, the correspondence exchanged between the Parties prior to the Claimant's issuance of the Notice of Intent, as summarised at § 255 of this Award, shows clearly that there was a disagreement concerning .Co Internet's right to an extension of the 2009 Contract. The

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257 In this context it is necessary to show that the timing of the transaction was not done in good faith and was with the sole purpose of gaining access to jurisdiction. See: *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 § 334 (RL-107)

258 Counter-Memorial § 263

Tribunal is not persuaded that Claimant's efforts to resolve this dispute through correspondence and negotiation, and then resorting to the dispute resolution mechanism provided for in the TPA, was unreasonable. The purpose of the Notice of Intent was to notify the relevant Colombian government officials of the existence of a dispute, detailing the legal and factual circumstances giving rise to it and to seek consultations. As already confirmed at § 258 above, the Notice of Intent satisfied this criteria as required under Article 10.16(2) of the TPA.

364. Further, both the 2009 Contract and the TPA contain dispute resolution clauses setting out the steps that need to be followed, depending on the nature of the dispute between the Parties which could be resolved amicably. This is exactly what Claimant did and the Tribunal has seen no evidence to the contrary.

365. There is also no evidence that the Notice of Intent and Claimant's initiation of this Arbitration hindered the 2020 Tender Process in any way. As a matter of fact, the Tribunal notes that the Notice of Intent was sent on 13 September 2019 and the RFA was filed 23 December 2019, "*at a time when the 2020 Tender Process had just commenced*".[259] In fact, despite Claimant's RFA, "*MinTIC continued its transparent consultation process with all interested stakeholders,*"[260] and organized a public hearing on 18 December 2019 during which interested parties could comment and raise questions on the 2020 Terms of Reference.[261]

366. The Tribunal is also not persuaded by Respondent's contention that MinTIC was "*forced*" to award the 2020 Contract to Claimant as alleged by Respondent.[262] This decision was taken following the selection of a shortlist of three applicants who had responded to the tender, submissions received from and meetings with the three selected candidates, which included .Co Internet. It was at the end of this process that MinTIC decided to award the 2020 Contract again to .Co Internet on 3 April 2020.

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259 Counter-Memorial §§ 128, 287

260 Counter-Memorial § 130

261 Counter-Memorial §§ 131-133; see First Witness Statement of Luisa Fernanda Trujillo Bernal § 27 (RWS-03)

262 Rejoinder § 18

367. The Tribunal also does not consider that Claimant exercised undue pressure on Respondent by initiating the present proceedings in parallel to the Consejo de Estado proceedings. The purpose of the Consejo de Estado proceedings was to obtain an order to preclude Respondent from issuing the tender for the next concession period following the termination of the 2009 Contract because Claimant believed it was legally entitled to an extension of the Contract. By initiating those proceedings on 18 September 2019, after the Notice of Intent had already been filed, Claimant sought suspension of the Respondent's actions until the actual dispute between the Parties was resolved in this Arbitration. As stated at § 280 above, the Tribunal has concluded that Claimant did not breach the TPA by starting and continuing the Consejo de Estado proceedings alongside the present Arbitration. Claimant simply exercised the legal and contractual rights to which it was entitled.

368. Finally, the Tribunal is also not persuaded that the fact that Claimant continued this Arbitration after .Co Internet was awarded the 2020 Contract constitutes undue pressure, bad faith or abuse of process. As stated above, the 2020 Contract was awarded only on 3 April 2020, i.e. almost a year after it was clear that there was a dispute between the Parties regarding the precise terms of the 2009 Contract with respect to its extension, a few months after the Notice of Intent and the RFA were filed. Thus, as determined elsewhere (see § 258 above), the Tribunal considers that a genuine dispute did exist between the Parties at that time.

369. Further, the Tribunal also accepts Claimant's submission that it continued this Arbitration even after it was awarded the 2020 Concession Contract because that Contract was awarded for a lesser time and on less advantageous terms than the 2009 Contract. Claimant contends this constituted a breach of Respondent's obligations both under the TPA and the 2009 Contract. This issue is discussed and determined in the merits section of this Award: see §VI below. For the purposes of this Tribunal's jurisdiction, what suffices here is that there is a genuine dispute between the Parties concerning alleged violations of the TPA. This has been prima facie satisfied. Accordingly, the Tribunal is not persuaded that Claimant is using the present proceedings to exert undue pressure on Respondent.

370. For all these reasons, the Tribunal has concluded there was no undue pressure exercised by Claimant on MinTIC.

d. Bad Faith

371. Respondent submits that the abuse of process is "*an application of the cardinal principle of good faith in the exercise of rights*" which is a "*particular feature of the abuse of rights principle*".[263]

372. The examples relied on by Respondent with respect to Claimant's actions, do not, in the Tribunal's view, show Claimant acted in bad faith.

373. Specifically, as stated at § 257 above, a party is entitled to amend its pleadings, change its position and/or modify its arguments during proceedings subject to the applicable rules and until a certain time in the proceedings. The ultimate time for changes would generally be decided by the tribunal.

374. The record shows that at the time the RFA was filed on 23 December 2019, and registered on 2 March 2020, the .Co Internet sale to GoDaddy had not been concluded; the negotiations were still on-going. This is evident from the fact that the UPA was concluded on 3 April 2020.[264] Claimant announced the conclusion of the deal three days after that, i.e. on 6 April 2020.[265] The Tribunal notes that this announcement was made after the RFA was already registered with ICSID and the 2020 Contract was awarded to .Co Internet on 22 May 2020.

375. The Tribunal has not found this timing to show any act of bad faith or abuse of process on part of Claimant for the following reasons. First, commercial negotiations relating to the sale of a business are confidential until concluded, especially if the said transactions involve a number of other interests. Second, transactions of this kind are never certain until the agreement is executed. There was no certainty as to whether the GoDaddy sale would go ahead at all. Disclosing it prematurely could have jeopardized the transaction and also

263 Counter-Memorial § 266

264 See Unit Purchase Agreement between Neustar, Inc. as Seller, and GoDaddy Inc. as Buyer dated as of 3 April 2020 (CONFIDENTIAL) (C-0126)

265 Counter-Memorial § 281

violated the US Securities and Exchange Commission's rules and regulations regarding disclosure of "*material non-public information*".[266] Third, and as evidenced by the terms of the UPA, this transaction was not only the sale of .Co Internet to GoDaddy; it also involved the sale of other rights and other parties.[267]

376. Accordingly, the Tribunal dismisses this jurisdictional objection. As the Tribunal has concluded there was no abuse of process, the issues of admissibility and jurisdiction is moot.

F. ARE CLAIMANT'S CLAIMS MERE CONTRACTUAL CLAIMS UNDER THE 2009 CONTRACT?

(1) The Parties' Positions

a. Respondent's Position

377. Respondent submits that the Tribunal's jurisdiction is limited to treaty claims as Claimant initiated this Arbitration pursuant to Article 10.16(1) TPA. Claimant's claims are essentially contract claims, stemming from the 2009 Contract. Respondent argues the Tribunal lacks jurisdiction over them.

378. In particular, Respondent argues that the "*essential basis*" for the claims relies on the interpretation of Article 4 of the 2009 Contract. There are two questions for the Tribunal: (i) whether the renewal of the 2009 Contract was a mere possibility open to negotiation between the Parties; and/or (ii) an obligation upon MinTIC and an absolute right of Neustar and .Co Internet to renew the 2009 Contract. Claimant's alleged treaty claims are therefore all systematically based on MinTIC's decision not to renew the 2009 Contract.

379. Respondent states that the decision not to renegotiate and renew the 2009 Contract was made by MinTIC in the exercise of its contractual prerogatives. Article 4 of the 2009 Contract explicitly provided that that the Contract "*may*" be renewed by the parties to the Contract. Previous tribunals tasked with this question have sought to determine the essential basis of the claim in order to decide if the claim is a treaty or contract-based claim;

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266 See, e.g., 17 C.F.R. § 240.10b5-1, "Trading 'on the basis of' material non-public information in insider trading cases" (C-0131)

267 C-0126

in this context tribunals have considered whether the State acted in its sovereign or purely commercial capacity.

380. To this end, Respondent affirms that the **.co domain** is a public asset which has been managed by MinTIC; over the years Colombia has adopted several laws, regulations and other administrative acts to regulate the **.co domain**. However, Respondent argues that Claimant has failed to show, even *prima facie*, that Colombia interfered with its alleged right to renewal under the 2009 Contract through sovereign acts which were contrary to the 2009 Contract. Hence, Claimant has failed to show that MinTIC acted in a manner different to that of a private party by deciding not to negotiate a renewal of the 2009 Contract with its counterparty, i.e. .Co Internet.

381. Respondent also submits that MinTIC and .Co Internet had agreed an arbitration clause at Article 19 of the 2009 Contract, explicitly providing for all "*disputes arising between the parties relating to the signature, execution, development, termination, liquidation, and interpretation of the contract*" to be determined by arbitration. Respondent contends that the contractually agreed dispute resolution mechanism is the appropriate forum for addressing the question whether MinTIC had an obligation to negotiate and renew the 2009 Contract; not the present ICSID proceedings.

382. Accordingly, Respondent states that Claimant's claims in this Arbitration stem from an issue of contractual interpretation of the 2009 Contract. They therefore fall outside the Tribunal's jurisdiction.

b. Claimant's Position

383. Claimant rejects this jurisdictional objection: it affirms its claims are treaty claims, not contract based claims. Claimant does not seek a remedy for a breach of the 2009 Contract by MinTIC. Rather, Neustar complains of specific governmental actions, measures, and wrongdoings that are specific to the "*government and are not contractual in nature*".[268] Claimant submits that the Tribunal needs to be satisfied that Claimant's claims are *prima*

[268] Memorial § 176; Reply § 172

facie capable of constituting a violation of Respondent's treaty obligations and are not solely contractual in nature.

384. Claimant accepts there is a difference between treaty claims and purely contractual claims. However, tribunals have repeatedly recognized that an investment based on a contract may nonetheless give rise to treaty-based claims. In determining whether a claim is a contract claim or a claim under a treaty, Claimant states that tribunals have considered whether the respondent State had acted in its sovereign capacity and the nature and formulation of the claims.

385. Claimant contends that its claims in this Arbitration meet the criteria of treaty claims for the following reasons.[269] First, Respondent acted in its sovereign capacity, not in its commercial capacity. The legal framework for the regulation of the **.co domain** provides clearly that this is a "public asset" to be regulated by the State.[270] Further, the Respondent Government used its public power to interfere with the extension of the 2009 Contract (via the intervention of the President of Colombia)[271] which resulted in MinTIC's refusal to negotiate the extension of the 2009 Contract. Further, delays to the negotiations for the extension of the 2009 Contract because presidential elections were set to take place also shows that Respondent's actions were guided by political, not commercial, considerations.

386. Second, Claimant contends that the TPA, not the 2009 Contract, is the legal basis for its claims in this Arbitration. Claimant has identified specific acts by Respondent which it contends constitute exercises of public power that breached the Respondent's treaty obligations. These include Articles 10.3 (national treatment), 10.4 (most-favored-nation treatment) and 10.5 (minimum standard of treatment) of the TPA, and customary international law. The fact that those acts relate to MinTIC's decision not to renew the 2009 Contract, and thus to the terms of the 2009 Contract, does not convert those acts into ordinary commercial behaviour outside the scope of this Tribunal's jurisdiction.

269 Reply §§ 176-179
270 Claimant's PHB § 22
271 Memorial § 11; Claimant's PHB § 22

387. Third, Claimant submits that investment tribunals have consistently considered that the existence of a contractual remedy does not deprive a tribunal of jurisdiction over treaty claims, nor does it preclude a competent tribunal from interpreting the contract when determining whether a treaty breach has occurred.

(2) The Tribunal's Analysis

388. Both Parties appear to agree that this Tribunal's jurisdiction is limited to treaty claims only, and any purely contractual claims would fall outside its jurisdiction.[272] This is further reinforced by the fact that Claimant initiated this Arbitration pursuant to Article 10.16 of the TPA arguing that there is an "investment dispute" between the Parties because Respondent has breached certain obligations under Section A of the TPA which relates to the substantive protections afforded to an investment in Colombia by the TPA.

a. Factors for determining whether a claim is a treaty claim or a contract claim

389. Accordingly, the Tribunal's jurisdiction in the present proceedings is limited to the alleged TPA violations raised by Claimant. This is because, as stated by previous tribunals, and in particular *Abaclat et al. v. Argentine Republic*, investment treaties are "*not meant to correct or replace contractual remedies, and in particular [are] not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims*".[273] This was also confirmed in *Joy Mining Machinery Limited v. Egypt*, where the tribunal found that "*the absence of a Treaty based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction*".[274]

390. For the purposes of establishing jurisdiction, Claimant must show that that the claims brought in this Arbitration are capable of constituting treaty breaches and are not mere

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272 Reply §§ 175-177; Counter-Memorial § 291

273 *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 § 316 (RL-057). This arbitration concerned claims by Italian holders of Argentine bonds which were devalued and repayment delayed by the Argentine Government. The pertinent question was whether the claims were contractual under the terms of the bonds, or under the BIT between the Republic of Italy and the Republic of Argentina 1990 under which the arbitration was brought.

274 *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 § 82 (CL-006). See also E*mmis International Holding et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 § 199 (RL-071)

contractual breaches. This follows the approach has been followed in numerous cases. For example, in *Plama v. Bulgaria*, the tribunal held that "'*if on the facts alleged by the Claimant, the Respondent's actions might violate the [BIT], then the Tribunal has jurisdiction to determine exactly what the facts are and see whether they do sustain a violation of that Treaty*".[275] Also, in *Bayindir v. Pakistan*, the tribunal stated that its "*first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to*".[276]

391. In this regard, the Tribunal accepts Respondent's submission that determining whether a particular claim is a treaty claim or a contract claim requires analysis of the "*real essence*" of the claim; alleging a violation of a standard enshrined in the TPA does not in itself demonstrate the existence of a treaty claim.

392. The Tribunal also accepts as relevant the generally accepted view that an investment based on a contract may give rise to treaty-based claims.[277] As stated by the *ad hoc* annulment committee in *Vivendi v. Argentina* (I):[278]

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275 See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, §§ 195-197 (CL-010) in which the tribunal discussed the following cases: *Methanex v. USA*, *SGS v. Philippines*, *Salini v. Jordan*, *Siemens v. Argentina*, *Plama v. Bulgaria*

276 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, n. 33 §§ 195-197 (CL-010)

277 See e.g. See *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 § 258 (CL-091); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005 §§ 88, 89 (CL-101); *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 § 318 (RL-057); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 §§ 557-559 (CL-009); *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 § 93 (CL-100); *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016 § 255 (CL-119); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 § 247 (CL-120); *CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award, 24 October 2019 § 221 (CL-121)

278 Reply § 176 referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 §§ 95-115 (RL-067)

> *A state may breach a treaty without breaching a contract, and vice versa … The point is made clear in Article 3 of the ILC Articles, which is entitled "Characterization of an act of a State as internationally wrongful":*
>
> *The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*
>
> *In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law— in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.*

393. Further, the tribunal in *Malicorp v. Egypt* expressed the view that:

> *In order for a breach of contract to serve as the basis for jurisdiction of a tribunal in an investment arbitration, such breach must at the same time, and for reasons inherent in the investment protection treaty itself, amount to a violation of that treaty, one that could not be resolved by using the ordinary procedure [set out in the contract]".*[279]

394. The Parties in this case agree that in distinguishing whether the breach of the treaty invoked by the investor involves an examination of an underlying State contract, tribunals have given particular attention as to whether the State has acted in its sovereign capacity (*iure imperii*), or in a purely commercial capacity akin to that of a private party (*iure gestionis*).[280] As stated by the tribunal in *Tulip v. Turkey*:

> *… determination of whether a claim arises under a BIT involves an inquiry into the "essential basis" or "normative source" of that particular claim. In order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of puissance publique.*[281]

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279 *Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011 § 103.c (RL-074)

280 Reply §§ 177, 178; Rejoinder § 152

281 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Türkiye*, ICSID Case No. ARB/11/28, Award, 10 March 2014 § 354 (CL-123). See also *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 § 260 (CL-091) ("I*n fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of*

395. This was also confirmed by the tribunal in *Abaclat* which stated:[282]

> *A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State. This applies where the circumstances and/or the behavior of the Host State appear to derive from its exercise of sovereign State power. Whilst the exercise of such power may have an impact on the contract and its equilibrium, its origin and nature are totally foreign to the contract.*

396. In that case, the tribunal determined that the investor's claims were treaty claims because it found that Argentina did not simply fail to perform its payment obligations under the bonds, but it actually "*intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general*…"[283]

397. Similarly, in *Toto Costruzioni v. Lebanon*, the tribunal held:

> *When the State acts in the context of the performance of the contract as a "puissance publique," a violation of the Contract would also constitute a violation of the Treaty, and the Tribunal will have jurisdiction for disputes arising from such violations. When the State acts as an ordinary employer, the contractual jurisdiction clause will be fully operative, and the Tribunal will have no jurisdiction.*[284]

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the Host State acting in breach of the obligations it had assumed under the treaty".); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 § 72 (CL-006) ("*The Tribunal is mindful that any answer to this question must be case specific as every contract and many treaties are different. However, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved*")

282 *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 §§ 318-326 (RL-057)

283 Ibid

284 *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 § 215 (CL-089). This has been confirmed by other tribunals as well. See e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 §§314-15 ("*a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign*'"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Türkiye*, ICSID Case No. ARB/11/28, Award, 10 March 2014 §354 (CL-123) ("I*n order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of puissance publique*"); *Muhammet Çap & Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 §§ 707-709 (CL-125) ("*it is not enough to establish that there was an intervention from the State organs. For a treaty claim to exist, the action or omission attributable to the State must be characterized as a violation of an international obligation binding upon the State concerned*")

398. Accordingly, based on the recognized principles set out above, and for the purpose of its analysis in this case, the Tribunal has considered the "*real essence*" of Claimant's claims by taking into account the following factors: (a) the formulation and nature of the claim, and (b) whether MinTIC acted in its sovereign capacity (or *puissance publique*) when it decided not to extend the 2009 Contract. Within this analysis, the Tribunal has also considered the nature of Neustar's claims which formed the basis of the Notice of Intent and the RFA and are set out in fuller detail in the Parties' written submissions. Therefore, to determine its jurisdiction the Tribunal has looked at the substantive factual and legal issues relevant to this jurisdictional objection.

(i) Formulation and Nature of the Claim

399. The Tribunal is not persuaded that the "*real essence*" of Claimant's claims is of a contractual nature. It is true that Claimant's main argument revolves around its alleged contractual right to an almost "automatic" extension of the 2009 Contract. The Tribunal also agrees that determining whether Claimant had the right to an extension of the 2009 Contract requires interpretation of Article 4 of the 2009 Contract. However, Claimant's claims go beyond this. In particular, Claimant contends that the President of Colombia and his advisors "*announced, demanded, and pushed through the tender, notwithstanding the purported independent authority of MinTIC, the party to the Concession*".[285] Further, Claimant contends that the "*actions of the government*" violated the minimum standard of treatment, the national treatment and the most-favoured nation protections to which it was entitled under the TPA.

400. The Tribunal considers that the decision not to extend the 2009 Contract affected Claimant's investment in Colombia as a whole, not just its contractual rights. This is for the following reasons.

401. The 2009 Contract is not a simple commercial contract. Its main subject matter is the **.co domain**, which is a public asset regulated by the State.[286] In fact, MinTIC issued Resolution 600 of 7 May 2002 "*on partial regulation of administration of domain name .co*",

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285 Memorial § 176

286 Counter-Memorial § 40; Reply § 180

recognizing the **.co domain** as a "*public asset in the telecommunication sector, the administration, maintenance and development of which shall be planned, regulated and controlled by the State*".[287] That Resolution also provided that the "*administration of the .co domain could either be handled directly by the State, or through qualified third parties under supervision of the State*".[288] Further, on 29 July 2006, the State adopted Law 1065 on the administration of the **.co domain**, declaring it to be a "*public asset*" and vesting the administration rights of the **.co domain** with MinTIC.[289] This was confirmed by MinTIC when it issued Resolution 284 of 2008 formally adopting a "*total exclusive outsourcing model*" according to which "*the policies [would] be defined by the Ministry of Communications and the functions of registry and registrar [would] be outsourced through an objective selection process*."[290]

402. In 2008, following the recommendations of the Advisory Committee for the implementation of a framework providing for an "*outsourcing model*", Resolution 1652 of 2008 was adopted. It provided for the conclusion of a contract between MinTIC and the selected third-party to administer the domain and pay MinTIC a percentage of the income generated by the sale of domain names.[291] A year later, on 30 July 2009, the definition of the legal framework for the **.co domain** concluded with the enactment of Law 1341 of 2009, which clarified and confirmed MinTIC's policy-setting role in respect of the **.co domain**.

403. In the Tribunal's view, although Claimant had to conclude a contract with Respondent for the administration and sale of the **.co domain**, at the end of the day, the domain remained a public asset, owned and regulated exclusively by MinTIC on behalf of Respondent. This required MinTIC to contract for the management of the **.co domain** following the specific procedure of Colombian law.

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287 Resolution 600 of 7 May 2002 (original version), Article 1 (R-0020). See also, Resolution 600 of 7 May 2002 (ITU translation) Article 1 (C-0008)

288 Counter-Memorial § 40 referring to Resolution 600 of 7 May 2002 (original version) Article 2 (R-0020). See also, Resolution 600 of 7 May 2002 (ITU translation) Article 2 (C-0008)

289 Law 1065 of 29 July 2006, Art. 1 § 1 (C-0009)

290 Resolution 284 of 21 February 2008 (original version) Art. 1 (R-0001)

291 Resolution 1652 of 30 July 2008 (original version) Art. 10.5 (R-0025). See also Resolution 284 of 2008 (C-0011)

404. On 19 May 2009, MinTIC began the process of selecting the operator for the **.co domain**, by officially opening the tender on 24 June 2009.[292] A hearing was held for all potential bidders and interested parties.[293] .Co Internet was one of the bidders. At the time, it was owned jointly by Arcelandia SA and Neustar (respectively holding 99% and 1% of .Co Internet's shares).[294] After further evaluations took place, on 19 August 2009, MinTIC announced that .Co Internet had been selected as the successful tenderer and would be the new administrator of the .co top-level domain.[295] The Concession State Contract No. 19 of 2009 was signed on 3 September 2009 for the "*promotion, administration, technical operation and maintenance of the .CO domain and to provide such additional services as required by the Concession*" ("the 2009 Contract").[296] The 2009 Contract entered into effect on 7 February 2010, after the official transition of the **.co domain** from the University to .Co Internet was announced by MinTIC on 20 January 2010.[297]

405. Further, the evidence in the record shows that Neustar's investment in Colombia depended on the 2009 Contract. In particular, Neustar made substantial efforts to develop the **.co domain** by promoting it in various ways and entering new markets.[298] The success was also recorded by MinTIC itself.[299] Respondent confirms that due to .Co Internet's efforts to market the **.co domain** as an alternative to .com, and "*due* […] *to Colombia's decision to allow the registration of .co domains all around the world*", the **.co domain** "*grew exponentially during the first few years of the 2009 Contract, from 27,000 domains in February 2011 to over 1.5 million domains by early 2014*".[300] The record also shows that the promotion, administration and operation of the **.co domain** resulted in .Co Internet

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292 2009 Terms of Reference (C-0014)

293 Resolution No. 002121 of 13 August of 2009 (C-0015)

294 Neustar's certification for .Co Internet's 2008 offer pp. 14-15 (C-0016)

295 See IANA, Redelegation of the .CO domain representing Colombia to .Co Internet SAS, pp. 2-4 (C-0123)

296 Memorial § 46

297 .CO, Final Transition of .CO ccTLD to .Co Internet S.A.S. Underway, 20 January 2010 (C-0018)

298 See Submission from .Co Internet to MinTIC of 27 December 2018, Submission No. 955263 (C-0030). See, e.g., Elliot Silver, "First Look: .CO Billboard in Times Square", 23 February 2011, DOMAIN INVESTING (C-0023); Decision of the Consejo de Estado of 12 march 2020 on emergency precautionary measures (C-0115); Konstantinos Zournas, .CO domains get approved in China, 28 June 2018 (C-0116)

299 See MinTIC, Registered .CO Domains (Accumulated by Year) at MinTIC, Revenue Generated for the Colombian Government by Quarter: Years 2010 to 2020 (Contract 019/2009) (C-0120); MinTIC, Minutes of Advisory Committee Meeting dated 13 June 2018 p. 3 (C-0026)

300 Counter-Memorial § 71. See MinTIC, Action plan - .co domain registry operator selection process, November 2019, p. 8 (R-0028)

receiving income of approximately "*USD 87.9 million between 2010 and 2014*", and MinTIC receiving a royalty of approximately USD 6.6 million during the same period (as agreed under the Contract). [301]

406. In 2013 when Neustar sought to acquire Arcelandia's shareholding of .Co Internet it required MinTIC's authorization. This was given on 3 February 2013.[302] Consequently, on 3 February 2014, MinTIC and .Co Internet concluded Amendment No 3 to the 2009 Contract[303] which recorded Neustar's acquisition of Arcelandia's shares in .Co Internet and it becoming the owner of 100% of its shares.[304] On 14 April 2014, Neustar acquired 100% of the .Co Internet's shares,[305] along with other associated assets for a "*total purchase price of USD 113.7 million*".[306] Neustar's investment in .Co Internet was then registered by the Colombian Central Bank.[307]

407. Accordingly, the above shows Neustar's investment in Colombia was in 2009 in .Co Internet;[308] its investment continued until August 2020, when Neustar sold its interest in .Co Internet to GoDaddy.[309] The Tribunal considers that the 2009 Contract was more than an ordinary commercial contract; it was the start of Neustar's investment in Colombia which grew substantially over the years. Thus, the non-extension of the 2009 Contract naturally impacted not just the term of the Contract, but also Neustar's investment rights

301 Counter-Memorial § 72; MinTIC, General data on the .co domain as of 31 March 2021, accessible at MinTIC, Revenue Generated for the Colombian Government by Quarter: Years 2010 to 2020 (Contract 019/2009) (C-0120)

302 Amendment No. 3 dated 3 February 2014 to the Public Concession Contract No. 00019 of 2009 , p. 14 (C-0019). This is due to the fact that the 2009 Terms of Reference required that the percentage of Colombian control in the concessionaire remain unchanged

303 Amendment No. 3 dated 3 February 2014 to the Public Concession Contract No. 00019 of 2009 (C-0019)

304 Amendment No. 3 dated 3 February 2014 to the Public Concession Contract No. 00019 of 2009 First Clause, which in relevant part states: "*Eliminate the contractual condition [that set up limitations to foreign investors by not allowing to reduce the percentages of national shareholder interest in the concessionaire]. In that order, the CONCESSIONAIRE will be able [now] to modify its shareholder structure […]*" (Tribunal's translation) (C-0019)

305 Nariña & Asociados Auditores Consultores S.A., Share Certification dated 14 April 2014 (C-0020)

306 Counter-Memorial § 74, see Neustar, Annual Report for the fiscal year ended December 31, 2014, 2015, p. 58 [R-0004]. See also, Memorial § 53

307 See Cámara de Comercio de Bogotá, Certificate of Registration dated 16 December 2019 (C-0022)

308 Neustar's certification for .CO Internet's 2008 offer (C-0016)

309 Resolution 1652 of 2008, No. 47.101 published 3 September 2008 (C-0110)

since its whole investment in Colombia revolved around the promotion, administration and management of the **.co domain** which was the subject of the 2009 Contract.

408. For the above reasons, the Tribunal has concluded that the "real essence" of Claimant's claims are investment disputes under the TPA; which is not purely contractual given the nature of Neustar's investment in Colombia and the consequences that the non-extension of the 2009 Contract potentially had on its investment. As discussed in more detail below, Claimant also argues that specific acts by Respondent constituted an exercise of public power that breached Respondent's treaty obligations. In particular, Claimant contends that Respondent failed to accord Claimant as an "investor" the protections afforded to it and to its investment under the TPA. Specifically, Claimant contends that the Government of Colombia's intervention into the non-extension of the 2009 Contract, the manner in which the public tender was then held and the fact that the 2020 Contract was awarded on less advantageous terms than provided for under the 2009 Contract all affected Claimant's rights as an investor. According to Claimant, this amounted to discriminatory treatment and a violation of Articles 10.3, 10.4 and 10.5 of the TPA, as well as a breach of Article 4(1) of the Colombia-Swiss BIT by failing to protect Neustar's investment against unreasonable measures.[310]

(ii) MinTIC – public vs private capacity

409. Before determining if MinTIC acted in a public or private capacity, the Tribunal has determined as a preliminary point what amounts to a "public act" given the disagreement between the Parties. Both Parties have relied on a line of case law in which different tribunals have determined different acts to amount to sovereign conduct. Although this Tribunal is not bound by these decisions, it has considered them as a guidance in this determination.

410. The tribunal in Abaclat held:

> *A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract.*

310 The substance of these claims is determined in this Award in §§ VI(B) and VI(D) below.

This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State.[311]

411. The Abaclat tribunal further explained that the exercise of sovereign power may have an impact on the contract and its equilibrium, and that its "*origin and nature* [*were*] *totally foreign to the contract*".[312] The tribunal also stated that "*Argentina has not invoked any contractual or legal provision excusing its non-performance of its contractual obligations towards Claimants*".[313] Argentina exercised its sovereign powers to change its insolvency law which allowed it to avoid its contractual obligations.[314]

412. A similar conclusion was reached by a tribunal in *Deutsche Bank v. Sri Lanka*.[315] There the tribunal found that it was not the act of failing to perform a contractual obligation that constituted a "*sovereign conduct*" but the fact that the respondent state "*intervened as a sovereign by virtue of its State power to modify its payment obligations towards Claimant*".[316]

413. Relevant to the facts in this case, Claimant argues that it was the President of Colombia and his advisors who "*announced, demanded and pushed through the tender, notwithstanding the purported independent authority of MinTIC*" as the party to the concession.[317] Accordingly, a review of some of the relevant correspondence and facts leading to the making and execution of the decision not to extend the 2009 Contract is important and helpful for understanding the nature of the actions of Colombia and MinTIC.

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311 *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 § 318 (RL-057)

312 Ibid

313 Ibid § 321

314 Ibid § 323

315 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 § 559 (CL-009)

316 Ibid. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018 (CL-122), where the tribunal found there was "*a plausible claim"* that the termination of a license to operate in the gaming and lottery sector was not due to a breach of the license terms but rather "*for alleged breaches of Enjasa's legal obligations under Article 5 of Law No. 7020 concerning anti-money laundering provisions and the hiring of operators without ENREJA's authorization*" and "*an act of public power or puissance publique*": §§ 220-221.

317 Memorial § 176

a. In a report of July 2018,[318] prepared to serve *as* a recommendation document for the new Government, the Vice Minister of Digital Economy pointed out that "*renewing the term of the current concession contract would imply maintaining a financial model in which the economic consideration in favor of the Ministry is low compared to the profitability produced by the business*".[319] Thus, unless the extension would result in a significant increase of the consideration to the State, a new concession would be necessary to ensure increased resources to the State. The Report recommended the best option "*as the most convenient and favorable legal scenario for the public interests protected by the MinTIC, to start another selection process with an economic model as the one proposed in this document, or to renew the current contract as long as it implies renegotiating the consideration and bringing it to the economic conditions proposed in this document*".[320]

b. On 20 September 2018, Neustar wrote to Dr Silvia Constain, the MinTIC Minister, expressing its *"commitment to continue contributing to the growth, stability and security of the .co ccTLD with the highest standards of quality and technological innovation*" as it had been doing since 2010. Referring to clause 4 of the Concession Contract Neustar indicated that it was prepared to negotiate aspects of the concession and "*restructuration of the compensation package*".[321]

c. On 22 November 2018, MinTIC replied to Neustar's letter saying that the administration of the register of domain names is a function of public interest. It acknowledged that under Clause 4 of the Contract and Article 2 of Law 1065 of 2006, MinTIC had the authority to decide whether to extend the Contract or not, and that in doing so it also has to respect various principles established by the law such as "*good faith, equality, morality, celerity, economy, impartiality, effectiveness, efficiency, participation, publicity, responsibility and transparency"*.

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318 Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia, July 2018 (C-0027)

319 Ibid p 8

320 Ibid p 9

321 Letter from .Co Internet to MinTIC of 20 September 2018, MinTIC Reference No. 935805 (C-0028)

It concluded by indicating that it was "*taking the necessary actions which would allow for an efficient administration of the .co domain*".[322]

d. On 27 December 2018, Neustar, through .Co Internet, reiterated its desire to extend the Concession and requested to commence discussions with MinTIC. A legal opinion by a former President of the Consejo de Estado was attached to that letter stating the legal context for such discussions. The letter also expressed concerns about Resolution 3278 of 3 December 2018 which excluded .Co Internet from future meetings of the Advisory Committee on ccTLD.co.[323] No response was received from Respondent.

e. On 11 February 2019, Neustar representatives met with the Vice Minister of Digital Economy and other MinTIC officials, along with representatives from its subsidiary, .Co Internet.[324]

f. On 15 February 2019, MinTIC wrote to Neustar (in response to its letter of 27 December 2018) informing it that the Ministry was still considering what decision to take with respect to the future of the ccTLD .co administration. It also stated that "…*this decision will be made based on the needs of the country under the current circumstances of the .co ccTLD, taking into account the public interest, and state contracting principles, in particular transparency, planning and objective selection*". The letter explained that the reorganization of the Advisory Committee on ccTLD.co. was justified by the need to face present challenges.[325]

g. By email on 19 February 2019, .Co Internet acknowledged and thanked the MinTIC Vice-Minister for the meeting held the previous week on 11 February 2019 and

322 Letter from MinTIC to .Co Internet of 22 November 2018, Response to Submission No. 935805 of 21 September 2018, MinTIC Reference No. 1246985 (C-0029)

323 .Co Internet letter to MinTIC of 27 December 2018 (C-0030)

324 Memorial § 69

325 Letter from MinTIC to .Co Internet of 15 February 2019, Response to Submission No. 955263 of 27 December 2018, MinTIC Reference No. 192011188 (C-0031)

confirmed .Co Internet's willingness to support the Ministry's efforts to determine the actions to be taken in the development of our contract and its renewal.[326]

h. On 5 March 2019, .Co Internet wrote to MinTIC seeking to take forward the negotiation process and accepting that the extension of the Contract and the revised terms should guarantee the best long term investment to the benefit of all Colombians. [327]

i. In a letter dated 6 March 2019 (received by Claimant on 8 March), MinTIC asserted that "*it is in the process of evaluating the current concession*". It explained that one scenario among those being considered was a new tender. It also requested that .Co Internet produce by 15 March 2019 a plan for the transition of the **.co domain** in light of a possible new concessionaire being appointed to commence on 2 February 2020.[328]

j. On 15 March 2019, .Co Internet sent another letter to MinTIC stating that MinTIC was required to first engage in negotiations for the terms of an extension to the existing Concession before taking steps to make way for a new concessionaire, if the negotiations did not lead to a result beneficial to the interests of the State.[329]

414. In the Tribunal's view, the above correspondence shows that MinTIC was approaching the issue of extending the Concession or launching a new tender as a sovereign and not as a commercial party. As the administration of the register of domain was a function of public interest, MinTIC's decision was motivated by the needs of the State. .Co Internet had no doubt that it was discussing with a sovereign State, as shown by its constant references to the benefit of the State and of all Colombians, as well as its reliance on the fact that the extension of concession contracts was part of the Ministry's policy.

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326 Email chain between MinTIC and .CO Internet of 6 March 2019 (R-0007). See also third email in chain indicating a meeting on 11 February 2019

327 Letter from .CO Internet to MinTIC of 5 March 2019, Response to Letter No. 192011188 of 15 February 2019 and Specific Petition, MinTIC Reference No. 191010681 (C-0032)

328 Letter from MinTIC to .CO Internet of 6 March 2019, Request for a Transition Schedule, MinTIC Reference No. 192016874 (C-0033)

329 Letter from .CO Internet to MinTIC of 15 March 2019, MinTIC Reference No. 191012761 (C-0034)

415. Moreover, there were continual direct and indirect Government interventions in the rights and options of .Co Internet. For instance, the record shows that up until the adoption of Resolution 3278 of 2018, .Co Internet was allowed to attend meetings of the Advisory Committee on ccTLD as a permanent guest.[330] However, after Resolution 3278 was adopted on 3 December 2018 (after Neustar had already sent its Notice of Intent to formalize the extension of the 2009 Contract), the composition of the Advisory Committee was modified; .Co Internet was excluded from future meetings.[331] This was despite the fact .Co Internet's attendance at those meetings was provided for by the Preliminary Studies of the 2009 Public Bidding and the 2009 Terms of Reference which were incorporated into Clause 34 of the 2009 Contract.[332] From that point onward, .Co Internet was only able to attend meetings to which it was specifically invited.[333]

416. In the Tribunal's view, MinTIC had the authority to decide whether or not to extend the Contract, and in this regard considered the relevant applicable law and rules, and followed the appropriate procedures. However, modifying the composition of the Advisory Committee and removing .Co Internet from attendance, although something provided for by the Concession, is not an act of a commercial party; it is an act of a public authority.

417. Further, it is unclear why MinTIC had to inform the President of Colombia of its decisions with respect to the Concession, or why the negotiations with Neustar/.Co Internet had to be postponed because of the elections in Colombia. Respondent confirms that throughout the decision-making process, Ms. Constaín kept President Duque updated about the actions that were being taken by MinTIC regarding the future of the **.co domain**. Once the President was informed of MinTIC's final decision to start a new tender process, the

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330 Resolution 1250 of 2008, Article 2 (C-0036); MinTIC, Minutes of Advisory Committee Meeting of 10 December 2018, p. 10 (C-0037)

331 Resolution 3278 of 2018, by which the Advisory Committee on ccTLD.co is regulated of 3 December 2018 (C-0035) (according to MinTIC, this resolution "*responds to the current needs in which the entity must face the challenge of decision making with regard to the administration of the ccTLD.CO*") Letter from MinTIC to .CO Internet, Response to Submission No. 955263 of 27 December 2018 (15 February 2019), MinTIC Reference No. 192011188 (C-0031)

332 The Preliminary Studies of the 2009 Public Bidding and the 2009 Terms of Reference established that "*the administrator will be part of the Advisory Committee as a permanent guest*" p. 10 (C-0014). These documents, in turn, integrate and regulate the Concession according to Clause 34

333 See Resolution 3278 of 2018, by which the Advisory Committee on ccTLD.co is Regulated of 3 December 2018, (C-0035)

President communicated this decision (amongst other points regarding the Colombian telecommunications sector) at the assembly of the Colombian Chamber of IT and Telecommunications in late March 2019.[334]

418. Accordingly, the decision to launch a public tender for the Concession was first announced by the President of Colombia to the public on 30 March 2019,[335] not by MinTIC to Neustar. This statement was made following the Presidential Advisor for Innovation and Digital Transformation tweet of 17 March 2019 that the President would announce that the public tender for the **.co domain** would take place during the second half of 2019.[336]

419. MinTIC formally informed .Co Internet of its decision on 10 April 2019.[337] At the time the President made that announcement, the parties to the 2009 Contract - .Co Internet and MinTIC – were still in the process discussions.

420. Respondent also confirms that even after it had communicated its decision to .Co Internet, the latter continued to submit requests for renewal of the 2009 Contracts. In fact, its request to MinTIC for renewal of 21 May 2019 offered, *inter alia*, the "*anticipated payment of USD 50 million to MinTIC*";[338] this was discussed at the Advisory Committee meeting of 30 May 2019[339] despite the fact that a final decision had already been made.

421. The fact that the expiration of the 2009 Contract and the negotiations for its potential extension were dependent or at the very least impacted by the elections in the country is a further indication that this was not a purely commercial contract benefitting two private commercial parties. Respondent itself confirmed that the term of the 2009 Contract would only expire after the presidential elections, and that "*the then*" MinTIC had decided to

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334 Counter-Memorial § 108. Also C-0041. Note: in its Memorial (§ 83, fn. 107), Neustar relies on this press article to allege that the President had "*ordered that the operation of the .CO domain be given to another entity*". This allegation is unsupported by this press article, in which it is the columnist who pleads for the attribution of the .**co domain** administration to a Colombian company. See English translation of Ernesto Rodriguez, 'Beware of Monopolies', El Nuevo Siglo, 30 March 2019 (produced as C-41) [R-0039]. First Witness Statement of Sylvia Constaín, para. 16 [RWS-01]; El Nuevo Siglo, 'Asamblea CCIT', 26 March 2019 [R0040].

335 The President made his announcement at the annual meeting of the Colombian Chamber of IT and Telecommunications.

336 See Victor Munoz (@Vicmunro), Tweet on the President's Announcement (17 March 2019) (C-0040)

337 Letter from MinTIC to .Co Internet, 10 April 2019), ENG (C-0044)

338 Letter from .Co Internet to MinTIC of 21 May 2019 (C-0069)

339 Minutes of the Advisory Committee session of 30 May 2019 (C-0070)

"*focus on doing the groundwork to enable the new administration that would assume office by mid-2018 to decide on the future of the .co domain name*".[340] This further shows that MinTIC was acting in a public not a private capacity, and that the delay in the negotiations with .Co Internet was caused by political and policy considerations, not just commercial ones.

422. Accordingly, the Tribunal concludes that MinTIC acted in a public capacity when it decided not to renew the 2009 Contract, not in a private capacity of a commercial party to a contract.

423. For the above reasons, the Tribunal finds that this jurisdiction objection fails because Claimant's claim are not purely contractual claims, but amount to treaty claims.

G. DID CLAIMANT (VERCARA) FAIL TO PROVE THAT IT IS ENTITLED TO BRING CLAIMS AFTER ITS TRANSFER OF THE 'ICSID CLAIM'?

(1) The Parties' Positions

a. Respondent's Position

424. On 29 July 2022, concurrently with the filing of its Reply, Neustar, the Claimant in this Arbitration, notified the ICSID Secretariat of a corporate and procedural change to "*[t]he name of the Claimant*".[341] Respondent contends that this change is "*far more substantial*" than a simple change of name; rather, Neustar is actually attempting to replace itself , the "*original claimant*" in the proceedings, with a third party, Security Services LLC (now Vercara LLC).

425. To this end, Respondent submits that Neustar has failed (i) to provide "adequate" and "sufficient" documents showing that this change of claimant name was valid and effective under the law, and (ii) to obtain Respondent's consent to this change of claimant (if the substitution was permissible).

340 Counter-Memorial § 79; First Witness Statement of Sylvia Constaín, paras. 5, 6 (RWS-01)
341 Letter from Claimant to ICSID Secretariat of 29 July 2022

(i) No valid replacement of Neustar

426. In its letter of 29 July 2022 to the ICSID Secretariat, Neustar explained that on 1 December 2021, the shareholders of Security Services LLC (and former shareholders of Neustar) sold Neustar to TransUnion. However, prior to that transaction, they had completed a "spin-out" of Neustar's legacy cloud-oriented security services activities to operate as a standalone company, Security Services LLC. Under the terms of the "spin-out" Security Services LLC "*retained […] the rights to this arbitration*" as a "*successor of Neustar with regard to the assets it retained to operate the Security Business*".[342]

427. Respondent contends that although Claimant has disclosed some documents regarding this alleged change of the name, they were "*heavily redacted*" and provided only a "*glimpse*" of the extent of the corporate reorganisation. Though once they did get access to the non-redacted copy of the UPA "*this has not changed much*".[343] In this regard, Respondent submits that it can be inferred from the UPA that prior to 1 December 2021 Neustar completed a "*reorganization*" which "*apparently entailed the transfer/assignation of the MinTIC Claim from Neustar to another unknown entity, purportedly a 'member of [Security Services LLC's] company group*".[344] Respondent submits that this amounts to a replacement of Claimant, not a name change.

428. Respondent argues that the "*underlying mechanisms of this change remain highly unclear*", for the following reasons:

a. Claimant has provided no details regarding the terms of the transfer/assignment of the MinTIC Claim. It is also unclear to which "*member of the Company Group*" the claim was allegedly transferred/assigned.[345]

b. Nothing in the record confirms that Security Services LLC actually "*retained […] the rights to this arbitration*" and is the "*successor*" of Neustar, as alleged by Claimant. In fact, from a legal standpoint, Security Services LLC (now Vercara

342 Letter to ICSID of 29 July 2022, pp. 1, 2
343 Tr. Day 1 [ENG] 142:1-4
344 Rejoinder § 23; Letter from Claimant to the ICSID Secretariat of 29 July 2022
345 Rejoinder § 24; Tr. Day 1 [ENG] 142:1-11

LLC) cannot be the legal successor of Neustar because Neustar has not ceased to exist, and its rights and obligations have not been transferred to another company. Security Services LLC has existed since April 2017, "*long in advance of the purported spin out*"; Neustar Inc had similarly continued to exist (although under a different ownership) after the completion of the transaction.[346]

c. Claimant did not disclose this transfer when it happened on 1 December 2021 but waited to do so until its Reply. Respondent argues that this casts "*serious doubts over its approach to the present proceeding*".[347]

429. Respondent also contends that Claimant has failed to establish that the transfer/assignment of rights was valid and/or effective under Delaware law. The Bill of Sale and the UPA on which Claimant relies are "*extremely general*" with respect to the precise terms of the assignment. Respondent states that this is insufficient to confirm whether Neustar effectively transferred the ICSID claim, and in any event to which entity it was transferred. Further, Delaware law imposes several limitations on the types of claim that can be assigned and, where the claim is assignable, the conditions for the assignment to be valid.[348] Respondent submits that in the present case there is no proof that Security Services/Vercara had any interest in the ICSID claim prior to the assignment.

430. In any event, irrespective of whether or not the assignment is effective and/or valid under Delaware law, Respondent contends that Neustar has failed to explain how this assignment in a private agreement between private parties could validly serve as the basis for the substitution of the claimant party in ICSID proceedings governed by international law, absent Respondent's consent. Respondent argues that a claimant cannot be replaced midway through proceedings without the respondent's consent (which in this case has not been given). Further, international law imposes certain limits on assigning BIT claims.

431. Respondent contends Claimant has failed to prove that its assignment of rights in the MinTIC Claim was valid under international law. Therefore, either Neustar remains the

346 Application on SfC § 24
347 Ibid § 20
348 Reply on SfC § 47, citing *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194 (2020), (C-0158)

Claimant in this Arbitration or the Tribunal has no jurisdiction to determine Claimant's claims.

(ii) Respondent's lack of consent

432. Respondent contends that the Tribunal lacks jurisdiction *ratione voluntatis* over this intended new claimant. This is because Neustar failed to inform Respondent of this purported transfer of the claims in this Arbitration and obtain Respondent's consent in this regard. Respondent submits that even if Security Services remains under the same ownership as Neustar, this does not change the fact that Claimant had failed to obtain Respondent's consent to the change of the party in this proceeding.

433. The Parties' consent to the present proceedings derives from the arbitration agreement contained in Article 10.17 TPA. This was Respondent's "*offer*" to arbitrate which Neustar accepted by commencing these proceedings. Thus, the Tribunal's jurisdiction is limited to this agreement, unless both Parties have agreed to modify it.[349] In this regard, Respondent contends that Claimant's assertion that "*[t]he arbitration agreement containing Neustar's consent to arbitration [...] has been assigned to Vercara*" would amount to a unilateral modification of the agreement without the consent of all the Parties to that agreement. This would be a breach of the numerous conditions on the Respondent State's consent enumerated by Section B of Chapter 10 of the TPA.[350]

434. Further, both the TPA and the ICSID Convention confirm that the respondent State's consent is limited to a specific claimant identified at the outset of the proceedings, "*not just any claimant that would appear midway the proceedings*". This ensures that the respondent State is fully informed of the identity of the claimant and that when bringing a claim the investor has complied with the conditions to the consent of the respondent State set out in Chapter 10, Section A of the TPA, Articles 10.16.2. and 10.18, and in the ICSID Convention, Article 36.2. Hence, an investor cannot simply replace the original claimant by a third part assignee for whatever reason, midway through the proceedings.

349 Rejoinder § 30
350 Reply on SfC § 61

435. In the present case, Respondent submits that Claimant failed to obtain its consent (i) to modify the arbitration agreement, or (ii) to replace Neustar by Security Services LLC as claimant in this Arbitration. The Tribunal therefore lacks jurisdiction *ratione voluntatis* to continue with these proceedings.

436. Further, Neustar has not "*formally discontinued*" its participation in this Arbitration and cannot do so unilaterally to avoid liability for a potential adverse costs award. This is prohibited under Article 25 of the ICSID Convention.[351] Respondent states that previous tribunals have held that a claimant could only discontinue participating in proceedings if the respondent had consented or at least expressed no objections to such discontinuance pursuant to the procedure under Rule 44 of the ICSID Arbitration Rules. Respondent argued that even when such discontinuance is accepted, ICSID tribunals have held that the withdrawing claimant would remain liable for costs.

437. In its Security for Costs Application, Respondent also refers to this objection holding that Vercara failed to satisfy the burden of proof to show that it remains entitled to present and recover in respect of the claims presented in this Arbitration. This was because the UPA was not the legal instrument under which the ICSID claim was allegedly transferred and it is not clear to which member of the Security Services' "*Company Group*" such claim was transferred.[352] Respondent adds that Exhibit C-0135 an internal press release titled "*Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth*", referred to by Vercara at the hearing, is insufficient.[353]

438. The Respondent submits that any potential award of costs in Colombia's favour should be rendered primarily against Neustar because irrespective of Claimant's attempted change of claimant, the Tribunal retains jurisdiction over Neustar for the purposes of cost allocation.

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351 It provides that "*[w]hen the parties have given their consent, no party may withdraw its consent unilaterally*". In line with this principle, ICSID Arbitration Rule 44 regarding the "*discontinuance at request of a party*" provides that "*if a party requests the discontinuance of the proceeding, the Tribunal […] shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. [...] If objection is made, the proceeding shall continue*".

352 Application on SfC § 14

353 Application on SfC § 16

439. Respondent argues that from a legal standpoint, Security Services LLC and/or Vercara LLC cannot be the legal successor of Neustar. This concept refers to a situation where a company has ceased to exist and its rights and obligations have been transferred to another company. The first consequence of this attempted change of claimant is that the Tribunal lacks jurisdiction *ratione voluntatis* over this intended claimant Security Services/Vercara as consent to arbitrate under the TPA and the ICSID Convention is necessarily limited to a specific party.

440. Neustar did not request to discontinue its involvement in the proceeding, and it is therefore unnecessary for Respondent to submit any new or specific *request* that costs be awarded against Neustar, since this company has simply remained a party to the proceedings for purposes of cost allocation.

441. Respondent referred to its email of 12 August 2022 and the Rejoinder where it reserved its rights regarding the change of name in these documents and indicated that the record of the proceedings could be updated for purely "*administrative purposes*".[354] Noting that it has not agreed that Neustar discontinue its involvement entirely in the proceedings and avoid liability for an adverse award on costs. Instead, such an award should be rendered primarily against Neustar.

442. In its Reply on Security for Costs, Respondent argues that there is no evidence that the transfer is valid and effective under Delaware law, and no legal support for Claimant's theory under international law, that it could unilaterally assign the arbitration agreement containing Colombia's consent to a new party midway through the proceedings.

443. Respondent holds that Claimant has failed to establish that the claim was effectively and/or validly transferred under Delaware law. The Bill of Sale produced with Claimant's Response on Security for Costs, is an 8-page agreement which does not specifically mention the present proceedings nor the assignment of the claim. The UPA, the unredacted version of which was produced with Claimant's Response on Security for Costs, is not the instrument where the reorganization is carried out and does not indicate to which company

354 Application on SfC § 31

the claim would be transferred. In fact the UPA included a procedure in case the MinTIC Claim could not be or was not assigned.

444. Claimant also failed to establish that the assignment of the ICSID claim was permissible and valid under Delaware law.[355] Delaware law imposes limits and conditions the assignability of claims. In the present case, the Bill of Sale and UPA do not allow to confirm that Neustar and Security Services/Vercara met the requirements for the assignment to be valid under Delaware law.

445. Even if the assignment was valid and effective under Delaware law, Claimant fails to explain how it could possibly have any effect under the controlling international law (i.e. the TPA and the ICSID Convention) and result in the unilateral substitution of the claimant party to the arbitration agreement on which the present proceedings are based.

446. Respondent states that the question at issue is whether Claimant was entitled to substitute the original party to the arbitration agreement formed with Colombia by another entity without seeking Respondent's consent, and even though the original entity remained in existence.[356] It argues that the cases relied on by the Claimant are inapposite on the facts. That the only previous ICSID case known to Respondent is the *Wintershall* case where the tribunal found that Wintershall Holding could be *joined* to Wintershall (and not *substituted* as Claimant intends to do in the present arbitration), it did so on the basis that the respondent State had *consented* to the joinder.

447. As the United States reiterated at the hearing, consent of the States parties to the TPA to arbitrate (and also the ICSID Convention) is necessarily limited to a *specific* claimant, for example in the waiver requirement. These requirements have a jurisdictional nature and noncompliance cannot be remedied by Security Services/Vercara at this very late stage in the proceedings.

448. Claimant's proposition that the arbitration agreement containing Neustar's consent to arbitration has been assigned to Vercara, would precisely amount to a unilateral

355 Reply on SfC § 46
356 Reply on SfC § 53

modification of the agreement without the consent of all the parties to the agreement, in breach of numerous conditions on the respondent State's consent in Section B of Chapter 10 of the TPA.

449. Section 5.10 of the UPA indicates that Neustar and Security Services/Vercara were aware that there was a real risk that claim could not and/or would not be assigned to Security Services and that Neustar would have to remain the party to the proceedings before ICSID.

450. Finally, Respondent never consented to the intended change notified by Claimant on 29 July 2022. Respondent expressly reserved all of its rights with respect to the changes notified by Claimant, and that any update to the record of the proceeding would be for administrative purposes and in order to avoid any confusion to members of the public. In addition, Respondent followed up a few weeks later, with an application mentioning the potential jurisdictional consequences of these changes (requesting further information) and submitted a full preliminary objection with its Rejoinder.

451. The Security for Costs application (against both Security Services/Vercara and Neustar) also does not equate to consent as it was made pending the Tribunal's decision on whether it has jurisdiction over Security Services/Vercara.

b. Claimant's Position

452. Claimant argues that Neustar Security Services is not a third party to this Arbitration. It contends that the rights to the arbitration and Claimant's standing to maintain its claims before this Tribunal were preserved under the terms of the UPA. The terms of the agreement show that Neustar Security Services has the rights under the ICSID claim and is the successor of Neustar's rights in this respect.

453. Moreover, Neustar Security Services has maintained board and management continuity from Neustar including those involved in this dispute.[357] Neustar Security Services also

[357] Tr. Day 1 [ENG] 75:2-25, and 76:1-17

remains under the same beneficial ownership as Neustar. The Claimant has been clearly identified throughout the proceedings and has not changed in substance.[358]

454. A Spin-Out is a common business transaction. It is not a secret; all sales are secret until they are final.

455. In its Response to the Respondent's Application for Security for Costs, Claimant states that since the outset of these proceedings Respondent has known (i) Neustar's Delaware File Number and Incorporation Date; and (ii) that from 8 August 2017, Neustar had been wholly-owned by Aerial Topco LP, which in turn was majority-owned by Golden Gate Private Equity, Inc.

456. Claimant refers to its letter of 29 July 2022 as clearly pointing to Neustar Security Services being a different entity to Neustar. In particular the redacted UPA made clear (i) that not only was Neustar separate from Neustar Security Services, but also that (ii) Neustar was (prior to the Spin Out) the immediate parent of Neustar Security Services, and (iii) the UPA's purpose was to cause the sale of Neustar's interest in Neustar Security Services to Aerial Security Intermediate, LLC. The primary position was apparent from the face of the letter both that Neustar Security Services was a different entity to Neustar *and* that it was intended that the former replace the latter as Claimant.[359]

457. Neustar contends that it assigned all of its rights, obligations and liabilities with respect to this Arbitration to Neustar Security Services by way of the Bill of Sale and as recorded in the UPA. In relation to the Bill of Sale, Claimant explains that there is no requirement that an agreement must list out every single asset being transferred; it is sufficient for assets to be listed more broadly. Regarding the UPA, Claimant holds that the Bill of Sale and UPA clearly show that the MinTIC Claim has been transferred and they further make clear that it was transferred to Neustar Security Services. In relation to section 5.10, Claimant holds that it is boilerplate language designed to cover the *possibility* that the assignment of the MinTIC Claim might ultimately prove to have been ineffective.[360]

358 Tr. Day 1 [ENG] 76:6-17
359 Response on SfC §§ 35-37
360 Rejoinder on SfC § 46

458. At all relevant times Neustar Security Services has remained under the ultimate ownership of the Claimant's ultimate owners, via their indirect subsidiary Aerial Topco LP.[361] Post Spin Out there has been continuity of Claimant entities' board and management.[362]

459. Claimant contends that the Tribunal no longer has jurisdiction over Neustar because Vercara has now assumed all rights, obligations and liabilities of Neustar with respect to the "*applicable Transferred Assets*". This includes the MinTIC Claim and the arbitration agreement which contains Neustar's consent to arbitration under the TPA. Given that such consent to arbitration has been assigned to Security Services/Vercara, this is "*a mere substitution of the original claimant with its assignee*". Claimant states this substitution was valid and effective under the applicable law and that it occurred with Respondent's consent.[363] This is for the following reasons.

460. First, Claimant contends that its "ultimate Owners" (i.e. Golden Gate Funders) sold Neustar to TransUnion on 1 December 2021. Prior to the sale, the Ultimate Owners spun out Neustar's legacy cloud-oriented security services business, by virtue of the Bill of Sale and the UPA. The Bill of Sale "*assign[ed], transfer[ed], convey[ed] and deliver[ed*]" specified assets from Neustar to its 100 percent owned then-subsidiary, Security Services, LLC (now Vercara), including the rights in this Arbitration.[364] The UPA then confirmed the re-organisation of assets, and specifically confirmed that the claims in this Arbitration were a "*Transferred Security Asset and Security Liability*" to be retained by the Claimant's ultimate owners (via Vercara).[365] Thus, Claimant contends that at all material times, the MinTIC Claim remained in United States hands, and even under the same ultimate ownership.

461. Second, Claimant submits that both Delaware law and international law permit assignment of claims. In particular, conveyance of a lawsuit is permitted under Delaware law "*so long as the transferor possesses and conveys a complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation*

361 Response on SfC § 29
362 Response on SfC § 30
363 Response on SfC §§ 183, 184
364 See Bill of Sale (C-0143); Response on SfC § 22
365 See UPA (C-0136 and C-0140); Response on SfC § 24

itself".[366] Claimant submits the legal test is met here as recorded in the Bill of Sale and the UPA. Accordingly, under Delaware law Security Services (now Vercara) is "*the bona fide owner of and claimant*" of the claims in the Arbitration.

462. Claimant further submits there is no general prohibition on the assignment of claims under international law, though there may be certain limits on the assignability of BIT claims, which are otherwise capable of assignment.[367] Further, the replacement of a claimant "*midway through proceedings*" absent a respondent State's consent is permissible as confirmed in various investment cases. Accordingly, Claimant states the substitution of Security Services/Vercara for Neustar as Claimant was valid, even absent Respondent's consent.

463. Claimant contends that there is no express prohibition on the assignment of claims under Article 36(2) of the ICSID Convention, or Articles 10.16.2 of the TPA. These are "*mere formality requirements*" which do not relate to the Tribunal's jurisdiction. Rather, Article 36(2) concerns a matter of "*registration procedure*" not jurisdiction and its requirements were complied with when Neustar filed its RFA. Further, Claimant argues that, the TPA's waiver requirement in Article 10.18 fails because under the Bill of Sale and the UPA Security Services/Vercara has assumed all rights, obligations and liabilities of Neustar with respect to this Arbitration. By reason of the assignment, Security Services/Vercara is a party to the original arbitration agreement, and with it the connected waiver. If the waiver did not pass to Security Services/Vercara, Claimant argues this can be remedied should the Tribunal so direct.[368]

464. In the alternative, Claimant submits that if the Tribunal concludes that Respondent's consent was required for the substitution of a claimant, such consent has been "sufficiently"

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366 Rejoinder on SfC §§ 48, 52

367 E.M. Borchard, Diplomatic Protection of Citizens Abroad (1st edn 1919, reprinted in 2003 by William S. Hein & Co) (CL-0163); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility, 29 July 2008 (CL-0164). See Response on SfC §§ 139-144 relying on *Renée Rose Levy de Levi v. Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (RL-164); *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision, 12 July 2006 §§ 3-18, 92-94 (CL-0008); *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 §§ 6, 12-27, 30, 72 (RL-131)

368 Response on SfC § 172

given. First, in its reply to Claimant's notification of the Spin Out of 12 August 2022, Respondent expressly agreed to the change of the title of the proceedings. Claimant contends that this was a valid consent, despite the fact that Respondent "*reserved its rights*" and stated that this was "*for administrative purposes*"; the change of claimant was an administrative matter. That email constituted Respondent's consent to the change of claimant, subject only to its reservation of position as to whether the new claimant was entitled to claim.

465. In addition, Respondent confirmed its consent by way of its subsequent conduct in this Arbitration.[369] By seeking an order for security for costs against both Neustar and Vercara, Respondent implicitly agreed to the joinder of Vercara as a party to this Arbitration. This holds true irrespective of the fact that this Request was "*pending*" the Tribunal's determination on jurisdiction. This is because the Tribunal can only make such an order against a claimant.[370]

466. Accordingly, Claimant submits that "*to the extent*" Respondent's consent is a necessary condition to Vercara being added to these proceedings, such consent was given.

467. In relation to Neustar, Claimant's position is that the Tribunal no longer has jurisdiction over Neustar.[371] Regarding unilateral withdrawal of consent under the ICSID Convention, Claimant holds that the arbitration agreement containing Neustar's consent to arbitration has not been withdrawn, but rather assigned to Vercara. This is not a case of unilateral withdrawal of consent to arbitration or discontinuance by a claimant, it is a mere substitution of the original claimant with its assignee.[372]

468. Claimant maintains that Respondent has failed to point to any authority which stands for the proposition that an assignment of an arbitration agreement amounts to a modification of that agreement. Therefore it argues Vercara is now a party to the original arbitration

369 Response on SfC § 178
370 Response on SfC, § 180. Claimant refers to Tr., Day 2 [ENG] 303: 17-19 and 306: 7-17
371 Response on SfC § 183
372 Response on SfC § 184

agreement; there has been no change and no modification, but merely an assignment of the rights and obligations arising from it.[373]

(2) The Tribunal's Analysis

469. The main question here is whether, by substituting itself, midway through the proceedings, with Security Services/Vercara as claimant in this Arbitration, Neustar, has effectively deprived this Tribunal of its jurisdiction? To this end, the Tribunal discusses and determines the following questions below:

a. Was there a valid and/or effective assignment of Claimant's ICSID claim under Delaware law?

b. Was there a valid and/or effective assignment of Claimant's ICSID claim under the TPA, under the ICSID Rules and under international law? In this regard, the Tribunal will also discuss whether Respondent's prior consent to this attempted substitution of Claimant was required for the purposes of the TPA and this Tribunal's jurisdiction, and the relevant ICSID Rules and international law rules; and if so, whether such was granted?

c. Does the Tribunal still have jurisdiction over Neustar or not? Also, does the Tribunal have jurisdiction over Vercara in connection with the Claims in this Arbitration.

470. However, as a preliminary issue it is important to set out the factual developments surrounding the corporate restructuring which Claimant, Neustar and, Security Services/Vercara, have gone through since the beginning of these proceedings.

(i) <u>Corporate structure and ownership of Claimant</u>

471. On 23 December 2019, when the RFA was filed, Claimant was named Neustar. It was a company established under the laws of the State of Delaware, United States of America. Its main business address is 21575 Ridgetop Circle, Sterling, Virginia, USA.

373 Rejoinder on SfC § 62

472. On 29 July 2022, concurrently with the filing of its Reply, Neustar as the Claimant in this Arbitration notified the ICSID Secretariat, the Tribunal and Respondent that the Claimant had changed to "*Security Services LLC, doing business as Neustar Security Services*", and that the owners of Claimant sold Neustar and the majority of its business assets but spun out the cloud related security services business which included the claim in this Arbitration. The letter stated:

> *The name of the Claimant in this arbitration has changed to "Security Services LLC doing business as Neustar Security Services". On December 1, 2021, the owners of Claimant sold Neustar Inc. ("Neustar") and the majority of its business assets previously held under the umbrella of Neustar, including the rights to the name Neustar, to TransUnion. The key part of that sale was the sale by Claimant's owners of Neustar's fraud, marketing and communications business to TransUnion (the "Transaction"). The Transaction excluded Neustar's legacy cloud-oriented security services business (the "Security Business"). To effectuate the Transaction, therefore, Claimant's owners spun out Neustar Security Services concurrently with the sale to TransUnion, to operate the Security Business as a standalone portfolio company (the "Spin Out"). Under the terms of the Spin Out, the Claimant (now "Security Services LLC, d/b/a Neustar Security Services", a US limited liability company) retained and continues to retain the rights to this arbitration. For the avoidance of doubt, the Claimant remains under the same ownership as Neustar prior to the Spin Out. As is evident on its website, Neustar Security Services is a successor of Neustar with regard to the assets it contained to operate the security business, noting it's "over 20 years of experience".*

473. On 7 April 2023, after the Hearing on merits and jurisdiction, Claimant (as Neustar Security Services) notified ICSID and the Tribunal that on 4 April 2023 it changed its name to Vercara, LLC. This was in accordance with the laws of Delaware. The certificate of amendment to the certificate of formation of Security Services, LLC stated that the company's name was amended to Vercara, LLC.[374]

474. Following Respondent's lack of objection, on 3 May 2023, ICSID updated the name of this case in its record of this Arbitration as: "*Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia*".[375]

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374 See Certificate of Amendment to the Certificate of Formation of Security Services, LLC, 4 April 2023 (C-0139). Also, the Delaware file number (6375088) is the same for Security Services LLC and Vercara

375 For convenience in this Award where not referred to as Claimant, the names Neustar, Security Services and Vercara are used as appropriate.

475. Accordingly, a fundamental question this Tribunal needs to determine is whether Security Services, now Vercara, is the same entity which started these proceedings, i.e. Neustar, Inc whose name was changed (again), or whether there has been a substantive change of Claimant as argued by Respondent. If the latter is found, then the issue is whether Vercara is a valid claimant in this Arbitration as a successor to Neustar.

476. In its Response to Respondent's Security for Costs Application, Claimant provided additional details with respect to its corporate restructuring and organisation since the beginning of this Arbitration. In particular, at the time Claimant filed its RFA in December 2019, it was called Neustar, a Delaware company, 100% indirectly owned by Aerial Topco L.P. through several other subsidiaries, the last one of which Aerial Acquisition Corp (Delaware) directly owned 100% of Neustar. Aerial Topco L.P. was in turn majority-owned by Golden Gate's Fund and a GIC Affiliate. In turn, Neustar owned 100% of Security Services, LLC.

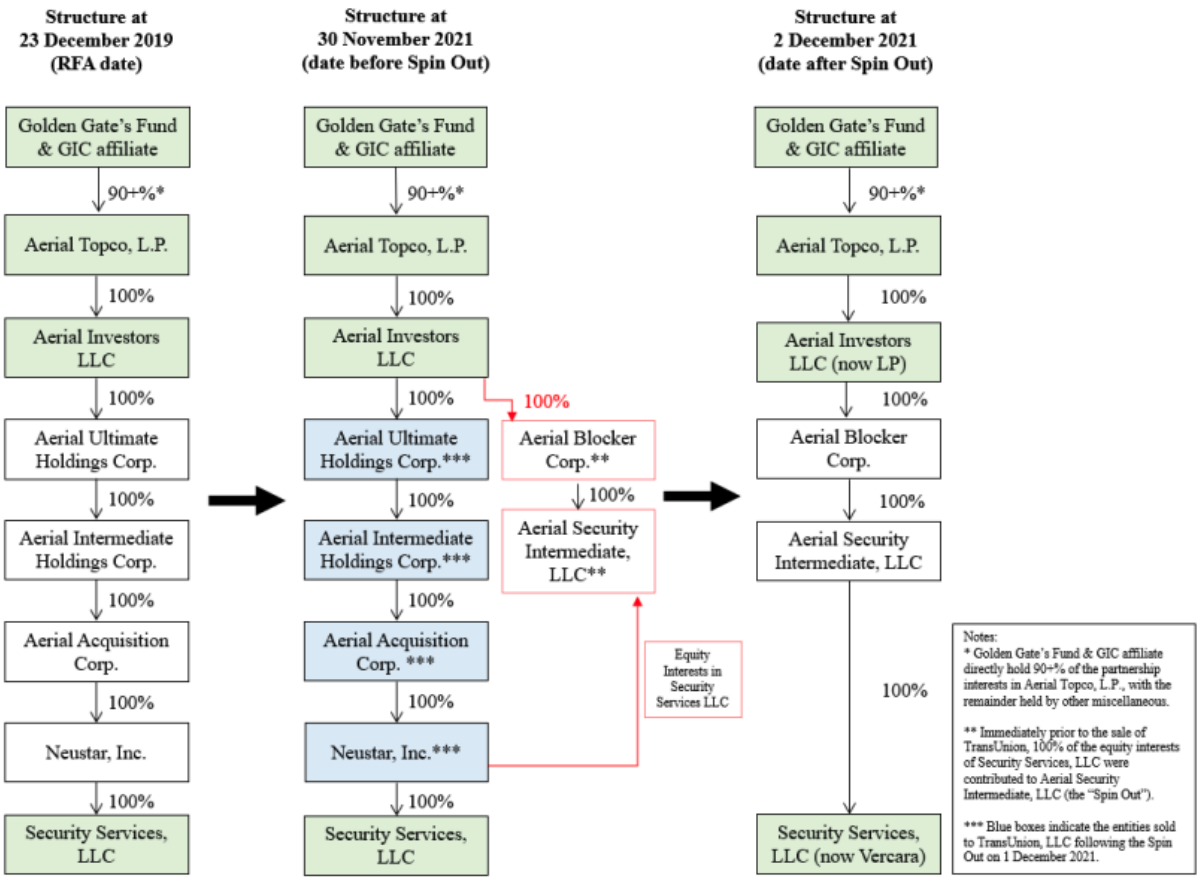
477. Claimant contends that Neustar's corporate structure on 30 November 2021 remained relatively the same as explained above, except that one of the companies in the chain of ownership between Aerial Topco L.P. and Neustar – Aerial Investors LLC (which is 100% owned by Aerial Topco, and which owns 100% of other subsidiaries which in turn own Neustar) – held two newly created holding company subsidiaries: Aerial Investors LLC held 100% of Aerial Blocker Corp. (Delaware) which in turn owned 100% of Aerial Security Intermediate, LLC (Delaware).

478. The actual Spin Out took effect on 1 December 2021 when the UPA[376] and the Bill of Sale[377] were concluded. The majority of Neustar's other business assets and Neustar itself were sold to Transunion.[378] Neustar's "*ultimate owners*" retained its security services business. This was effected by Neustar and its subsidiaries transferring to Neustar Security Services all assets relating primarily to the Business. This was done through the Bill of Sale and the UPA.

376 UPA (C-0140)
377 Bill of Sale (C-0143)
378 U.S. Securities and Exchange Commission, TransUnion, Form 8-K, 1 December 2021 (C-0144) and TransUnion, "TransUnion and Neustar Announce Transaction Close", 1 December 2021 (C-0145)

479. After the conclusion of the Spin Out, Neustar Security Services LLC was 100% owned by Aerial Security Intermediate, LLC (which was indirectly but ultimately owned by Aerial Topco L.P through three other subsidiary companies). Aerial Topco itself was still owned by Golden Gate's Fund and GIC Affiliate.

480. The above changes were recorded by Claimant in the chart below which the Tribunal adopts for ease of reference:[379]



481. The Tribunal considers that Neustar and Security Services LLC are two distinct legal entities despite the reorganisation on 1 December 2021. This is for the following reasons.

379 Response on SfC § 27

482. First, the Bill of Sale was concluded between several parties including Neustar and Security Services for the purpose of transferring all those assets relating to the Business. Paragraph 5 of Schedule A of the Bill of Sale provides for the assignment, transfer, conveyance and delivery by Neustar to Security Services of two kinds of assets: *"(i) each contract to which such Transferor is a party and (ii) each other asset held by such Transferor, in each case, which is primarily related to the Business*."[380] Neustar argues that its rights in relation to this Arbitration and the MinTIC Claim fall within the second category of asset because it was an asset held by Neustar and which "*primarily related to the Business of providing cloud security solutions and services… operated by Security Services, LLC and its subsidiaries*". [381]

483. Second, the UPA was concluded between Neustar, Aerial Blocker Corp., Aerial Security Intermediate LLC, and Security Services LLC. This Agreement expressly records that Neustar had reorganised its assets through the Bill of Sale. It also records the transfer of assets including the MinTIC Claim and Neustar's rights in this Arbitration. In particular, Section 5.10 UPA provides that:

> *The International Centre for Settlement of Investment Disputes claim by Neustar and .CO Internet S.A.S. against the Colombian Ministry of Information Technology and Communications (MINTIC) (the "MINTIC Claim") shall be a Transferred Security Asset and Security Liability.* ***To the extent the MINTIC Claim cannot be, or is not, assigned to the Business, (i) the Company shall assume the control of such claim and shall pay as incurred the fees and out-of-pocket expenses of outside counsel related to such claim, (ii) Neustar shall have the right, at its own cost and expense, to participate in the pursuit of such claim, and (iii) the Company shall be permitted to settle the MINTIC Claim in its sole discretion; provided, that in the event any such settlement involves an injunction or other equitable relief against Neustar, such settlement shall require the prior written consent of Neustar (not to be unreasonably withheld, conditioned or delayed).*** *In connection with the MINTIC Claim, Neustar shall provide reasonable cooperation to the Security Parties (to the extent reasonably necessary to allow the Security Parties to control, pursue, prosecute and enforce such claim), so long as the Business reimburses Neustar for all reasonable out-of-pocket expenses and for the time spent by Neustar employees on such matter. (*Emphasis added)[382]

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380 Other rights were assigned, transferred, conveyed and delivered from Neustar related companies to Security Services pursuant to §§ 1-4 of Schedule A of the Bill of Sale.

381 Bill of Sale § 1, Schedule A (C-0143)

382 "Business" was similarly defined in Section 1.1 of the UPA as "*the business of providing cloud security solutions and services, comprising Application & Network Security (BoT Management, DdoS Protection, Web Application Firewall), DNS Services, Threat Data Feeds (UltraThreat Feeds and custom security data feeds) and Web Performance Management as operated by Security Services, LLC and its Subsidiaries".*

484. Further, Section 2.1 Bill of Sale provides in pertinent part:

> *… the Parties acknowledge and agree that, prior to the consummation of the Transaction, Neustar has caused: (i) any Transferred Neustar Assets held by any member of the Company Group to be transferred and assigned by such member of the Company Group to Neustar or one of its Subsidiaries, other than any member of the Company Group, (ii) any Neustar Liabilities of any member of the Company Group to be assumed by Neustar or one of its Subsidiaries, other than any member of the Company Group, (iii) the* ***Transferred Security Assets*** *to be transferred and assigned to a member of the Company Group, subject to the terms of the Patent Assignment and License-Back Agreement and (iv)* ***the Security Liabilities*** *to be assumed by a member of the Company Group…".* (Emphasis added)

485. It follows from the above that the MinTIC Claim under ICSID Rules was subject to transfer under the UPA and the Bill of Sale. However, what is also clear, is that the two Agreements above were concluded by Neustar Inc and Security Services LLC as two separate limited liability entities, registered as such under Delaware law. This is evident from the preambles of both Agreements, as well as from the language used in Section 5.10 of the UPA Agreement. The Tribunal notes that the reference to "Neustar" and the "Company" are to Neustar, Inc. and Security Services LLC, respectively. This is affirmed by the highlighted language of Section 5.10 set out at § 483 above.

486. This provision essentially envisages the participation of both Neustar and Security Services in case the MinTIC Claim "cannot" or "is not" transferred to Security Services under the UPA Agreement. Therefore, the Tribunal has concluded that even though Neustar may have intended to transfer the MinTIC Claim to Security Services and to be replaced by Security Services (now Vercara) as the claimant in this Arbitration, this intention was limited to the extent that such transfer could take place.

487. The Tribunal notes, that under Section 5.8(b) of the UPA, Neustar granted Security Services and its subsidiaries the right to use "*any Trademarks containing the NEUSTAR brand and name*" for a period of 3 months, and "*any Trademarks containing the 'NEUSTAR SECURITY' brand and name*" for a period of 12 months following the conclusion of the UPA. After 12 months Security Services ceased to use the Neustar name.

488. Although Security Services was a subsidiary within the group in which Neustar was also a member, Security Services was a separate legal entity, having been incorporated in the

State of Delaware as a limited liability company on 12 April 2017. Neustar was incorporated on 8 December 1998, almost 19 years earlier. Both companies have different "*file numbers*".[383] Thus, for the purposes of the law under which it was established, and for the purpose of this Arbitration, Security Services/Vercara was and is a separate legal entity whose parent company was Neustar. The fact that both Neustar and Security Services/Vercara share the same ultimate owners and employees does not negate this fact.[384]

489. This was confirmed by Claimant[385] when it stated that its

> *primary position is that it was apparent from the face of its letter of 29 July 2022 both that Neustar Security Services was a different entity to Neustar and that it was intended that the former replace the latter as Claimant.*[386]

490. For the above reasons, the Tribunal has concluded that Neustar had essentially transferred/assigned its claim in this Arbitration to Security Services as part of the Spin Out. In the Tribunal's view, this constitutes an assignment of the MinTIC Claim to Security Services/Vercara and not a mere change of name as initially argued by Neustar.

(ii) The transfer of the ICSID Claim under Delaware law

491. At the Hearing, Claimant repeated that "*Neustar has no rights and/or obligations in this proceeding, unlike Neustar Security Services which retained the rights to the arbitration*", concluding that on this basis the Tribunal has no jurisdiction to issue an award of costs against Neustar.[387] Respondent argued that this was not possible because Neustar still exists and as a matter of law, an entity can be a legal successor of another entity only where the latter ceases to exist.

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383 Response on SfC § 36

384 Neustar Press Release re Spin Out, found at https://www.home.neustar/about-us/news-room/press-releases/2021/neustar-security-services-spins-out-with-focused-investment-to-foster-accelerated-growth (C-0135). During the Hearing, Claimant submitted that the purpose of this piece of evidence was to confirm its assertion that Golden Gate Capital was Claimant's "ultimate" owner (both Neustar and Neustar Security Services), see Tr. Day 1 [ENG] 203:9-16; Neustar Security Services Home Page, found at https://neustarsecurityservices.com (C-0134);Neustar's SEC Form 8-K, dated 8 August 2017 (RFA-13) and Neustar's Certificate of Incorporation and Bylaws (RFA-14)

385 Response on SfC § 36

386 Response on SfC § 37

387 See Tr. Day 3 [ENG], 428:1-8

492. The Tribunal is not persuaded by this argument. An entity can be a legal successor of another entity where there is a transfer of rights, assets, etc. conducted in accordance with the applicable law. In the present case, Neustar transferred a substantial part of its overall business and assets to Security Services and its subsidiaries as recorded in the Bill of Sale and the UPA. From a factual point of view, this makes Security Services and Neustar's other subsidiaries its successor with regard to that part of the business transferred. The question that arises is whether this whole transaction was legally effective under Delaware law, and particularly whether the transfer of the ICSID claim was legal and valid. This was challenged by Respondent.

493. The Tribunal notes that both the Bill of Sale (section 5) and the UPA Agreement (section 7.8) are governed by Delaware law. The Parties agree this covers the Spin Out.[388] The Tribunal also notes that the Parties agree that assignment of claims is allowed under Delaware law as long as certain conditions are met.[389] This was recognised in Delaware court decisions which stated:

> *Delaware continues to recognize a policy against sale of a lawsuit. At the same time, Delaware generally favors the free exchange of property. These two policies stand in tension, because superficially they appear to call into question whether a property buyer obtains the right to prosecute property torts preceding the purchase. The resolution of this apparent tension is that Delaware permits conveyance of a lawsuit so long as the transferor possesses and conveys a complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation itself.*[390]

494. Respondent argues that Delaware courts have previously considered that for the doctrine of champerty to be inapplicable, it is necessary that the "*transferee already has a legal or equitable claim on the rights that predates and is outside of the transfer*". For instance, Delaware courts have held the "*transfer of litigation rights to a creditor's creditor is void for champerty*", because such creditor has no interest predating the assignment. In the present case, Respondent argues that there is no proof that Security Services/Vercara had any interest in the ICSID claim prior to the assignment.

388 Reply on SfC § 41; Rejoinder on SfC § 45

389 Reply on SfC § 47; Rejoinder on SfC § 48

390 *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 203–04 (Del. Super. 2020) (quoting Drake v. Nw. Nat. Gas Co., 165 A.2d 452, 454 (Del. Ch. 1960)) (C-0158)

495. In contrast, Claimant argues that the Court's decision in that case (on which Respondent relies) was based on specific claims and issues raised in that case; this was a separate consideration from whether a claim may be assigned. In addressing this separate issue, the Court confirmed that "*modern champerty*" might arise where a seller is an unrelated third-party to the claims in issue. The Court then noted that where there is a "close relationship" between the assignor and assignee, either by blood or "*affinity to either of the parties*", champerty will not apply. Claimant submits that this is the "*exact circumstances here*".

496. The Tribunal notes that Section 5.10 of the UPA specifically provides that the MinTIC Claim is a "*transferred security asset and security liability*". However, no further details or explanations are provided as to what this entails or whether this constitutes a "*complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation'"* as stated by the court. There is also no evidence showing that it did not constitute a full transfer of the right.

497. The Tribunal is not persuaded that the doctrine of champerty applies in this case to invalidate the assignment/transfer of the claim. In particular, as established above at paras 477-478, at the time of the Transaction, Security Services (now Vercara) was wholly owned by Neustar, both of which were wholly owned by Aerial Topco, L.P. (ultimately owned and controlled by Golden Gate). Thus, Neustar was not a "*third party seller lacking possession*"; there existed a "*close relationship*" or "*affinity*" between the assignee (Security Services/Vercara) and assignor (Neustar).

498. For the above reasons, the Tribunal concludes that Respondent has failed to discharge its burden of proof and establish that Claimant's transfer of the MinTIC Claim is contrary to Delaware law and is therefore ineffective.

(iii) The transfer of the ICSID Claim under international law

499. Respondent submits that the unilateral assignment of an "*arbitration agreement*" containing a state's offer to arbitrate to "*a new party midway the proceedings*" is not valid and effective and supported under international law.[391] Further, it contends Claimant failed

[391] Reply on SfC § 4

to obtain Respondent's consent (i) to modify the arbitration agreement, or (ii) to replace Neustar by Security Services as claimant in this Arbitration. Thus, the Tribunal lacks jurisdiction *ratione voluntatis* to continue with these proceedings.

500. First, with respect to the legality of the assignment of an arbitration agreement and/or a BIT claim, the Tribunal notes that each party has provided legal authorities in support of its position. They require that this issue be determined both under international law, in general, but also with specific regard to the particular circumstances of this case.

501. It is a common ground between the Parties that there is no "*general prohibition on the assignment of claims under international law*". The Parties have referred to cases in which the assignment of a claim had taken place, after the cause of action had already accrued and after an arbitration proceeding had already commenced.

502. In the Tribunal's view, there is no general prohibition on the assignment of a claim under international law. However, there are certain limitations and conditions which must be met for a valid and legal assignment of a claim. Prof. Crawford stated:

> *Although it is said that that assignment does not affect the claim if the principle of continuity is observed, great care is required: BIT claims are essentially claims intuitu personae under international law, and this imposes limits to their assignability.*

503. However, the general practice is that a respondent state must agree to a different claimant being substituted by another entity. Thus in *Wintershall Aktiengesellschaft v. Argentine Republic* the tribunal agreed to join the assignee of the claim, Wintershall Holding Aktiengesellschaft as a second claimant because it was expressly agreed by Argentina, the respondent.[392]

504. Accordingly, the relevant question here is whether Claimant's assignment of the MinTIC Claim is valid and effective under international law without Respondent's consent to that end, provided that such consent was not already obtained. In this regard, the Tribunal notes that both Parties provided case law in support of their respective positions as to whether

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392 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 § 60 (RL-123)

consent is needed.[393] On balance, the Tribunal is not persuaded that a claimant can be replaced midway through proceedings without the respondent's State's consent to this end, and especially in the circumstances of this case.

505. In this regard, the Tribunal also notes Professor Schreuer's opinion, which is pertinent to this case, since at the time of the assignment, Security Services was a subsidiary of Neustar. He opines that:[394]

> *If the host State is aware of and agrees to the assignment of rights and duties, the approval of the extension of jurisdiction ratione personae to the successor will be assumed. If the host State is unaware of an assignment or has resisted succession, it is less likely that a tribunal will decide that party status under the Convention has been transferred. If the successor to rights and obligations is closely affiliated to the party named in the consent agreement, either as a parent company or as a subsidiary, the standards will be less stringent.*

506. However, the Tribunal also agrees with the findings of the tribunal in *Sumrain v. Kuwait* case, that:[395]

> *Once an arbitration agreement comes into existence and the parties to that agreement have been defined, the arbitral tribunal cannot modify that agreement without the consent of all the parties to that agreement. That is a fundamental principle: a tribunal can interpret and apply an arbitration agreement, but it cannot rewrite or amend it.*

507. Although the issue in that case related to the claimant's application to join a third party to the proceedings, and not a substitution of a claimant, as noted by Claimant, it is still pertinent. This is because contrary to Claimant's contentions Vercara is not a party to the original arbitration agreement. The original arbitration agreement was concluded between Neustar and Respondent. The fact that at a subsequent date after proceedings had started, Neustar decided to transfer the ICSID claim, which it had brought on its own in this proceeding, does not automatically make Vercara a party to the "original arbitration agreement". As Neustar stated itself this is "*an assignment of rights and obligations arising*

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393 Application on SfC §§ 25-27; Reply on SfC §§ 51-59; Rejoinder §§ 55-64; Response on SfC §§ 127-144

394 C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (Second Edition) (2009), 'Article 25 – Jurisdiction' **(**RL-44). Respondent cites p. 185 § 362 at Rejoinder § 34.

395 *Sumrain et al v. State of Kuwait*, ICSID Case No. ARB/19/20, Decision on the Joinder Application, 5 October 2020 § 21 (RL-122)

from it". These rights and obligations, however, originally belonged to Neustar, not to Vercara.

508. In addition, as seen above with respect to the notices necessary before the arbitration can be validly commenced under the TPA and the ICSID Convention (see § 254), the state's consent to the arbitration comes about because the arbitration was validly commenced in accordance with the relevant treaty and subject to the appropriate notices having been received by Colombia from Neustar. In the Tribunal's view, Neustar cannot freely assign and transfer the existing and validly commenced ICSID claim under an independent arrangement to an unknown party. Absent an express consent to the change of claimant by Colombia in this case, there was no consent to the assignment and transfer of the MinTIC Claim to Security Services and then Vercara. Security Services/Vercara therefore did not formally become a party to this Arbitration. For these reasons, Neustar cannot walk away from the Arbitration and unilaterally substitute itself with another entity not known to Colombia.

509. In support of its submissions, Claimant relies on *Quasar de Valores v. Russia*, where the BIT claim was assigned to the original claimant's majority shareholder who was permitted to replace the original claimant. The tribunal allowed this change, despite the respondent's objections, stating:[396]

> *In sum, the Tribunal considers that (a) it was a universal succession, (b) if this was not so, ALOS 34 under these circumstances could nonetheless, given its legal title to the credito litigioso [i.e. the arbitration claim], assume Rovime's position irrespective of consent by the Respondent, (c) there are no special circumstances that cut the other way; to the contrary, (d) ALOS 34 qualifies under the BIT just as Rovime did.*

510. However, in that case the original claimant ceased to exist completely by virtue of its completed merger into its parent company. The tribunal held there to be an "*universal succession*" which is different in the present case. It was further held that the respondent's consent was not needed, and there were no "*special circumstances*" suggesting otherwise.

396 Rejoinder § 61; *Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012 § 35 (RL-205)

Furthermore, that was an SCC case; this Arbitration is brought under the ICSID Convention.

511. Accordingly, the above legal authorities indicate the factors that should be taken into account when determining whether a respondent state's consent is needed with respect to the substitution of a claimant midway through the proceedings. However, these factors are not binding on this Tribunal. Furthermore, in one way or another, these factors all confirm that the decision reached was based on the particular circumstances of each case. Therefore, the Tribunal's decision will be based on the specific wording of the TPA applicable to this case, the ICSID Convention and the particular facts of this case.

512. In the present Arbitration, Article 10.16 of the TPA contains Respondent's standing offer to arbitrate to any investor who fulfils the relevant legal criteria to bring such a claim against Colombia. Article 10.16 specifically gives a claimant the right to commence arbitration proceedings in respect of a dispute arising out of its investment in Colombia subject to certain prior requirements. A claim is "deemed" "s*ubmitted to arbitration*" under Article 10.16 when "*the claimant's notice of or request for arbitration*" is received by the Secretary-General of ICSID in accordance with Article 36(1) of the ICSID Convention.[397]

513. For the purposes of the TPA, Neustar filed its RFA with ICSID on 23 December 2019, when it formally accepted Colombia's offer to arbitrate. The State's consent has been given in the TPA, subject to certain conditions, as provided for under Article 10.17 TPA which stipulates that "*each party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement*", and that such consent "s*hall satisfy the requirements of (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute*".

514. Further, Article 36(2) ICSID Convention specifically provides that the request for arbitration "s*hall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings*". The Tribunal accepts Claimant's

397 Article 10.16(4) TPA

submission that this provision does not necessarily affects the Tribunal's jurisdiction because it concerns matters relating to the "*registration procedure*", which at the time were satisfied by Neustar. However, the purpose of this registration procedure is to inform ICSID, the respondent and the tribunal, who the claimants and respondents are, how the issues in dispute are to be determined, and the relevant applicable rules and laws, to be applied to determine all necessary requirements (even if a question of formality and or administration of the proceedings) have been satisfied for the case to be registered. Also, it importantly serves to inform the respondent State which investor has accepted the State's offer to arbitrate and initiate proceedings.

515. Neustar and .Co Internet concluded the agreement to arbitrate with Respondent by initiating this Arbitration and thereby accepting Colombia's offer to arbitrate under Article 10.16 TPA, and subjecting itself to the jurisdiction of ICSID and this Tribunal. Also, Neustar is identified as one of the Claimants in the RFA. It was not Security Services (now Vercara) or Neustar's other subsidiaries. The fact that Security Services was a subsidiary of Neustar at the time, does not mean that it was also a party to the arbitration agreement. As stated above, Neustar and Security Services/Vercara are two different legal entities. If it wasn't for the transfer of the MinTIC Claim, Security Services/Vercara could have no rights and obligations in this Arbitration. For the purposes of this Arbitration, Vercara is effectively a third party which cannot be joined absent Respondent's consent. Accordingly, prior to transferring its MinTIC Claim to another entity and "substituting" the Claimant in this Arbitration, Neustar should have sought and obtained Respondent's consent.

516. There is no evidence that Claimant sought Respondent's consent to the transfer of the MinTIC Claim and the substitution of Security Services/Vercara as Claimant in these proceedings. In fact, it was only 6 months after the Spin Out that Neustar gave an almost matter-of-fact notice to ICSID (and the Tribunal and Respondent) of a change in Claimant. It gave little detail of who Security Services was or any guarantees as to its ability to conduct the Arbitration properly. It described it as a "change of name" not a different entity taking over as claimant. In the Tribunal's view the fact that Security Services was part of the larger corporate group to which Neustar was a member is irrelevant.

517. Further, the Tribunal is not persuaded by Claimant's submission that such consent was given by Respondent "*by virtue of its initial response to the notification of the change of claimant and/or its subsequent conduct in seeking security from Vercara and indicating its intention to seek a costs award against it*".[398] Since then, Claimant has filed further documents showing that this was not a mere change of name, but a substitution of claimant. Respondent has not consented to this substitution.

518. For the above reasons, the Tribunal is not persuaded that Claimant's transfer of the ICSID claim was valid and effective under international law given the absence of Respondent's consent to that end.

(iv) Jurisdiction over Neustar

519. In light of the above, the Tribunal is not persuaded that Neustar's actions constitute discontinuance of the proceedings under ICSID Arbitration Rule 44, as argued by Respondent. In reality this Arbitration has continued in the normal way with the Parties filing their written submissions and evidence in accordance with the Tribunal's procedural directions, the hearing on 27-29 March 2023 and Respondent's formal application of security for costs. ICSID Arbitration Rule 44 provides:

> *If a party requests the discontinuance of the proceeding, the Tribunal […] shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal […] shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.*

520. In this case Neustar has not requested the proceedings be discontinued. Rather, it initially submitted that there had been a mere "*change of name*" from Neustar, Inc to Neustar Security Service LLC. It was not until its Response to Respondent's SFC Application that Claimant submitted that this Tribunal has no continuing jurisdiction over Neustar as all rights and obligations had been transferred to Security Services/Vercara. Therefore, it

[398] Rejoinder on SfC § 65

argued, no potential adverse cost orders could be made against Neustar.[399] This argument was not raised in Claimant's Memorial or its Reply Memorial.

521. In the Tribunal's view, the practical and legal effect of Neustar's assignment of the MinTIC Claim to Security Services/Vercara is Neustar's attempt to withdraw from the proceedings. Claimant explicitly stated that this Tribunal no longer has jurisdiction over Neustar pursuant to the Bill of Sale and the UPA, under which Vercara "*assume[d] all rights, obligations and liabilities of [Neustar] with respect to the applicable Transferred Assets, which include those in relation to the MINTIC Claim*". Accordingly, "*Neustar has no obligations or liabilities with respect to this claim*".[400] In practical terms, this amounts to a unilateral withdrawal of consent from this Arbitration.

522. However, Article 25 of the ICSID Convention explicitly precludes unilateral withdrawal of consent. In particular it provides:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

523. It follows that once an investor has started proceedings and effectively consented to arbitration, the investor cannot "*withdraw its consent unilaterally*" and avoid liability by discontinuing participation in this Arbitration.

524. Accordingly, Neustar's unilateral withdrawal is not valid and effective under the applicable legal rules governing this Arbitration. Therefore, Neustar remains party to the proceedings and this Tribunal has jurisdiction over it. By corollary, the Tribunal has no jurisdiction over Vercara because of the Claimant's failure to obtain the Respondent's consent to the assignment of the MinTIC Claim prior to executing the assignment of the claim.

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399 Response on SfC §§ 183, 184

400 Response on SfC § 183

(v) Tribunal's Conclusion

525. For the reasons explained above, Neustar did not validly and effectively transfer the MinTIC Claim to Security Services/Vercara under international law as it intended. Neustar did not seek Respondent's agreement to the transfer of the MinTIC Claim to Security Services/Vercara as required by the ICSID Rules. Equally, Neustar did not seek to withdraw its consent under Article 25 of the ICSID Convention, and therefore remains a Party to this Arbitration.

526. Accordingly, the Tribunal has decided that it still has jurisdiction over Neustar. This Arbitration has proceeded in full. The Tribunal has therefore issued this Award recognising Neustar as the Claimant in this Arbitration. If there are differences between Neustar and Security Services/Vercara *inter se* concerning their rights and obligations pursuant to the TPA the issues will need to be determined between them in light of the UPA and the Bill of Rights.

VI. LIABILITY

527. Neustar claims Colombia violated its obligations under the TPA and customary international law. This included specifically the allegations that Colombia (A) failed to accord Neustar fair and equitable treatment (FET) in violation of Article 10.5 TPA, (B) acted in a discriminatory manner in violation of Articles 10.3 and 10.4 TPA, (C) failed to protect Neustar's Confidential Business Information, and (D) failed to protect Neustar's investments against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT. Respondent rejects the allegations of violations and breaches of the TPA and the Swiss-Colombia BIT; and it also denies that this BIT is relevant or applies in these circumstances.[401] The Parties' position and the Tribunal's analysis and determination on these claims are set out in turn below.

A. FAIR AND EQUITABLE TREATMENT

[401] Counter-Memorial §§ 302, 303

(1) The Parties' Positions

a. Claimant's Position

528. Neustar contends that Respondent's measures were arbitrary, discriminatory, lacking in good faith, based on pretext rather than reason, failed to provide due process and violated Claimant's legitimate expectations.[402] It therefore breached Article 10.5 TPA by failing to negotiate with Neustar an extension of the Concession, and by failing to provide Neustar with *"any reasonable information as to the extension process, which was both shrouded in secrecy and showed concerted actions with another company, AFILIAS*".[403] Further, Colombia also acted in a discriminatory manner towards Neustar and frustrated its legitimate expectations.

529. Claimant contends that under the applicable law "*a State thus will be deemed to have violated its obligation to accord minimum standard of treatment, including fair and equitable treatment, if it imposes arbitrary measures, targets or discriminates a foreign investor, or repudiates representations on which a Claimant reasonably relied when it made its investment*".[404]

530. Claimant relies on the customary international law minimum standard of treatment, a broadly recognized to be a developing body of law. This follows decisions in *Eco Oro v. Colombia, Mondev v. Mexico, ADF .v United States*. It refers to the standard set out in *Waste Management v. Mexico,* as cited to by *Biwater Gauff v. Tanzania* and *Mobil v. Canada*. In particular Claimant states that the minimum standard of treatment "*should not be static*"; it develops and "*changes over time to account for the reality in the world that we live in*".[405]

531. As to the specific FET violations, Claimant alleges that Colombia's failure to negotiate "*an extension of the Concession and failing to provide Neustar any reasonable information as to the extension process*" and the frustration "*of Neustar's legitimate investment backed expectations*" violated Article 10.5. In this respect Neustar argues that the actions taken by

402 Claimant's PHB § 31
403 Memorial § 190
404 Memorial § 187
405 Tr. Day 1 [ENG] 46:4, 11-12

Colombia (i) were arbitrary,[406] (ii) failed to give due process to Neustar, and (iii) "*violated Neustar's legitimate expectations*".[407] Finally, (iv) Claimant also rejects Respondent's argument regarding the scope of application of the FET standard. Claimant contends in particular "*this lack of candour seems to be very acute in this proceeding*".[408]

(i) Respondent's actions were arbitrary and discriminatory

532. Claimant argues that arbitrariness is established when the following four elements are present:[409] (i) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (iii) a measure taken for reasons that are different from those put forward by the decision-maker; and (iv) a measure taken in wilful disregard of due process and proper procedure. Claimant argues that these elements are satisfied by Respondent's conduct since it "(*1) was not rationally connected to any legitimate policy objective; (2) was not based on legal standards, but rather was based on prejudice and was discriminatory in nature, and (3) arose out of a failure of Respondent to act in good faith*".[410]

533. In particular, Respondent's own Report discusses the benefits of extending the Concession and discusses ways in which such an extension can be accomplished as a benefit to Colombia. Thus, the decision to refuse to negotiate an extension was based on prejudice and discriminatory.[411] Furthermore, despite multiple requests from Claimant, Respondent gave no reasons for the rejection of the extension to the Concession and Respondent's refusal to negotiate.

534. Claimant also contends that Respondent's conduct was arbitrary because it was not rationally connected to any legitimate policy objective.[412] To this end, Claimant refers to a

406 Memorial §§ 191-212
407 Memorial §§ 225-237
408 Tr. Day 1 [ENG] 47:16-17
409 Memorial § 193 relying on *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 § 760 (CL-023)
410 Memorial § 194
411 Memorial § 194
412 Memorial § 197; Claimant's PHB § 34

two-prong test elaborated by Dr. Heiskanen to discern arbitrary treatment, namely: (i) whether there is any rationale or justification put forward in support of the measure; and (ii) whether the rationale or justification is related to a legitimate governmental policy. Claimant submits that there is no rational reason for Respondent's conduct, nor were these actions in furtherance of any legitimate policy objective. The evidence shows that Respondent knew that benefits existed to an extension of the Concession and repeatedly extended concessions for domestic investors and other foreign investors.

535. Claimant rejects Respondent's contention that its decision not to extend the Concession was based on different policy objectives including the economic and market conditions, and that renewal could breach fundamental principles of Colombian administrative law. This is for the following reasons:

a. First, Claimant argues that if the "*better economic conditions*" were indeed one of the reasons, Respondent could have negotiated with .Co Internet better terms of an extended Concession or even consider Neustar's unilateral offer of 22 May 2019, which offered better conditions to Colombia.

b. Second, if there was a possibility for the renewal of the 2009 Contract to violate Colombian administrative law, the Parties would not have included the renewal clause. Moreover, the July 2018 Report on which Respondent relies barely addresses the compliance with administrative law; it focuses on fiscal terms.[413] This rationale was never communicated to .Co Internet as demonstrated by the documents contemporary to events in question.[414] Claimant provided multiple examples of concessions in the telecommunications sector extended with material changes in the financial terms.[415]

c. Third, Respondent admits that its actions were motivated by political favoritism, instead of non-partisan public administration, in violation of minimum standard of treatment. For instance, Respondent refers to the forthcoming presidential elections

413 Reply § 229
414 Claimant's PHB § 34
415 Claimant's PHB § 35

as a reason for its failure to evaluate the Concession in late 2017. Claimant further provides the record of Respondent's external public communications in the period from November 2017 through June 2018, which, contrary to the late 2017 decision, showed the positive feedback of the .Co Internet work and indicated the intention to extend the Concession. Claimant submits that such communication gave hope of extension. Claimant also refers to President Duque having made the decision not to renew the 2009 Concession, before the Advisory Committee allegedly even recommended a new tender process.[416]

536. Further, Claimant contends that Colombia's conduct was not based on legal standards and was discriminatory. In this regard, Claimant refers to the findings in *Metalclad v. Mexico*, *Eureko v. Poland*, *Lauder v. Czech Republic* that failure to grant regulatory approvals for an ulterior, political motive to be arbitrary, and thus a violation of the FET standard. In light of this, Claimant argues that Respondent's failure to negotiate or engage with Claimant regarding the extension of the Concession was done "*for the most pernicious of ulterior motives - to install a favored operator for reasons not related to that company's performances or some other rationale measure*".[417] Claimant argues: "*When there is a process that is supposed to happen, if that process is opaque or that process doesn't happen, or there is a lack of candour with regard to that process… those actions violate the minimum standard of treatment"*.[418]

537. Claimant contends that Respondent is wrong to consider that the .co concession was not comparable to other telecommunications concessions. By way of its regulations, it has specifically placed the **.co domain** within the telecommunications sector. By ignoring its regular practice of concession renewals, the Respondent acted in an arbitrary and discriminatory manner, without regard to due process.

538. In relation to the discriminatory element, Claimant refers to the 2012 UNCTAD Report's inclusion of the prohibition of targeted discrimination as one of the five elements of the

416 Claimant's PHB § 39
417 Memorial § 201
418 Tr. Day 1 [ENG] 48:22-49:1-2

FET standard, as confirmed by a number of NAFTA tribunals.[419] Claimant contends that the minimum standard of treatment under Article 10.5 covers nationality-based discrimination, contrary to Respondent's argument.[420] In any event, Claimant submits that even the "*high standard*" to which Respondent refers was met here.[421] This is because Neustar was discriminated against as compared with domestic investors and investors from third countries, referring to the concession extensions in the telecommunications, mining and port sectors.[422]

539. Claimant further contests Respondent's contention that high tender requirements were meant to choose the proponent experienced enough in operating large domains. According to Claimant, contemporaneous media reports, indicating the size and experience of the registries excluded, did not support this statement. Further, Ms. Trujillo confirmed that she was not even "*directly involved in the technical and financial discussions*", and that she simply "*underst[ood] that the general approach was to include quite high requirements*".[423]

540. Claimant also rejects Respondent's argument that an extension of the 2009 Concession was inconsistent with Colombian competition law. This is for three main reasons. First, in July 2018 Respondent made no mention of competition law, but instead focused on the Colombia's remuneration terms.[424] Second, Respondent "*routinely renewed*" contracts or concessions for domestic investors.[425] Third, Claimant provides the list of contemporaneous communications from Respondent indicating that in July 2018 Respondent had no basis to assert that it was undercompensated from .Co Internet. Thus, Claimant argues that such assertions in July 2018 Report were pretextual and meant to coerce Claimant into an unfavourable economic deal.

541. In relation to the relationship with ICANN, Claimant states that MinTIC specifically retained responsibility for participation at ICANN by way of Resolution 1652 and .Co

419 Memorial § 203
420 Reply § 241
421 Reply § 242
422 Memorial §§ 204-206
423 Witness Statement of Luisa Fernanda Trujillo, 23 February 2022 § 20 (RWS-03)
424 Reply § 247
425 Reply § 248

Internet encouraged governmental presence at ICANN meetings. Further regarding technical oversight, under the terms of the Concession MinTIC could require any information necessary to verify the compliance with obligations under the Concession and had two full time employees supervising the contract.

542. Claimant further argues that Respondent acted in bad faith as its failure to negotiate was due to its intention to install AFILIAS as the concessionaire as demonstrated in the ITU Report;[426] also other concessionaires received extensions whereas it was refused for Neustar. In response to Respondent's counterarguments Claimant clarifies that its claims in this Arbitration rest on the way in which Respondent "*acted in bad faith in dealing with Neustar and its investment*",[427] not on the failure to renew the 2009 Concession. Such action in bad faith included making supportive public statements and at the same time having "*political mental reservation"* not to renew the Contract.[428]

(ii) <u>Respondent failed to afford due process to extension</u>

543. Claimant contends that Respondent failed to accord it due process, which is a minimum standard of treatment under Article 10.5, was a violation of the TPA. Claimant contends that it is well-established that the FET standard contains an obligation for host States to provide foreign investors with due process, including transparency, consistency, stability, predictability, conduct in good faith, and the fulfilment of an investor's legitimate expectations. Claimant argues that it does not have to prove denial of justice; it is sufficient to show "*that there is the lack of candour in the administrative process*".[429] Thus, when determining whether a failure to provide due process has violated the minimum standard of treatment, tribunals have considered the following factors:

a. whether the powers exercised by a host State's administrative body have been misused for improper purposes. In this case, Claimant argues that Respondent's

426 Claimant's PHB § 43
427 Reply § 266
428 Reply § 265
429 T. Day 1 [ENG] 52:3-13

refusal to negotiate and extend the Concession was an administrative action which was used for improper purposes.[430]

b. a failure on the part of the administrative agencies to act in a transparent and candid manner could amount to a violation of the FET standard. In this case, Claimant argues that the President of Colombia's decision, and that of other officials to decide to conduct a new tender of the now valuable **.co domain**, were actions taken in wilful disregard of due process, shrouded in secrecy and lacked transparency, including secret meetings with representatives from AFILIAS.[431] Further, when a State takes a decision affecting an investor, "*it must act in good faith and provide clear, consistent and truthful reasoning*".[432] Claimant argues that Respondent lacked candour and truthfulness with respect to the refusal to negotiate and making it impossible for Neustar to challenge the reasoning. Further, the "*Colombian President had already decided to direct that a new tender be conducted, while Colombian officials were reportedly having secret meetings and discussions with AFILIAS regarding a new concession*".[433]

544. Claimant contends that "*Respondent failed to afford due process to the Claimant by its constant refusal to respond to correspondence from Claimant, and by its lack of any consideration of the offers made by .Co Internet to re-negotiate the Concession as recommended by the July 2018 Report*".[434] Respondent "*failed to demonstrate any semblance of due process afforded to the consideration of the May Offer or of the Claimant's correspondence seeking in good faith to negotiate a renewal*".[435]

545. In relation to .Co Internet's participation in the Advisory Committee, Claimant argues that there was no reason for its removal as a separate task force was created to bring a recommendation with regard to whether a tender process or an extension would be the most optimal choice. The contradictory testimony at the hearing regarding the Committee's role

430 Memorial § 216
431 Memorial § 219
432 Memorial § 220
433 Memorial § 221
434 Claimant's PHB § 45
435 Ibid

"*further underscore the complete lack of transparency and due process with regard to Colombia's dealings with the Claimant*".[436]

546. In addition, Claimant submits that affording due process to an investor requires the presence of a mechanism to raise claims against actions taken or about to be taken by a host State. This includes the obligation to consult with the investor (in this case Neustar and .Co Internet) to give it the opportunity to address any issues of concern; it also encompasses the obligation to conduct a public hearing and inform the investor that it is taking place and to invite it to appear and present evidence at that hearing.

547. Finally, Claimant argues that under Article 10.5.2(a) denial of justice is not required for the breach of due process to constitute a violation of the FET standard.[437] In support of its position, Claimant relies on Annex 10-A and case law in which tribunals have interpreted the minimum standard of treatment.

(iii) Respondent Violated Claimant's Legitimate Expectations

548. Claimant argues that Respondent's conduct violated its legitimate expectations regarding the negotiation and the extension of the Concession in good faith. In this regard, Claimant argues that the minimum standard of treatment also encompasses a state's obligation to ensure regulatory fairness and predictability to investors. In fact, the standard has consistently been applied by tribunals to protect investors "*against unfair treatment arising from a state's repudiation of commitments made to encourage the investor to invest*".[438]

549. Neustar states that its legitimate expectations were based on Respondent's practice of negotiating and extending concessions.[439] These expectations were based also on the law and the terms of the Concession, in particular: Article 2 of Law 1065 which authorizes the extension of the Concession, and the second paragraph of Article 4 of the 2009 Concession Contract. In this regard, Claimant stated that it expected *"Respondent would negotiate in good faith, which in any event is mandated by Colombian law*.[440] According to Claimant,

436 Claimant's PHB § 48
437 Reply § 269
438 Memorial §§ 226, 227
439 Memorial § 231
440 Memorial § 234

even if the Concession language does not contain an obligation of renewal, it contains the obligation to negotiate in good faith regarding the possible extension. "Article 4 "*does not promise an automatic extension*"; however, it *"does promise a concrete assurance of the ability to seek a renewal, should the concessionaire so choose*"; and it is a *"provision designed to ensure that MinTIC negotiate in good faith with respect to a possible extension*".[441]

550. In addition, Claimant states that it also had an expectation that Respondent would negotiate the extension of the Concession, in good faith. Instead, rather than having an extension of the ten-year concession on terms similar to the existing Concession, Claimant was forced to submit an unfavorable bid for a five-year Concession.

551. Claimant states that its purchase of .Co Internet from Arcelandia for US$113.7 million evidences its legitimate expectations of the Concession. It would not have been tenable to pay the price to purchase .Co Internet had it known that the Concession would not be renewed. Respondent is mistaken that the USD 6 million "*contingency payment*" in case of "Qualified Renewal" shows that Neustar understood that this was only a possibility and not a certainty. The math does not work. Claimant purchased Arcelandia halfway through the Concession period for USD 113.7 million for the remaining part of a 5-year concession; it cannot be that a 10-year renewal would be worth only USD 6 million. "*The contingent payment was set so low precisely because a renewal assumption was baked into the headline price*".[442]

552. Claimant also "*expected that the Respondent would adhere to its international obligations, including under the TPA*". In fact is disregarded the TPA.[443]

(iv) <u>The Scope of Application of the Legal Standard under Article 10.5 TPA</u>

553. In response to Respondent's counterarguments on the issue, Claimant asserts that Respondent has sought to rely on an "*unduly narrow the legal standard*" under Article

441 Claimant's PHB § 32
442 Claimant's PHB § 50
443 Claimant's PHB § 52

10.5.[444] Claimant disagrees with Respondent's view that the test established in the *L.F.H. Neer and Pauline E. Neer (United States) v. Mexico case,*[445] (the "*Neer test*") should be applied strictly; rather, the standard has developed through caselaw and is now broader.[446] Claimant emphasizes that what is seen as "*arbitrary*" has changed and evolved since the above definition in the Neer case, and continues to change.[447]

554. Claimant rejects Respondent's argument that its FET claim falls outside the TPA scope of protection due to treatment of Neustar as an investor.[448] Claimant states that the minimum standard of treatment under Article 10.5.2 and Annex 10-A relates to aliens as persons, and not solely to their investments. However, Claimant contends that this distinction is not applicable in the present dispute as the treatment in question concerns the rights of .Co Internet which is the investment itself.

b. Respondent's Position

555. Respondent rejects Neustar's claims for breaches of the FET standard for several reasons set out below. It requests the Tribunal dismiss the claims.

(i) The FET standard under Article 10.5 TPA

556. Respondent contends that Article 10.5 explicitly links the FET standard in the TPA to the minimum standard of treatment which in turn seeks to prevent over-expansive interpretations of the FET standard.[449] This FET standard cannot be interpreted as an autonomous standard going beyond the minimum standard of treatment. Further, relying on the United States' position in *Seda v. Colombia,* Respondent submits that the obligation to provide FET applies only to covered investment and not to investors. Respondent additionally argues that the conclusions reached in cases where FET was not linked to the minimum standard have no relevance for the present proceedings.

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444 Reply § 206
445 *L.F.H. Neer and Pauline E. Neer (United States) v. Mexico*, UNRIAA Award, 15 October 1926, Vol. 4, pp. 61-62 § 4 (CL-022)
446 Reply § 207
447 Reply § 211
448 Reply § 217
449 Counter-Memorial §§ 307, 308

557. Further, relying on *Waste Management v. Mexico (ii)*, *SD Myers v. Canada*, and the 2021 UNCTAD Report, Respondent argues that the threshold for establishing that a state's conduct has breached this minimum standard is particularly high. In particular, as established in *Thunderbird v. Mexico*, a breach of the minimum standard are acts that "*amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards*".[450]

558. Respondent submits that the minimum standard remains high,[451] even though it may have evolved from the threshold established in *Neer v. Mexico*, over the years to include an obligation not to discriminate, the concept of transparency, due process and protection of legitimate expectations. In this respect, Respondent states that Claimant has failed to show state practice and *opinio juris* in support of its allegations of these claimed elements of minimum standards. Thus, Respondent argues that acts that may give rise to a breach of the minimum standard are "*those that weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards*".[452]

559. Respondent contends that "*Claimant has failed to prove that the MST includes self-standing obligations not to discriminate, transparency, a broad conception of due process (as opposed to denial of justice) and legitimate expectations*".[453] It is not an actionable claim that Respondent failed to respond to Claimant's enquiries.

(ii) <u>Claimant's claims fall outside of the scope of Article 10.5 TPA</u>

560. As a preliminary point, Respondent notes that Claimant's claims relate to the treatment afforded to Neustar as an "*investor*", rather than the treatment accorded to its *"investment*". Therefore, Respondent submits that these actions do not fall within the scope of Article 10.5 and should be rejected on this basis alone. This is because Article 10.5 is expressly limited to the treatment accorded to "*covered investments*". None of the FET claims

450 Counter-Memorial § 313
451 Rejoinder §§ 174, 175
452 Counter-Memorial § 313 quoting from *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 § 194 (CL-059)
453 Respondent's PHB § 58

concern treatment afforded to its shareholding in .Co Internet, Neustar's primary investment. According to Respondent, this distinction between "*investors of another party*" and "*covered investments*" is also illustrated by the language of other TPA provisions. Respondent also argues that the United States practise regularly confirmed that Article 10.5 applies only to "*covered investments*".[454]

(iii) Colombia's actions were not manifestly arbitrary

561. Respondent argues that the threshold to establish arbitrariness in relation to the FET minimum standard of treatment is high, and that tribunals commonly require manifest arbitrariness. In particular, in the *ELSI* case, the ICJ said "*unlawfulness cannot be said to amount to arbitrariness […]*" and *"[arbitrariness] is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[455] Respondent also cites Prof. Dumberry, who stated that "*the threshold applied by NAFTA tribunals in order to establish a finding of arbitrariness has been consistently high*".[456] Thus, Respondent argues that tribunals require that the finding of "*arbitrariness*" to be "*shocking*", "*surprising*", and to "*rises below to the level that is acceptable from the international perspective*" or be "*manifestly arbitrary*".[457]

562. Further, Respondent argues that a refusal to renew the 2009 Contract could not give rise to a claim for arbitrariness. This is because under the 2009 Contract, the Parties had the possibility of renewing or not renewing the Contract after its term, but this was at their discretion. There is nothing "*shocking*" in one party refusing to renew a Contract or refusing to negotiate a renewal when it has the possibility to do so.[458] To this end, Claimant has failed to present any evidence showing that Colombia was not following a legitimate

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454 Rejoinder § 187

455 Counter-Memorial § 324

456 Rejoinder § 191, citing P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), Chapter 3: 'The Substantive Content of Article 1105', pp. 160-323, p. 23 of the pdf (RL-084)

457 Rejoinder § 191 referring to *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 § 296 (CL-018); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 § 626 (CL-017); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 §§ 370, 371 (CL-084); *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006 § 197 (CL-059); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 §§ 282-286 (CL-085)

458 Counter-Memorial § 325

purpose when it decided not to renew the 2009 Contract. In fact, Neustar knew the specific reasons for Colombia's decisions as expressed in the communications of MinTIC and the minutes of the Advisor Committee's meeting of 18 March 2019, as well as during several other meetings with .Co Internet, through correspondence exchange and through the publication of the ITU report. Respondent contends that the evidence shows that "*MinTIC had a real and legitimate reason not to renew the Contract*", protecting the State's public interest by "*administering its asset in an economically profitable way*".[459]

563. While the **.co domain** had little value in 2009, in 2018 or 2019 it was very valuable, and that was an asset of the State and Neustar was taking 97% of its profits. The State did a thorough analysis showing the original financial model under which Neustar operated was not sustainable for the State and was not in accordance with the current market that had massively changed and grown in the past ten years.

564. In addition, Respondent contends that an analysis of the facts confirms that Respondent's decision had a legitimate policy objective. This was primarily the need for Colombia to obtain a better financial return and adapting the administration/operation model. The best option from a legal perspective was a new tender process because the market conditions for the operation of domain names had changed significantly. This was also the recommendation of the ITU Report. Further, Respondent explains that renewing the Concession with fundamental changes could have breached principles of Colombian administrative law like transparency and equality.

565. Respondent also argues that its conduct was based on legal standards; it was not a discriminatory treatment. Respondent submits that there is a debate as to whether the FET minimum standard of treatment covers non-nationality based discrimination, but submits that if that were the case the standard would be "*high*". Additionally, there was no discrimination in this case.

566. With respect to the issue of a legitimate objective of the measures, Respondent contends that Claimant ignores that Article 4 of the 2009 Contract only referred to a renewal as a

[459] Tr. Day 1 [ENG] 162:23-163:3

contractual prerogative; in other words, it could only be pursued if both Parties agree. Thus, MinTIC had a discretionary contractual prerogative to consider whether or not to discuss renewal with .Co Internet. It was under no contractual or legal obligation to do so. This was acknowledged by Neustar and .Co Internet in both a legal opinion transmitted to MinTIC on 27 December 2018 and in a further communication of 5 March 2019. Additionally, Respondent's focus was not only on obtaining better conditions for Colombia but also ensuring full compliance with its own administrative law. This is because Colombia identified clear legal risks that a renewal of the 2009 Contract associated with a significant modification of the contractual terms could breach fundamental administrative rules of transparency and equal opportunity. Hence, Respondent denies there was a hidden motive behind the decision not to renew the 2009 Concession.[460]

567. Respondent also rejects Claimant's allegations that the terms of reference for the 2020 Tender Process were "tailor made" for AFILIAS, which resulted in discrimination against Neustar, or that the process itself was carried out in a non-transparent manner. This is for the following reasons. First, as a preliminary point, Claimant has failed to show that the minimum standard of treatment under Article 10.5 provides protection against non-nationality-based discrimination. However, even if did, Claimant has provided no evidence, including witnesses to confirm this allegation.

568. Second, in relation to the extension of other concessions, Respondent argues that the language of the 2009 Contract was clear that MinTIC had the discretionary right to decide whether or not to extend the Concession; and that it was justified not to do so. Similarly, the negotiations and renewals of the other concessions were also a discretionary right. In any event, comparators referred to by Claimant, and Neustar were not in like circumstances, and extensions of concessions in Colombia are not allowed where there are changes to essential elements of the Contract.[461]

569. Third, all of the allegedly discriminatory provisions in the 2020 Terms of Reference were included on the basis of express and reasoned recommendations from the ITU experts. In

460 Rejoinder § 204
461 Rejoinder § 216

fact, .Co Internet was allowed to participate in the public tender for the 2020 Contract on an equal footing as the other candidates and was awarded the 2020 Contract.

570. Colombia was pursuing a legitimate objective in deciding not to renew the 2009 Contract which further justifies the rejection of Claimant's discrimination allegation.[462] In contrast, Claimant has failed entirely to show that Respondent engaged in any kind of discrimination with respect to either its decision not to renew the 2009 Contract or its conduct of the 2020 tender process.

571. Finally, Respondent submits that Claimant failed to prove Respondent acted in bad faith in relation to both the decision not to renew the 2009 Contract and throughout the carrying out of the 2020 tender process.[463] Respondent denies that Colombia had the intention to install AFILIAS as the new operator. In fact, the record shows that at the end .Co Internet was ultimately awarded the Contract.[464] Relying on *Micula v. Romania*, Respondent submits that the standard of proof to establish a breach of good faith is particularly high and cannot be presumed or inferred.[465]

(iv) Respondent's actions respected due process

572. Respondent denies there were any failures of due process and submits that, pursuant to the wording of the TPA, the FET standard can be violated only where a breach of due process results in a denial of justice. In particular, Article 10.5 explicitly links the FET under the TPA and the "*obligation not to deny justice in criminal, civil, or administrative adjudicatory proceeding in accordance with the principle of due process*".[466] According to Respondent, this requires a very high threshold including a systemic failure of the state's justice system.[467] This is true even in cases where the due process standard is not limited to cases of denial of justice.[468] Referring to the decisions in *Teco v. Guatemala*, *Waste*

462 Rejoinder § 216
463 Rejoinder §§ 218-222
464 Counter-Memorial § 339
465 Counter Memorial § 340
466 Counter Memorial §§ 345
467 Counter Memorial § 346; Rejoinder §§ 225-228
468 Counter Memorial §§ 347, 348; Rejoinder § 230

Management v. Mexico, and *Railroad v. Guatemala*, Respondent contends that the irregularity must lead to an outcome which offends judicial propriety.[469]

573. In light of these principles, Respondent contends that misuse of administrative powers, as alleged by Claimant, could not amount to a breach of due process. Even if there had been a misuse of power there is no allegation by Neustar that the alleged misuse led to an outcome that offends judicial propriety.[470] This is because Respondent's decision not to renew the Contract was a purely contractual act, which did not involve the use of state powers and therefore did not entail the adoption of a specific administrative act.

574. Further, Respondent argues that transparency is not part of the minimum standard of treatment, as argued by Claimant.[471] But even if it were, it would have a very high standard, as established in several decisions *Saluka v. Czech Republic*, *RWE v. Spain*,[472] and would not require complete disclosure. To this end, Respondent submits that it did not fail to act transparently or candidly. In fact, in response to Claimant's initial request to renew the 2009 Contract, Respondent clarified that the renewal was only an option and that it was considering launching a public tender process. The Parties exchanged numerous communications and held several meetings and all the supporting documents for Respondent's decision were made available to .Co Internet.[473] This was also the case in relation to the 2020 Tender Process.

575. Finally, Respondent submits that by arguing that Respondent violated due process because it failed to implement a mechanism which would have given Claimant opportunity to convey its concerns, Neustar misrepresented the requirement of due process. According to Respondent, the only due process requirement is the presence of a mechanism to challenge the State's actions.

576. In any event, there were legal mechanisms available to Neustar and .Co Internet in relation to the decision not to renew the 2009 Contract and the 2020 Tender Process. In particular,

469 Counter Memorial §§ 348, 349
470 Counter Memorial §§ 351, 352; Rejoinder §§ 231-233
471 Counter Memorial § 354
472 Counter Memorial § 355
473 Counter Memorial § 358; Rejoinder § 240

under the 2009 Contract, Neustar had the possibility to start commercial arbitration should there be a dispute between the Parties. Further, Neustar had recourse to the national courts, which it actually used when it tried to challenge the decision before the Council of State. In relation to the 2020 Tender Process, there were numerous mechanisms under Colombian law.

577. In response to Claimant's allegations that the decision came from the President's office, Ms. Constaín clearly confirmed that she took the decision.

(v) Neustar's claims based on alleged legitimate expectations go beyond the minimum standard and are in any event groundless

578. Respondent submits that Claimant's legitimate expectations claim must fail as it does not fall within the limited scope of Article 10.5. The concept of legitimate expectations "*is not a component element of the customary minimum standard of treatment*".[474] Further, Article 10.5 expressly provides that the concept of FET under the TPA (a) does "*not create additional substantive rights*" and (b) only extends to the treatment accorded to covered investments (and not investors). It follows that, by definition, an investment cannot have any legitimate expectations only an investor can. Claimant's claim must be dismissed on this basis alone.

579. Even if the Tribunal accepts that legitimate expectations could be part of the FET standard under the TPA (which is denied), a violation of this standard requires a (1) clear and specific conduct of the state towards the investor, (2) that the investor relied on when making its investments, (3) that such expectations were objectively legitimate and reasonable, and (4) that the State repudiated these representations causing damage to the investor.[475] Respondent contends that none of these requirements were satisfied in this case.

580. First, there was no specific undertaking on which Neustar relied. Article 4 of the 2009 Contract does not provide a right to and an obligation of renewal.[476] Rather, Article 4 refers

474 Counter Memorial §§ 370, 371; Rejoinder § 246
475 Counter Memorial §§ 378-382
476 Rejoinder §§ 253-256

to "*may be*" renewed, which is not a binding right. Further, Claimant's references to the extension of other concessions or the State's past practice of extending concessions cannot prevail over the clear and explicit terms of the 2009 Contract. In addition, Article 2 of Law 1065 of 2006 also does not provide that the Contract shall be renewed.

581. Second, Neustar has provided no evidence showing that it relied on Colombia's conduct or representations, or that it relied on the possibility of renewing the 2009 Contract. To the contrary, Claimant was "*well aware*" that this was only a possibility.

582. Third, Respondent's conduct could not have given rise to a reasonable or legitimate expectation since it would not be reasonable for Neustar, a sophisticated foreign investor, to expect that the Contract would be renewed. This was especially true given that the contractual terms refer to the renewal as a possibility, not as a certainty. Further, automatic renewals are prohibited under Colombian law. In addition, such expectation would not be reasonable in light of the clear imbalance in the royalties received. Respondent further argues that Claimant has not provided any contractual undertaking, or general legal principle under Colombian law whereby MinTIC would have been required to negotiate a renewal.

583. Fourth, even if Neustar had an expectation of renewal, it would still need to demonstrate that (i) such expectation was objectively legitimate and reasonable, and (ii) that it relied on such conduct at the time of its investment. In relation to the first requirement, Respondent argues that it would not have been reasonable for Neustar, a sophisticated investor, to have expected at the time of its investment that the 2009 Contract would be renewed. Both the Colombian Constitutional Court and the Council of State had repeatedly held that automatic renewals are illegal and unconstitutional under Colombian law, and that the convenience of a renewal must be determined on a case-by-case basis; this was also confirmed by information publicly available at the time.

584. With respect to the second requirement, Respondent argues that Claimant failed to show reliance. Claimant argues this was demonstrated by the price it paid to Arcelandia in 2014 for the acquisition of .Co Internet's shares. However, Neustar has provided no evidence of

how the Arcelandia purchase was valued then; also, the wording of Section 5.18(g) of the Arcelandia SPA confirms that renewal was only a possibility.

585. For the above reasons, Respondent submits that Claimant's FET claim should fail.

c. Non-Disputing Party Submission

586. The text of Article 10.5 demonstrates the parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.

587. The burden is on the Claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinion juris*.[477] Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule. A departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

588. Arbitral decisions interpreting "*autonomous*" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.[478]

589. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide "*fair and equitable treatment*," which includes "*the obligation 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*".[479] The concepts of legitimate expectations, transparency, good faith and non-

477 Non-Disputing Party Submission § 28
478 Non-Disputing Party Submission § 30
479 Non-Disputing Party Submission § 31

discrimination are not component elements of "*fair and equitable treatment*" under customary international law that give rise to independent host State obligations.[480]

(2) The Tribunal's Analysis

590. Claimant alleges that Colombia violated the FET obligations in Article 10.5 TPA by failing to negotiate with Neustar the extension of the Concession and provide Neustar with any reasonable information as to the extension process. Respondent denies Claimant's allegation and contends that it was under no obligation to negotiate or extend the Concession.

591. Both Parties agree that the FET standard prescribed under Article 10.5 is limited to the minimum standard of treatment.[481] However, they disagree on the precise scope of application of Article 10.5. In particular, Claimant contends that Annex 10-A TPA confirms that the customary international law minimum standard of treatment of aliens, as that phrase is used in Article 10.5, refers to "*all customary international law principles that protect the economic rights and interests of aliens*".[482]

592. In contrast, Respondent argues the FET standard is not "*uniformly drafted across investment treaties and agreements*"; rather, it "*largely depends upon the contents of the treaty in which it is employed*".[483] Thus, determining the meaning of the FET standard requires due regard to each treaty's specific wording pursuant to Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT). Respondent submits that Article 10.5 explicitly links the FET standard to the minimum standard of protection under customary international law.

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480 Non-Disputing Party Submission § 32

481 Counter-Memorial § 309; Reply § 207

482 Memorial § 180 referring to TPA, Article 10.5, n. 3 (C-0002) ("*Article 10.5 shall be interpreted in accordance with Annex 10-A*"). See also North American Free Trade Agreement ("NAFTA"), Article 1105 (CL-015); NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 ("*Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party*"); Dominican Republic – Central America – United States Free Trade Agreement ("DR– CAFTA"), Article 10.5 (CL-016)

483 Counter-Memorial § 306. This was determined by the tribunal in *Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 § 214 (RL-076])

a. Scope of FET standard under Article 10.5

593. The Tribunal first considers below the meaning and scope of application of the FET standard under Article 10.5, and second whether there has been a breach of that provision as alleged by Claimant.

594. There has been considerable development of tribunal decisions regarding the scope of application of the minimum standard of treatment to which both Parties refer.[484] Claimant brought this Arbitration alleging breaches of the TPA and specifically that Respondent breached the FET standard as prescribed under Article 10.5. To understand the meaning of the FET standard pertinent to the present case, requires interpretation of the specific wording of Article 10.5 in accordance with Article 31.1 of the VCLT[485] which provides as follows:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*

484 Memorial §§ 179-187; Counter-Memorial §§ 309-314

485 VCLT, Article 31.1 (RL-010)

595. Article 10.5 of the TPA provides:

> *1.* ***Each Party shall accord to covered investments treatment*** *in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2.* ***For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.*** *The concepts of* ***"fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*** *The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation 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; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law." (Emphasis added)*

596. It is clear from the wording of Article 10.5(1) that each party (i.e. State) "shall" (mandatory) "*accord to covered investments*" a treatment which is "*in accordance with customary international law*" and which includes FET and full protection and security (FPS). On its plain reading, this essentially means that the obligation to provide FET and FPS applies only to investments which fall within the TPA, and not to investors. This interpretation is further supported by the United States (which is also a party to the TPA) in *Seda v. Colombia*:

> *Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors. In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments. In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (i.e., an investor) must establish that a Party's treatment was accorded to the covered investment and violated the relevant obligation.*[486]

597. The interpretation of Article 10.5 as set out above is also supported by other provisions in the TPA. For instance, Articles 10.3(1) and (2), relating to national treatment, explicitly

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[486] *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021 § 5 (RL-078)

state that they apply to both "*investors*" and "*covered investments*" respectively. Article 10.4, which provides for the most-favoured-nation treatment and Article 10.6 which provides for treatment in case of strife, also apply to both "*investors*" and "*covered investments*". In contrast, Article 10.7, which provides for expropriation and compensation, applies only to "*covered investments*". Accordingly, the Tribunal accepts Respondent's argument that the contracting parties to the TPA intentionally made this differentiation between which provisions should apply to both "*investors*" and "*covered investments*" and which only to "*covered investments*".

598. For these reasons, the Tribunal concludes that the FET standard in Article 10.5 applies only to Neustar's covered investment in Colombia, not to Neustar itself.

599. As quoted above, Article 10.5(2) provides that the minimum standard of treatment to be afforded to "*covered investments*" is the prescribed "*the customary international law minimum standard of treatment of aliens"*. It further states that the FET does not "*require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights".* While the Tribunal agrees that the purpose of this specific wording included in Article 10.5 is to prevent "*overexpansive interpretations of the FET standard*",[487] it also considers that as the TPA does not define "*customary international law minimum standard of treatment of aliens"* recourse should be made to relevant case law. To this end, both Parties have cited a line of case law arguing the meaning of this standard.[488]

600. The tribunal in U.S.-Mexico Claims Commission's decision in *Neer* stated:

> *[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*[489]

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487 UNCTAD, 'Fair and Equitable Treatment', UNCTAD Series on Issues in International Investment Agreements II (2012), p. 28 (CL-043)

488 Memorial §§ 179-187; Counter-Memorial §§ 309-314

489 *L.F.H. Neer and Pauline E. Neer (United States) v. Mexico*, UNRIAA Award (15 October 1926), Vol. 4, pp. 61, 62, § 4 (CL-081)

601. This standard has been followed and (in some cases) applied by other tribunals.[490] However, the principles of customary international law are not "*frozen in amber at the time of the Neer decision*".[491] This is because the minimum treatment standard (like other standards under customary international law) is a developing body of law which is bound to change over the years in one way or another. As noted by the tribunal in *Eco Oro v. Colombia*, the meaning of this standard under customary international law must not remain "*static*"; it "*must be permitted to evolve as indeed international customary law itself evolves; it should be understood today to include today's notions of what comprises minimum standards of treatment under customary international law*". Thus, the tribunal concluded that the standard today is "*broader than that defined in the Neer case*".[492]

602. The same conclusion was reached in *Mondev International v. United States*. When interpreting Article 1105(1) NAFTA the tribunal found that "*…what is unfair or inequitable need not equate with the outrageous or the egregious. ... the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s*".[493] The NAFTA tribunal in *ADF v. United States* agreed with this finding and further stated that customary international law is "*not frozen in time*" and the minimum standard of treatment "*does evolve*", so that NAFTA incorporates "*customary international law as it exists today*".[494]

603. Accordingly, in the Tribunal's view the minimum standard of treatment has evolved over the years together with customary international law as shown by the above decisions. However, this does not mean that the burden or standard of proving a violation of this

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490 See, e.g., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 § 616 (CL-017); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 § 286(CL-018)

491 See *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award, 24 March 2016 § 499 (CL-020) (citing *Pope Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002 § 57)

492 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 § 744 (CL-023)

493 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 §§ 116, 123 (CL-024)

494 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 §§ 113, 179 (CL-025) ("*it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not "frozen in time" and that the minimum standard of treatment does evolve…. It is equally important to note that Canada and Mexico accept the view of the United States on this point…")

principle has necessarily become less stringent. In fact, the Tribunal notes that the Parties appear to agree on the content of the FET requirement under the minimum standard of treatment, since both rely on the *Waste Management v. Mexico* decision,[495] where the tribunal stated:

> *[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[496]

604. Likewise, in *Mobil Investments Canada Inc. v. Canada* the tribunal stated:

> *(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;*
>
> *(2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.*
>
> *(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of*
>
> *(i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and*
>
> *(ii) were, by reference to an objective standard, reasonably relied on by the investor, and*
>
> *(iii) were subsequently repudiated by the NAFTA host State.*[497]

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495 Memorial § 185; Counter-Memorial § 310

496 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 § 98 (CL-027). See also W*illiam Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015 §§ 442-444 (CL-026); *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award, 24 March 2016 § 501 (CL-028) ("*Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in Waste Management II correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105*")

497 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 § 152 (RL-086). See also *TECO*

605. Similarly, in *S.D. Myers v. Canada*, the tribunal considered:

> *…a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.*[498]

606. In the Tribunal's view, the above cases show that in order for there to be a violation of the content of the minimum FET standard, the party alleging such violation bears the burden of proving that the conduct in question is: (i) "*arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*", (ii) harmful to the claimant, and (iii) attributable to the respondent State. This is a high burden of proof.

b. Alleged violation of Article 10.5 TPA

607. Applying the above findings to the present dispute, the Tribunal considers that in order for the Claimant's submission that the Respondent breached the FET standard in Article 10.5 TPA to be successful, it must demonstrate that the conduct in question was:

a. "*arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*" or repudiates representations on which Neustar reasonably relied when it made its investment;

Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013 § 454 (CL-030)

498 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 § 263 (CL-032). See also, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 § 296 (CL-018) (in which the tribunal found that *"[t]o determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive*").

b. harmed Neustar's investment in Colombia; and

c. was attributable to Colombia.

608. After reviewing the Parties' legal and factual submissions, and the relevant evidence in the record, the Tribunal has concluded that Respondent did not breach Article 10.5. Claimant failed to discharge its burden of proving that Respondent's actions and treatments fell within the definition under (a) above, i.e. that they were arbitrary, grossly unfair, unjust, idiosyncratic, or that that there was a failure of due process on part of Respondent.

609. For this reason, the Tribunal has not discussed (b) and (c) above as they had become moot. In any event, the Parties did not address them in their respective written or oral submissions.

610. Claimant contends that Respondent violated Article 10.5 by: failing to negotiate with Neustar an extension of the Concession, failing to provide Neustar with "*any reasonable information as to the extension process*,"[499] by discriminating against Neustar with respect to the extension of the Concession and negotiation for the renewal of the Concession, and by frustrating Neustar's legitimate investment backed expectations. To this end, Claimant submits that Colombia's actions were arbitrary, not connected to any legitimate policy objective or based on legal standards, and were discriminatory. Colombia also failed to act in good faith and failed to afford due process to Neustar and violated Neustar's legitimate expectations.

611. Respondent's first argument is that these allegations are not covered by Article 10.5 since they relate to an alleged treatment accorded to Neustar as an investor and not to its "*covered investment*".[500] Therefore, they do not fall within the scope of Article 10.5 and should be rejected. Second, and in the alternative, even if they did fall within Article 10.5, Claimant has failed to discharge its burden of proving its FET claims with respect to arbitrariness, due process and Neustar's claimed legitimate expectations.

499 Memorial § 190
500 Rejoinder §§ 180-188

612. The Tribunal has concluded (above at §§ 596-598) that Article 10.5 states that it relates to "*covered investments*" and not investors. However, in the present case, the Tribunal appreciates that such distinction is not necessarily relevant. This is because Neustar's investment in Colombia comprises not only of the 2009 Concession and the subcontract stemming from it, and the monetary claims resulting from it, but also its 100% shareholding in .Co Internet (since .Co Internet is the party to the 2009 Contract with MinTIC). The alleged arbitrary and unjust treatment that Claimant relies on concerns .Co Internet and the rights arising out of the 2009 Concession.

613. Further, "*arbitrary conduct*" violating the FET standard is usually defined as "*the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*".[501] Further, the tribunal in *Eco Oro* referred to the indicia of arbitrary measures formulated by Professor Schreuer in *EDF (Services) Limited v. Romania*, as follows:[502]

> *These indicia are:*
>
> *a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
>
> *b. a measure that is not based on legal standards but on discretion, prejudice, or personal preference;*
>
> *c. a measure taken for reasons that are different from those put forward by the decision-maker; and*
>
> *d. a measure taken in wilful disregard of due process and proper procedure.*

614. These indicia have also been relied on by other tribunals.[503]

615. Claimant submits that Respondent's conduct satisfies these indicia because it: (1) was not rationally connected to any legitimate policy objective; (2) was not based on legal

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501 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 § 263 (CL-036)

502 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 § 760 (CL-023)

503 See e.g. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017 § 923, fn. 1116 (CL-038); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 § 1449 (CL-039); *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020 [Redacted] § 561 (CL-040)

standards, but rather was based on prejudice and was discriminatory in nature; and (3) arose out of a failure of Respondent to act in good faith.[504] In support of its submission, Claimant refers to Respondent's Report in which it discussed the benefits of extending the Concession and the manner and ways in which such extension can be achieved as a benefit to Colombia.[505] Claimant contends that despite this fact, Respondent refused to negotiate with Neustar and proceeded to launch a new tender process.

616. The Tribunal is not persuaded that Respondent's decision not to negotiate and/or extend the 2009 Contract constitutes an arbitrary or unfair, unjust treatment, violation of due process, or that it violated Claimant's legitimate expectations. This is for the following reasons.

617. First, Neustar was neither contractually nor legally entitled to an extension of the 2009 Contract. Clause 4 of the 2009 Contract provides:

> *VALIDITY PERIOD AND TERM AGREED. The current concession contract will have a term of ten (10) years that will commence from the date of the authorization given by ICANN to THE CONCESSIONARY to carry out the activities of the domain, provided that by such time, the Universidad de los Andes, in cooperation with the concessionaire, had carried out every single activity required in the transition process, in a timely and adequate manner.*
>
> *Paragraph: **The term agreed may be extended** in the manner and terms established in the legislation in force at the time of its implementation. It may not be less than the term initially established, for which the expansion and extension of the guarantee(s) and the prior subscription of a document that so provides, are required, where the circumstances that motivated it must be indicated.*[506] (Emphasis added)

618. Further, Article 2 of Law 1065 provides:

> *For all purposes, the administration of the registration of .co domain names is an administrative function under the remit of the Ministry of Communications, whose exercise may be conferred on individuals in accordance with the law. In this case,*

504 Memorial § 194

505 Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia, July 2018 p. 8 (C-0027)

506 Concession Cl. 4 (C-0017) (Claimant's translation)

> *the duration of the agreement* *may be for up to 10 years, extendable, only once, for a period equal to that of the initial term.*[507] (Emphasis added)

619. The plain wording of Clause 4 is clear: the term of the Contract "*may*" be extended in the manner and terms provided for under the law. It is not a mandatory right or obligation; it is a possibility, a contractual prerogative, which can only be pursued following further discussions and agreement between the parties. Article 2 of Law 1065 provides for the same *possibility*, and not an obligation. Accordingly, MinTIC was neither contractually nor legally required to negotiate with Neustar and/or extend the 2009 Contract. This was also explicitly recorded in the minutes of the Advisory Committee's meeting on 18 March 2019.[508] Thus, the Tribunal is not persuaded that MinTIC's decision not to extend the 2009 Contract was arbitrary or unjust or violated the Claimant's legitimate expectations.

620. Second, the Tribunal is also not persuaded that the Report the Claimant refers to supports its position. The Report explicitly states that it was prepared for the purpose of "*serving as a recommendation document for the new Government, so that the same can be provided with a complete panorama of the current situation and future prospects of the .co domain, both from a financial, legal, and operational standpoint*".[509] The Report also states that this "***has been done with the intention that the new Government be able to take its own decisions regarding the future of the Colombian domain*** *in an informed manner and basing its analysis on real and hard data*".[510] (emphasis added) Thus, irrespective of what the content of the Report is, the Government is not bound by it in any way.

621. However, even if the Tribunal were to consider the content of the Report, the Claimant's submission still falls short. After providing a comparison between renewal of the 2009 Contract and a new contract, the Report explicitly noted that although there are operational advantages to renewing the current contract (which have been recognized and analysed by the MinTIC's team):

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507 Law 1065 of 2006, Official Journal No. 46.344, for the administration of domain name registration .co (29 July 2006) (C-0009) (Claimant's translation)

508 MinTIC, Minutes No. 2 of Advisory Committee Meeting, 18 March 2019 (C-0039)

509 Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia, July 2018 (C-0027)

510 Ibid

> *… renewing the term of the current concession contract would imply maintaining a financial model in which the economic consideration in favor of the Ministry is low compared to the profitability produced by the business, without such percentage being able to increase significantly until the year 2026 (the year in which Rank 3 registrations would be reached) according to the projected growth. To this extent, if the renewal does not imply an upward renegotiation of the consideration, it is deemed necessary to structure a new concession contract to guarantee greater resources in favor of the State.*[511]

622. The Report highlighted the presence of "*commercial risk*" and stated as follows:[512]

> *It is therefore important to emphasize the necessity that any* ***renewal of the current concession contract would be advisable and reasonable only if it goes hand in hand with an economic renegotiation that leads to a significant modification of the consideration paid by the Concessionaire to MinTIC/FonTIC****. […]*
>
> *To that extent, taking into consideration the opportunity for improvement due to the lessons learned, the process of knowledge that the MinTIC has had during these eight (8) years of concession, the progress of the market worldwide and the positioning of the .co domain in the same global market,* ***it is considered as the most convenient and favorable legal scenario for the public interests protected by the MinTIC, to start another selection process with an economic model as the one proposed in this document, or to renew the current contract as long as it implies renegotiating the consideration and bringing it to the economic conditions proposed in this document.*** *(emphasis added)*

623. The Report concludes, after its analysis of the options:

> *In accordance with the above, it is recommended that* ***the best option is to initiate a new public contracting process which would result in a new concession contract,*** *which can be structured based on the technical, financial and legal information and conclusions contained in this document, either by an external consultancy hired for this purpose, or by the integration of a team of officials and advisors in house, appointed exclusively to organize and structure the contractual process and accompany the bidding process until the awarding of the contract.*[513] *(emphasis added)*

624. Nothing in the Report recommends the extension of the 2009 Concession. Accordingly, the Tribunal has not seen anything arbitrary or unjust in the MinTIC's decision not to renew the 2009 Contract and instead to launch a new tender process.

625. Third, the Tribunal is not persuaded by Claimant's submission that Respondent's decision to launch a new tender process was prejudicial and discriminatory and not related to a

511 Ibid section 3.2, third bullet point
512 Ibid C-0027 § 2
513 Ibid C-0027, §§ 3, 4

legitimate policy objective and based on legal standards.[514] In particular, by letter dated 10 April 2019, MinTIC informed Neustar of its decision not to extend the 2009 Contract. It further noted that Clause 4 of the 2009 Contract and Article 2 of Law 1065 provide for the "*possibility of concluding a renewal*", which is within the "*sole and exclusive power*" of MinTIC through the Advisory Committee on the **.co domain** policy which has the power "*to assess and decide on the pertinence of continuing with the current concessionaire or initiate a new public process to ensure the continuity of the service for the next ten years*".[515]

626. Further, Respondent provided the Claimant with the minutes of the Advisory Committee's meeting of 18 March 2019 (during which the non-renewal of the 2009 Contract was discussed).[516] Those minutes contain the specific reasons on which Colombia based its decision, some of which are set out at § 255 above. While it was recognized that renewing the 2009 Contract provides for several advantages, Dr Paola Spada (Secretary General), stated: "*a renewal would imply postponing, at this time, the transactional costs of a new structuring and selection process, the redelegation procedures of the domain before the ICANN, in addition to the transition costs that would be derived from this process*".[517]

627. The Advisory Committee then met again on 19 March 2019 to discuss and decide on the two alternatives. It recommended that the Government continue "*the structuring of the selection process (public tender), in order to choose the operator for the administration of the .co domain…*".[518] The following reasons were given for this decision:[519]

> *(i) On the one hand, although the legal and conventional rules have set out the possibility of a renewal, as the case may be, of the 2009 Concession Contract for another 10 years, this possibility should be accompanied by a renegotiation of the consideration, a fundamental element of the contract.*
>
> *The jurisprudence of the Council of State (Third Section and the Chamber of Consultation and Civil Service), has recognized that it is possible to modify and extend concession contracts, due to their incomplete nature. However, such*

514 Memorial § 194
515 Letter from MinTIC to .Co Internet of 10 April 2019 (C-0044). MinTIC's decision was also communicated again to Neustar later via letter from MinTIC to .Co Internet of 21 June 2019 (C-0072)
516 Minutes of the Advisory Committee session of 18 March 2019 (C-0039). See Memorial § 79
517 MinTIC, Minutes No. 2 of Advisory Committee Meeting of 18 March 2019 (C-0039)
518 Ibid
519 Ibid

modifications must be due to the proven existence of a failure in the technical structure, or the occurrence of a specific circumstance of force majeure that has made it unfeasible for the contractor to continue with the execution of the contract under the current conditions. In this case and based on the technical reports, in the absence of the aforementioned conditions, this first alternative would not be viable.

An economic renegotiation of the consideration, as proposed by the current concessionaire, would imply a modification to one of the essential elements of the contract, which would not be justified by a shortcoming in the technical component, nor by any other circumstance that would jeopardize the provision of the service to end users.

Since the consideration is an essential element of the contract, and since the preliminary market studies that have been made with countries that have a similar number of domains according to the research carried out by the .co Advisor, Engineer Adriana Arcila, show that the variation of the consideration would have to be significant in order to adjust to the current market conditions.

Likewise, Dominique Behar, Legal Advisor of the .co domain, stated that undertaking such a renewal and modification would create an unnecessary risk in relation to compliance with the rules governing the administrative function and the contractual activity of the State.

On the contrary, when a new selection process is carried out, a new contract will be established in accordance with current market conditions, as well as the best international practices in the field.

(ii) Likewise, Engineer Adriana Arcila states that it is evident that the domain name market has changed significantly since 2009, and argues that the last tenders similar (in size of domain name registrations) to Colombia (Australia and India) have been granted for a maximum term of 5 years, so that the extension of 10 years would be out of line with recent international practices.

For his part, the Director of Development of the IT Industry reiterated that the technical, commercial and economic bases in the global market for this type of country ccTLDs are different from those considered in 2009 and therefore the relevance of opening a bidding process should be evaluated. […]

Engineer Adriana Arcila stated that, upon analysing the 2009 selection process, the offer of the current concessionaire was based on the model of payment of a percentage of income as consideration, and that the offer of the current concessionaire turned out to be the less favourable of the two offers presented at the time, although it won due to the technical shortcomings of the other offer.

628. Further, Claimant was also provided with the July 2018 Report[520] and the ITU Report,[521] which contained the different options available to the Government as to how to proceed managing the**.co domain** and why. The July 2018 Report (on which Claimant has relied at § 540 above) clearly emphasized the need for Colombia to obtain better economic conditions by at the same time comparing the two options available to the State, i.e. renewal of the current contract or launching a new tender process. As stated above at § 535, the July 2018 Report set out the potential difficulties associated with negotiations for a renewal, following which it concluded that from a legal perspective, it would be advisable to initiate a new tender process.[522]

629. This July 2018 Report was discussed by the Advisory Committee on 10 December 2018. It confirmed MinTIC's view that the July 2018 Report was insufficient to take an informed decision as it "*did not take into consideration the absence of a clear and specific public policy in this field, [which could be] different from the total exclusive outsourcing model for the operation and administration [of the* ***.co domain***]".[523] The Advisory Committee also recommended that MinTIC recruit international experts in order to "*assist MinTIC in the structuration of the best scenario for the administration of the .co domain*".[524]

630. MinTIC accepted the recommendation and acted upon it by recruiting ITU[525] experts who had experience with assisting States with respect to domain-related questions. In addition to assisting MinTIC with domain related to ccTLD policy, the ITU experts were also tasked with starting to prepare the preliminary documents for a potential new tender process.[526] MinTIC also recruited several external consultants which completed its reorganization leading to MinTIC having a "*team both internal and external, in place to carry out the*

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520 Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia, July 2018 p. 8 (C-0027)

521 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, p. 69 (C-0067)

522 Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia, July 2018 (C-0027)

523 Counter-Memorial § 94; Minutes of the Advisory Committee session of 10 December 2018, Section 2.1 (C-0037).

524 Ibid, p. 10 of the PDF (C-0037)

525 ITU stands for the International Telecommunications Union

526 First Witness Statement of Luisa Fernanda Trujillo Bernal § 16 (RWS-03)

research and investigation necessary to make an informed decision on the future of the .co domain".[527]

631. All of this led to the issuance of the ITU Report in May 2019 which was made publicly available and which recommended without contradiction:[528]

> *It is in the best interest of MinTIC to continue to outsource the operation of the .CO ccTLD to a qualified provider on more favourable commercial terms than those of the last contract. Following the ICANN 2012 round of new gTLDs, the price of backend registry services has been drastically reduced in response to a much more competitive market. MinTIC should look to reinvest some of the excess revenue from any future registry contracts into future innovations in the areas of digital identity and cybersecurity. This investment will allow MinTIC to foster a strong institutional understanding of the domain name market within the Colombian government and the local ICT sector.*

632. Accordingly, the Tribunal considers that MinTIC's decision to launch a new tender process rather than renew the term of the 2009 Contract was pursuant to a legitimate policy objective, of which the Claimant was aware and would not have been a surprise. This decision was also in line with the Colombian administrative law. In particular, the purpose of establishing the Advisory Committee was to advise MinTIC regarding the **.co domain**. Respondent argues that the decision not to renew the 2009 Contract was also based on Colombia's assessment of the legal risks associated with concluding a renewal i.e. agreeing to renew the 2009 Contract while making material changes to its financial conditions (as per .Co Internet's proposal) which could breach fundamental principles of Colombian administrative law, such as transparency and equality.[529]

633. Fourth, Respondent disputes Claimant's submission that the "non-discrimination" obligation is covered by the FET under Article 10.5. Irrespective of whether or not "non-discrimination" is part of the FET minimum standard, (about which this Tribunal expresses no opinion) Claimant has failed to provide evidence showing that Respondent's decision

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527 Counter-Memorial §§ 95-98. See also First Witness Statement of Sylvia Constaín § 13 (RWS-01)

528 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 p. 69 (C-0067)

529 In support, Respondent relies on § 327 of Counter-Memorial and § 201 of Rejoinder, to Constitution of Colombia, 1991, Art. 209

not to negotiate and renew the 2009 Contract was discriminatory towards Neustar or its investment.

634. Claimant's reliance on the fact that other concessionaires' contracts in the telecommunications and mining sectors had been extended[530] is neither helpful to Claimant's case nor does it prove discrimination. Those contract extensions are independent of the 2009 Contract, since they are concluded between different parties on different terms, in different commercial sectors. Even if these extended concessions had been in the same commercial sector, the mere fact of their extension while the 2009 Contract was not renewed, is not, as such, proof of discrimination. It has been found above that MinTIC's decision not to renew the terms of the 2009 Contract was pursuant to a legitimate policy objective and the further award of the new concession to Claimant is evidence that it was not discriminated.

635. In any event, the Tribunal has concluded at § 619 above that MinTIC had a discretion and responsibility with respect to the potential renewal of the 2009 Contract, both under the Contract and the law applicable at the time. The fact that MinTIC decided to exercise this discretion in a manner that Neustar did not expect or like, does not make the decision itself discriminatory or illegitimate, even if other concessionaires' contracts had been extended. As noted above, in making this decision, MinTIC followed the procedure provided for under Colombian Administrative law.

636. For the same reasons, Claimant has also failed to prove that MinTIC acted in bad faith when deciding not to extend the 2009 Contract. Claimant presented no evidence to support its allegation that the Terms of Reference for the 2020 Tender Process were "*tailored specifically to Afilias*",[531] or that MinTIC conducted any procedural irregularities during the tender process.

530 Memorial §§ 206-208
531 Reply § 263

637. Respondent has provided evidence showing that the 2020 Tender Process was conducted in accordance with the procedural requirements under the law. Ms. Luisa Trujillo who was responsible for the 2020 Tender Process stated in her evidence to the Tribunal:

> *I followed this process closely since ultimately I was the one who was directly responsible for the tender process. For the elaboration of the tender requirements, I understand that MinTIC's team and the external consultants relied on ITU experts' indications, who had more experience having participated in the preparation of other tender processes. Particularly, on the technical side, I understand that the general approach was to include quite high requirements in order to ensure that the future operator would have the necessary experience and infrastructure to ensure the smooth operation of the .co domain, one of the largest ccTLDs worldwide. However, we never sought to favour a specific operator; to the contrary, we also wanted to ensure that the process would be competitive, and that various interested [sic] companies would be interested in participating.*[532]

638. Further, after publishing the draft 2020 Terms of Reference on 5 November 2019,[533] MinTIC invited and received comments from the interested parties[534] and responded to them.[535] Following this, on 13 December 2019, MinTIC issued Resolution 3316 of 2019 publishing the 2020 Terms of Reference.[536] Ms. Trujillo stated that a substantial number of changes suggested by the interested parties were included in the Terms of Reference in order to ensure that "*a varied number of interested parties would be able to meet* [the tender] *requirements and participate in the process*".[537] A public hearing took place on 18 December 2019 where interested parties had another opportunity to submit comments on the draft 2020 Terms of Reference. This was attended by representatives of .Co Internet and Neustar. Ms. Trujillo states that .Co Internet submitted more than forty pages of

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532 First Witness Statement of Luisa Fernanda Trujillo Bernal § 20 (RWS-03)

533 2020 Terms of Reference (draft version) (R-0043)

534 First observations of .Co Internet to the draft 2020 Terms of Reference of 27 November 2019 (R-0045); Second observations of .Co Internet to the draft 2020 Terms of Reference of 27 November 2019 (R-0046); Third observations of .Co Internet to the draft 2020 Terms of Reference of 27 November 2019 (R-0047)

535 Response of MinTIC to observations on draft 2020 Terms of Reference of 6 December 2019 (R-0048). MinTIC even responded to observations submitted outside the agreed timeframe. See Response from MinTIC to observations on draft 2020 Terms of Reference of 20 December 2019 (R-0049).

536 2020 Terms of Reference (final version) (R-0051); Resolution 3316 of 13 December 2019 (R-0052).

537 First Witness Statement of Luisa Fernanda Trujillo Bernal § 25 (RWS-03)

observations,[538] and that several suggested changes (including those proposed by .Co Internet) were included in the 2020 Terms of Reference through successive Addenda.[539]

639. Last but not least, Neustar and .Co Internet won that Tender Process and was ultimately awarded the 2020 Contract. This in itself shows that Neustar was afforded the opportunity to participate in the new tender process, comment on the terms, submit the new bid and eventually win again the Concession. There is no evidence showing that Neustar was in any way forced to do all of this; thus, it is clear that they voluntarily applied for it and agreed to accept the Concession on the new 2020 terms.

640. The Tribunal is not persuaded that the Respondent acted in bad faith or that it had "*tailored*" the 2020 Terms of Reference for Afilias. As the party making the allegations, Claimant bore the burden of proving it with evidence. It is not for Respondent to disprove Claimant's allegation. Accordingly, Claimant failed to discharge its burden of proof.

641. Fifth, Claimant also failed to prove that Respondent did not provide due process to Claimant or that it violated Neustar's "*legitimate expectations*".

642. With regard to "due process", the Tribunal notes that for an investor to prevail on a claim for denial of justice "*a very high threshold is required*".[540] When considering cases in

538 First Witness Statement of Luisa Fernanda Trujillo Bernal §§ 27, 30 (RWS-03)

539 Counter-Memorial § 134, referring to First Witness Statement of Luisa Fernanda Trujillo Bernal § 28 (RWS-03). See also, Addendum No. 2 to the 2020 Terms of Reference of 7 February 2020 (C-0104); Addendum No. 3 to the 2020 Terms of Reference of 18 February 2020 (R-0050); Addendum No. 4 to the 2020 Terms of Reference of 26 March 2020 (C-0106); Addendum No. 5 to the 2020 Terms of Reference of 27 April 2020 (R-0056); Addendum No. 6 to the 2020 Terms of Reference of 7 May 2020 (R-0057); Addendum No. 7 to the 2020 Terms of Reference of 22 May 2020 (R-0058)

540 *Staur Eiendom AS et al. v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 § 472 (RL-091). See also, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 § 10.4.8 (RL-092) ("*It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice*"); *Philip Morris Brand SARL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 § 499 (RL-093) ("*An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such*"). The United States have also set the threshold for denial of justice very high. See for instance, *Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018 § 80 (RL-011) (in which the tribunal summarised the United States' Submission as Non-Disputing Party in Spence International Investments as establishing that "*denial of justice arises, for example, when a State's judiciary administers justice to aliens in a* "*notoriously unjust*" or "*egregious*" *manner* "*which offends a sense of judicial propriety*"" – see *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction, 25 October 2016 § 160 (RL-094)

which due process violations have been alleged, tribunals have assessed whether the host State had acted "*with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process or natural justice expected by and of all States under customary international law*".[541] The Tribunal considers that a violation of due process "*requires more than that the Claimant point to some inconsistency or inadequacy in* [the host State's] *regulation of its internal affairs*".[542] To constitute a breach of the FET standard, a due process irregularity has to lead to an outcome "*which offends judicial propriety*".[543]

643. The Tribunal is not persuaded that Respondent violated due process. Claimant has provided no evidence to substantiate its assertion that Respondent's decision not to negotiate and extend the 2009 Contract was an administrative decision used for improper purposes. Claimant has provided no evidence showing that MinTIC failed to act in a "*transparent and candid manner*" throughout this administrative process, and that its conduct offended judicial propriety.[544] On the evidence the Tribunal considers that Respondent followed the procedure provided for by the Contract and by the applicable law with respect to **.co domain**. It also considered the findings and recommendations of the Advisory Committee (which was comprised of various experts), and the reports issued by the international experts recruited for the same purpose.[545] On all of their findings MinTIC's decision not to renew the 2009 Concession was a contractual prerogative. It was not under a contractual or legal obligation to do so. Further, no evidence to the contrary was presented to support Neustar's position. Neustar also received MinTIC's decision for not renewing the 2009 Contract. The fact that MinTIC may have met with representatives from AFILIAS is also

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541 *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 § 390 (RL-097)

542 *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 § 390 (RL-097)

543 See e.g. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 § 454 (CL-030): "[T]he minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct … involves a lack of due process leading to an outcome which offends judicial propriety"; *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 § 98 (CL-027); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 § 219 (CL-060)

544 Memorial §§ 213-219

545 Counter-Memorial §§ 15-20, 46-49, 87, 94-96

irrelevant to the Claimant's submission. This is because MinTIC was responsible for making the appropriate decision on behalf of Colombia and under no contractual or legal obligation to renew the 2009 Contract. It was also not contractually prevented from meeting with and/or negotiating with other interested parties when looking for a concessionaire for after the 2009 Contract came to an end.

644. Finally, Claimant has failed to prove that its "*legitimate expectations"* were breached when Respondent decided not to renew the 2009 Contract. According to the relevant case law, a repudiation of an investor's legitimate expectations could constitute a violation of fair and equitable treatment "*where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct…. In this way, a State may be tied to the objective expectations that it creates in order to induce investment*".[546]

645. In the present case, there can be no breach of Claimant's "*legitimate expectations*" because there were no such *legitimate* expectations to begin with. As stated above, the renewal of the 2009 Contract was a mere possibility, not an obligation or certainty. Both the Contract itself and the applicable law at the time provided for such possibility -not a right - which was subject to further discussions between the Parties and mutual agreement. Claimant could not reasonably have had any legitimate expectations that the 2009 Contract would be renewed.

646. Further, Neustar has provided no evidence showing that MinTIC in a way created or gave Neustar and .Co Internet "*reasonable and justifiable expectations*" that the 2009 Contract would be extended. To the contrary, in its letter of 10 April 2019 MinTIC explicitly stated that (i) there is no obligation upon it to extend the 2009 Contract, and (ii) it had decided not to extend the 2009 Contract.[547] This was then confirmed by follow-up communications, reports and public statements. The fact that other concessionaires' contracts had been

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546 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 § 621 (CL-017) (citing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 § 147, (CL-059))

547 Letter from MinTIC to .Co Internet of 10 April 2019 (C-0044); MinTIC's decision was also communicated again to Neustar later via letter from MinTIC to .Co Internet of 21 June 2019 (C-0072)

extended could not have created legitimate expectations in Claimant for the reasons explained in § 634 above.

647. Accordingly, the Tribunal has concluded that Claimant has failed to adduce evidence showing that Respondent violated due process by acting in a manner lacking transparency and candour.

c. Conclusion

648. For the reasons set out above, the Tribunal has concluded that Neustar's claims that Colombia violated the FET obligation under the TPA fails and is therefore rejected. Neustar's contention that Colombia was required to negotiate and grant an extension of the 2009 Contract is also rejected: there were no such obligation.

B. NATIONAL TREATMENT AND MOST-FAVOURED NATION TREATMENT

(1) The Parties' Positions

a. Claimant's Position

649. Claimant argues that Respondent has violated its national treatment ("NT") and most-favoured-nation ("MFN") obligations under Articles 10.3 and 10.4 of the TPA respectively. These provisions apply to both "*investors*" and "*investments*".[548] Claimant refers to the decision of *Cargill v. Mexico* to determine the basic requirements of these obligations, which provides the following criteria:[549]

> *[I]t must be demonstrated first that the Claimant, as an investor, is in "like circumstances" with the investor of another Party or of a non-Party, or that the Claimant's investment is in "like circumstances" with the investment of an investor of another Party or of a non-Party. And second, it must be shown that the treatment received by Claimant was less favourable than the treatment received by the comparable investor or investment.*

650. Claimant submits that these requirements are satisfied in the present case showing Respondent's breach of its NT and MFN obligations.

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548 Memorial § 241

549 Memorial § 243

(i) Neustar and its Investment are in "Like Circumstances" with Domestic and Foreign Investors and Investments

651. Claimant contends that the first step is to identifying comparators in "*like circumstances"* which should be tailored to the context of each case. To determine the "*like*" examples, Claimant refers to *Methanex* which provides for the need to find the most apt comparators where possible.

652. Claimant contends three factors should be assessed in the context of this claim, i.e. whether the comparators (1) operate in the same business or economic sector, (2) produce competing goods or services, and (3) are subject to a comparable legal regime or requirements.

653. Neustar contends that its comparators fall into all three categories. Namely: there are other businesses in the telecommunications sector which provide a similar service and other services in Colombia, operate under the same legal regime, and many of the concessions include the same or similar language regarding extensions.[550] In this regard, Claimant rejected Respondent's contention that .Co Internet operated under a "*substantially different*" regulatory framework than its comparators, as being self-contradictory since in its Counter-Memorial Respondent referred to "*compliance with the legal framework for the administrative function and contractual activity of the State*".[551] Claimant argues that Respondent's regulatory acts and structure show that **.co domain** forms part of telecommunications sector. Accordingly, the standard of "*competing services*" which were established by the tribunals in the *Occidental v. Ecuador* and *Methanex v. United States* awards are met in this case.[552]

(ii) Neustar has been treated less favorably than comparable investors and investments

654. Claimant submits that it was treated differently from its comparators because it was not even allowed an opportunity to negotiate or to extend the Concession. Claimant argues that in order for such treatment to be justified, Respondent must show that its differential

550 Memorial § 250
551 Reply § 333
552 Reply §§ 328-330

treatment of Neustar bears a reasonable relationship to rational policies not motivated by nationality-based preferences. Rational policies are defined as policies that are logical with the aim of addressing a public interest matter and which have an appropriate correlation between the State's public policy objective and the measures adopted to achieve it.

655. Claimant contends that there was no rational basis for Respondent's policy, and there was no justification for not extending the Concession and negotiating with Claimant. Respondent did not assert that .Co Internet operated the **.co domain** improperly; in fact, it chose .Co Internet as the new concessionaire. Additionally, there is no correlation between any alleged public policy rationale and Respondent's conduct. Further, Claimant contends the Tribunal must focus on the discriminatory effect of the alleged violation on the investor and its investment and does not need evidence of the Colombian Government's intent.[553]

656. Further, Claimant disputes Respondent's contention that its claim falls outside the scope of the MFN or NT clauses of the TPA, because "*Colombia's individual decision not to renew the 2009 Contract and to launch a new tender process*" [554] does not constitute "*treatment*" actionable under a discrimination claim. Claimant argues that Respondent's position is unsupported by the law and by the facts in this dispute.

657. Claimant refers to a line of international arbitration decisions, such as *Merrill & Ring v. Canada* and *Bayindir v. Pakistan*, and argues that the word "*treatment*" has broad scope and refers to treatment "*with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*".[555] To this end, Claimant submits that Respondent's actions fall within the meaning of "*treatment*" because they related to, *inter alia*, the management, conduct, operation and sale of its investment. This includes ignoring Neustar's attempts to engage under the regulatory framework on the management and operation of its investment, abruptly announcing a public tendering process with respect to the management, conduct and operation of the **.co domain**, the subject of Neustar's investment; and ignoring

553 Memorial § 262
554 Counter-Memorial § 411
555 Reply § 319; TPA Article 10.3.4 and Article10.4.1

Neustar's offer to formalize the extension, and therefore affecting the operation of Neustar's investment.[556]

658. Finally, Neustar argues that even if Respondent has not violated the non-discrimination requirements of Articles 10.3 and 10.4, Respondent still had an obligation to protect confidential business information under Article 10.14, which they violated.

b. *Respondent's Position*

659. Except where otherwise indicated, Respondent's analysis refers to Claimant's allegations in relation to breaches of both NT and the MFN obligations. It contends the requirements are the same except that the applicable comparators are investors or investments of non-Parties as observed by the United States in its non-disputing party submission in *Seda v. Colombia*.[557]

(i) The scope and meaning of "treatment" under Articles 10.3 and 10.4 TPA

660. Respondent argues that there can be no breach of Articles 10.3 or 10.4 without a qualifying "*treatment*" and Claimant's allegations do not fall within the MFN or NT treatment clauses of the TPA. Respondent contends that the cases cited by Claimant emphasize that *"[n]ot all treatment given by a host country to foreign investors falls under the scope of the MFN provision. In order to be covered by the MFN clause, the treatment has to be the general treatment usually provided to investors from a given foreign country*".[558] Similarly, "*treatment*" for purposes of MFN and NT clauses has been equated to "*the aggregate of all the regulatory measures applied to (an investor*)".[559]

661. Respondent agrees that a variety of measures may fall within the scope of these provisions, including state regulatory measures. However, in the present case, the question concerns whether Respondent had an obligation to renegotiate for and to renew the Contract. Since

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556 Reply §§ 318-322

557 Counter Memorial §§ 401, 402 referring to *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021 § 55 (RL-78)

558 Counter Memorial § 407 citing to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, 31 March 2010 § 79 (CL-033)

559 Ibid

this right is discretionary and inherently linked to the freedom of contract, Respondent contends it cannot give rise to a claim for discrimination. Further, freedom of contract is a protected principle both under Colombian[560] and international law.[561] Respondent refers to the fact that in its 1998 Report, UNCTAD has explicitly supported this conclusion in the case of the MFN provisions recognizing that "*if a host country granted special privileges or incentives to an individual investor in an investment contract between it and the host country (so-called "one-off" deals), there would be no obligation under the MFN clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract*".[562]

662. Accordingly, Respondent's decision not to renew the 2009 Contract and to launch a new Tender Process was within the MinTIC contractual prerogatives. There is no "*treatment*" actionable under a discrimination claim.[563]

(ii) Claimant and its investments are not in 'like circumstances' with foreign and domestic investors cited by Claimant

663. Respondent also submits that even assuming that the decision to renew a specific contract could be deemed as "*treatment*" relevant to ensuring the equality of competitive opportunities between foreign investors, Claimant still would have to meet the requirements for a finding of a discriminatory treatment under Articles 10.3 and 10.4.

664. Referring to the United States' non-disputing party submission in *Omega v. Panama*, Respondent submits that the requirement of Articles 10.3 and 10.4 is that investors "*in like circumstances*" be afforded, to the extent possible, the same general treatment.[564] Respondent contends that the assessment of "*like circumstances*" is a fact-specific

560 Law 80 of 28 October 1993, Article 40 (R-0041)

561 UNIDROIT Principles of International Commercial Contracts (2016), Article 1.1 (RL-182); Commentary of Article 1.1, UNIDROIT Principles of International Commercial Contracts, p. 8 (RL-183): "*The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order*"

562 Counter-Memorial § 409 referring to UNCTAD, 'Most-Favoured-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements*, UNCTAD/ITE/IIT/10 Vol. III (1998), p. 12 (CL-072)

563 Counter Memorial § 412

564 Counter Memorial § 414

inquiry.[565] Respondent agrees with Claimant's submission that there are three criteria that tribunals have considered when analysing "*like circumstances"*: (i) whether the investors are in the same business sector; (ii) whether there is a competitive relationship between the investor and comparators; and (iii) whether there is an identity of legal regime applicable to the investor and the comparators.[566] However, Respondent submits that none of these criteria are met in the present case.

665. First, Respondent argues that Neustar's alleged comparators do not operate in the same 'economic sector' as .Co Internet; rather, the concessions relied on by Neustar were concluded for entirely different services. There is no competitive relationship between the comparators cited by Neustar and .Co Internet, as they do not operate in the same business sector and cannot be mutually replaced. The regulatory framework of the **.co domain** in which .Co Internet operates is substantially different from that of the alleged comparators. Further, Respondent argues that Claimant's reliance on *Occidental v. Ecuador* is also misplaced. This is because the tribunal's conclusions in that case were framed in a "*importers/exporters tax context and did not refer to discrimination provisions in investment treaties*".[567]

666. At the hearing both Ms. Trujillo and Mr. Castaño explained that the **.co domain** is a unique asset and the internet generally and the domain name market in particular are extremely dynamic and had evolved considerably since the conclusion of the 2009 Contract.[568]

667. Respondent contends that the most evident approach would have been to refer to the companies that were interested in the operation of the **.co domain**. However, from the outset .Co Internet was invited to participate in the tender by the MinTIC and it did so on equal footing with the other parties. In fact, it was ultimately awarded the contract. The fact that there is a general prohibition for automatic renewals in public contracts does not mean that all such contracts are identical and compete with one another.[569]

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565 Counter Memorial § 415
566 Counter Memorial § 416
567 Rejoinder § 288
568 Respondent's PHB § 71
569 Rejoinder § 283

668. In this light, Respondent submits that the Tribunal's role is not to find what comparators in a given state are in the most like circumstances; rather it should assess whether Claimant has identified valid comparators altogether, which could support a claim for discrimination.[570] If, as is the case here, Claimant does not identify any comparators in like circumstances, no violation can be established.

(iii) Claimant was not afforded 'less favorable treatment' than its alleged United States and Colombian comparators

669. Respondent argues that even if the various concessionaires cited by Neustar were to be considered valid comparators, Neustar would still have to demonstrate that it was treated less favourably than them, and that the reason for this was its nationality. This has not been proved.[571]

670. In particular, Respondent argues that differences of treatment, even between entities that are in "*like circumstances"* have to be nationality-driven in order to be actionable under MFN or NT provisions. Further, while discrimination may be *de jure* or *de facto,*[572] a link to nationality must always exist for the claim to be viable.[573] Respondent submits that even if it was to be assumed "*arguendo*" that Neustar's nationality was irrelevant for purposes of MFN and NT protection, Neustar would still need to prove that it and its investment were afforded less favourable treatment then the relevant comparators.[574] Respondent contends that Claimant has failed to prove this for the following reasons.

671. First, the concessions cited by Neustar included different contractual terms regarding the possibility of renewal, and the renewal of these concessions did not entail significant changes to their main terms.[575]

672. Second, though Neustar was not granted a renewal, it was nevertheless granted the operation of the **.co domain** under a new contract. Claimant has already acknowledged that it was necessary to adapt its financial terms due to the dynamism of the industry. Thus,

570 Counter Memorial § 421
571 Counter Memorial § 424
572 Counter Memorial § 430
573 Counter Memorial § 433; Rejoinder §§ 299-301
574 Counter Memorial § 437
575 Counter Memorial § 439; Rejoinder §§ 304, 305

Respondent argues that having acknowledged the necessity to renegotiate the terms of a concession prior to being granted an extension, "*one can hardly fathom how concluding a new contract that effectively has this effect, means being subject to a less favourable treatment*".[576]

673. For these reasons, Respondent submits that the claims under Articles 10.3 or 10.4 must fail: Claimant has failed to prove that Colombia has treated Claimant and .Co Internet differently to comparators, and even less so because or as a result of Neustar's nationality.

(iv) <u>In any event, Colombia's decision not to renew the 2009 contract is amply justified by a public policy rationale</u>

674. Respondent argues that even if there had been a discriminatory treatment as alleged by Claimant, its claim would still fail as Colombia's decision not to renew the 2009 Contract was justified by a public policy rationale.

675. First, Colombia sought to obtain an increase in the MinTIC share of proceeds resulting from the administration and operation of the **.co domain**, which are used to foster Colombia's digital transformation policies and increase connectivity.

676. Second, Colombia sought to adapt the conditions of administration and operation of the **.co domain** to the evolving realities of the domain name industry, in order to align with best practices and to increase MinTIC's share of the proceeds, as well as to develop its internal knowledge of domain names.

677. Respondent contends that Neustar's allegation is further disproved by the actual results of the 2020 Tender Process, which saw an increase of MinTIC's share of proceeds from 7% under the 2009 Contract to 81% under the 2020 Contract; as well as the improvement in performance under the 2020 Contract.

678. Finally, in response to Claimant's argument the State had not established that renewal of the contract could not have achieved its policy objective through non-discriminatory means, Respondent contends that concluding a new contract was the closest alternative to

576 Counter Memorial § 441

renewing the concession on modified terms. In any event, Respondent reiterated that it had no contractual obligation to renew the 2009 Contract. Claimant's baseless speculation does not disprove the clear nexus between Respondent's objectives, rationale and decision with respect to the **.co domain**.

679. Respondent also submits that renewal of the 2009 Contract with a revision of the main contractual terms could have created serious legal issues under Colombian law. Thus, the decision to proceed with a new tender was connected to the target objective, while taking into account applicable limitations under Colombian law.

680. Finally, Respondent rejects Claimant allegation that Respondent failed to address its claim under Article 10.14 regarding the protection of confidential business information. Respondent states that Claimant has failed to provide any explanation or evidence as to why this standard has been breached.[577]

c. Non-Disputing Party Submission

681. In its intervention as a non-disputing party to this Arbitration, the United States made submissions as to how the conditions of Articles 10.3 and 10.4 should be proved. Specifically, the United States expressed the view that Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investor (or investments) of the other Party that are in "*like circumstances*". Nationality-based discrimination under Article 10.3 may be *de jure* or *de facto*.[578]

682. The United States further expressed the view that it is for a claimant to identify domestic investors or investments as comparators. If a claimant does not identify any domestic investor or investment alleged to be in like circumstances, no violation of Article 10.3 can be established. The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself.[579]

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577 Rejoinder §§ 314-316
578 Non-Disputing Party Submission § 15
579 Non-Disputing Party Submission §§ 16, 17

683. When determining whether a claimant or its investment is in like circumstances with comparators, the claimant or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, 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 based on legitimate public welfare objectives.[580]

684. The requirements for establishing a breach of MFN under Article 10.4 are the same as for establishing an NT breach under Article 10.3, except that the applicable comparators are investors or investments of non-Parties. Thus, as in the case under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 10.4 can be established.[581]

685. The United States also expressed the view that a claimant must identify a measure adopted or maintained by a party through which that party was accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party.

(2) The Tribunal's Analysis

686. Claimant argues that by subjecting Neustar to different and unjustified wrongful treatment that was not applied to domestic and other foreign investors, Respondent violated Article 10.3 of the TPA (i.e. national treatment clause) and Article 10.4 of the TPA (i.e. most-favored-nation obligations clause).

687. Article 10.3 provides:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

580 Non-Disputing Party Submission § 18
581 Non-Disputing Party Submission § 20

> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.*

688. Similarly, Article 10.4 provides:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non- Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

689. As a first point, the Tribunal notes that Article 10.3 and Article 10.4 apply to both "investors" and "investments" and forbid discrimination in respect of investors and investments. Under Article 10.3, the State is under an obligation to accord foreign investors and their investments "*treatment no less favorable than that it accords, in like circumstances, to its own investors*" (the "NT" clause). Article 10.4 provides for the same obligation but with respect to other "foreign" investors (the "MFN" clause). To this end, both Parties agree that "[t]*he requirements for establishing a breach of Most-Favored-Nation Treatment ("MFN") under Article 10.4 (of the TPA) are the same as for establishing a National Treatment breach under Article 10.3 (of the TPA), except that the applicable comparators are investors or investments of non-Parties*".[582]

690. To determine whether there has been a violation of the MFN or NT treatment, the Tribunal considers a three-limb test must be applied:[583] (i) the discriminatory treatment claim must be based on a comparison with other (foreign or domestic) investors or investments "*in like*

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582 Counter-Memorial § 401; Memorial § 243; Reply § 317

583 Reply §§ 327-332

circumstances"; (ii) Claimant must have been afforded less favourable treatment as a result of its nationality, whether *de jure* or *de facto*; and (iii) the treatment afforded must not be justified by a rational public policy objective.[584]

691. Before determining whether Claimant's claims meet the above three-limb test, the Tribunal must deal with Respondent's preliminary argument that Claimant's claims do not "*qualify under Articles 10.3 and 10.4 of the TPA altogether and should be dismissed on this basis alone*".[585]

a. Claimant's claims do not fall within the MFN or NT clauses of the TPA

692. Respondent contends that there can be no breach of Articles 10.3 and 10.4 of the TPA without a qualifying "*treatment*".[586] In particular, the State must have "*adopted or maintained*" a measure for Chapter 10 of the TPA to apply in the first place.[587] In this regard, Respondent referred to the cases relied on by Claimant and submits that "[n]*ot all treatment given by a host country to foreign investors falls under the scope of the MFN provision. In order to be covered by the MFN clause, the treatment has to be the* ***general treatment usually provided*** *to investors from a given foreign country*".[588] Similarly, "treatment" for purposes of MFN and national treatment clauses has been equated to "*the aggregate of all the regulatory measures applied to (an investor)*".[589]

693. In the present case, Claimant argues that Respondent violated Articles 10.3 and 10.4 by not renewing the 2009 Contract and instead launching the new tender process. Respondent

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584 Counter-Memorial § 404 referring to *Archer Daniels v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 §§ 196, 205 (CL-071); *Total v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 § 212 [RL-111]; *United Parcel Service v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 §§ 184, 187 (CL-076); Memorial § 243 referring to *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 § 228 (CL-018)

585 Counter-Memorial § 403

586 *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021 § 49 (RL-078) ("*To establish a breach of national treatment under Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"*"). See also, *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020 § 6 (which contains the same wording) (RL-105)

587 Counter-Memorial § 406 referring to TPA, Article 10.1 (C-0002)

588 Counter-Memorial § 407 referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, 31 March 2010 § 79 (CL-033)

589 Ibid

contends that this cannot amount to a violation of the MFN and NT treatment because the decision was within the contractual prerogatives of MinTIC; it had the option of deciding whether to renew the 2009 Contract, or to allow it to expire, or to launch a new tender process going forward.

694. In contrast, Claimant contends that Respondent's actions fall within the meaning of "*treatment*" under both Article 10.3 and 10.4 of the TPA. This is because the provisions are phrased broadly so as to relate to "*the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*". Claimant states that the same provision and argument were considered by the tribunal in *Merrill & Ring v. Canada*,[590] which considered:

> *The Tribunal must first address Canada's argument that no "treatment", in the sense of Article 1102, has been identified by the Investor. The treatment to which that Article refers is with respect to the "establishment, acquisition, expansion, management, conduct, operation and sale or other dispositions of investments". This is a broad definition indeed, as it includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity. The treatment is no different than the aggregate of all the regulatory measures applied to that business. The Investor has specifically complained about the adverse effects the measures in question have on the expansion, management, conduct and operation of its forestry business in British Colombia. The Tribunal is thus satisfied that the treatment complained of has been adequately identified by the Investor*.[591]

695. Similarly, the tribunal in *Bayindir v. Pakistan* stated:[592]

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590 This case concerns a claim by the Investor in respect of the implementation of Canada's Log Export Regime to the investor's timber operations in British Columbia and the requirement that any of its exports be subject to a log surplus testing procedure, among other regulatory measures. The investor complained that the adopted federal regulations affect the conduct of its business in the province. Accordingly, the Investor alleged that as a result of this, including the way it was adopted and the procedures that the Investor had to followed, were not transparent and fair, there was also a conflict of interest, there was no procedure for the appeal or review of the governmental body's recommendation, except an ad-hoc review by the another body which the Investor claimed was entirely discretionary

591 *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award, 31 March 2010 § 79 (CL-033)

592 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award, 27 August 2009 § 388 (CL-104). This case concerns a Turkish investor's claim against Pakistan regarding a six-lane motorway project. In particular, the National Highway Authority of Pakistan contracted with the investor for the construction of the motorway. However, the project was subject to various delays which the investor alleged were caused by factors beyond its control such as lack of available land. The dispute arose when the agency terminated the investor's contract and the Pakistani army secured the work

> *As noted in the Decision on Jurisdiction, the Tribunal considers that the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment. It may also apply to the manner in which a State concludes an investment contract and/or exercises its rights thereunder. Indeed, the Tribunal stressed that:*
>
> *[t]he mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors.*

696. Claimant submits that it was subject to "*treatment*" by Respondent's actions and conduct relating to the management, conduct, operation and sale of its investment. In particular, Respondent:

> *… ignored Neustar's attempts to engage under the regulatory framework on the management and operation of its investment; abruptly announced a public tendering process with respect to the management, conduct and operation of the .co domain, the subject of Neustar's investment; and ignored Neustar's offer to formalize the extension and as a basis to negotiate the extension of the Concession, and therefore affecting the operation of Neustar's investment.*[593]

697. The Tribunal accepts Claimant's submission that the term "*treatment*" under Articles 10.3 and 10.4 should be understood broadly and applied on that basis. This includes "*the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory".* Therefore, Respondent's actions and conduct about which Claimant is complaining in this case could, in principle, fall within the scope of Articles 10.3 and 10.4.

698. However, in the present case, the Tribunal is not persuaded that Respondent's actions came within this definition of treatment for the following reasons.

699. First, as determined above, MinTIC's decision not to renew the 2009 Contract was not contrary to the express terms of the Contract. Renewal of the Contract under Clause 4 was a mere possibility; it was subject to the will of both Parties and further discussion and agreement between them. Thus, MinTIC was under no obligation to renew the 2009 Contract and .Co Internet and Neustar had no entitlement to a renewed contract. This was

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site. The investor started arbitration proceeding alleging different violations of the applicable BIT by Pakistan including FET and MFN.

593 Reply § 321

a purely contractual right which MinTIC had the discretion to decide whether or not to exercise, and Neustar and .Co Internet could have accepted or not without any obligation.

700. MinTIC's freedom of contract is a principle provided for and protected under Colombian law.[594] The freedom of contract is a recognized legal principle in many systems.[595] Further, according to the 2010 UNCTAD Report on MFN, "*if a host country grants special privileges or incentives to an individual investor through a contract, there would be no obligation under the MFN treatment clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract. In this case, "freedom of contract prevails over the MFN clause*". [596] Accordingly, in the Tribunal's view Respondent's decision to offer a new concession by an open tender cannot in itself amount to "*treatment*" within the meaning of the MFN or NT standards, or a violation under Articles 10.3 and 10.4.

701. Second, the lack of negotiation and no "*rational policy*" for Respondent's decision not to renew the Contract, which Claimant complains of as being treated less favourably than others, follow from MinTIC's decision not to renew the 2009 Contract. Here too, these action and decisions do not amount to a violation of the MFN or NT treatment. Furthermore, as stated in § 619 above, MinTIC was under no obligation to negotiate with Neustar, and even if it was, the record shows (as set out above at § 255) that the Parties did exchange numerous correspondence regarding the term of the 2009 Contract.

702. Similarly, the Tribunal is not persuaded by Claimant's submission that MinTIC "*abruptly announced a public tendering process*". As shown above at § 255, this tender process was held at the end of the term of the 2009 Contract, after Neustar had already been informed of MinTIC's decision not to renew or renegotiate the 2009 Contract. Furthermore, the record shows that this tender process was held in accordance with the legal and

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594 Article 40, Law 80 of 28 October 1993 (R-0041)

595 Commentary of Article 1.1, UNIDROIT Principles of International Commercial Contracts, p. 8 (RL-183): "*The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order*"

596 UNCTAD, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II (2010) (RL-184)

administrative requirements under Colombian law. Claimant was also invited to comment on the draft Terms of the 2020 Tender and to attend the launch of the Tender; both of which it did. Accordingly, all Respondent's actions and conduct were either in conformity with the 2009 Contract itself and/or in accordance with the applicable law at the time; Claimant has failed to establish otherwise. Therefore, in the Tribunal's view this conduct cannot amount to a "treatment" within the meaning of Articles 10.3 and 10.4.

703. Third, the *Bayindir* decision relied on by Claimant is not directly relevant to the present case. The facts in that case and the questions surrounding the interpretation of "*treatment*" are fundamentally different from this dispute. In the *Bayindir* case, the investor complained that the term of its contract was terminated before the completion date of the project and that following its expulsion from the project, the National Highway Authority of Pakistan awarded a new contract to a local company to complete the construction of the project. In this dispute, the issue in this dispute is whether the Claimant was entitled to an almost automatic extension of the 2009 Contract once its term has expired. For the reasons given, the Tribunal has determined that it did not.

704. For the above reasons, the Tribunal finds that Respondent's actions and conduct of which the Claimant has complained do not constitute "treatment" within the meaning of Articles 10.3 and 10.4. Accordingly, the Tribunal dismisses this claim.

b. The MFN and NT standards – the three 3 limb test

705. For good order, the Tribunal notes that even if those actions did constitute "treatment", the claim would have still been dismissed because Claimant failed to discharge its burden of proof and demonstrate that Respondent had treated Neustar and/or its investment in a discriminatory manner within the meaning of Articles 10.3 and 10.4. This is for largely the same reasons as the ones provided above at § 608 above. In particular, there is no evidence in the record to show that the Respondent's decision not to renew the 2009 Contract was based on or relates to the Claimant's nationality.

706. There is also no evidence showing that other investors, be it Colombian nationals or foreign nationals, were treated more favourably than Neustar its investment. As found above, MinTIC had the contractual discretion to decide whether or not to renew the term of the

2009 Contract. Even if the contracts of other concessionaires had been renewed, this in itself does not amount to a discriminatory treatment *per se*. This is because each contract had different contractual terms establishing discretionary prerogatives and mandatory obligations, which were specifically negotiated by the two parties to those contracts[597] and none of the other contracts had an automatic renewal provision. Furthermore, two of the concessions were concluded for the operation and exploitation of national television channels, and the other for the provision of radio broadcasting services,[598] whereas the Claimant's concession relates to the **.co domain** registry.

707. In light of the above, the Tribunal concludes that even if MinTIC's actions and conduct constituted a "*treatment*" within the meaning of Article 10.3 and 10.4, Claimant has still failed to establish that those actions amounted to a violation of the MFN and NT provisions in the TPA. Accordingly, this claim is rejected.

C. CONFIDENTIAL BUSINESS INFORMATION

(1) The Parties' Positions

a. Claimant's Position

708. Neustar argues that even if Respondent has not violated the non-discrimination requirement as provided for in Article 10.3 and 10.4, Respondent still had an obligation to protect confidential business information under Article 10.14.[599] Neustar states that MinTIC had meetings with competitors who were expected to bid for the connection with the **.co domain** concession in New York and in Canada (during the ICANN annual meeting) in September and November 2019 respectively. The competitors invited included AFILIAS

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597 See Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997 Cl. 8 (C-0045); Amendment No. 4 to Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 21 January 2009 Cl. 8 (C-0047);Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997 Cl. 8 (C-0048); Amendment No. 8 to Concession No. 140 between the National Television Commission and RCN Televisión S.A., 29 October 2009 (C-0049)

598 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. (C-0050); Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 12 July 2021 (C-0051)

599 Memorial §§ 264, 265; Tr. Day 1 [ENG] 54:2-8

who were expected to bid for the **.co domain** concession. Neustar was not invited to either meeting.[600]

b. Respondent's Position

709. Respondent denies that because it did not address Claimant's Article 10.14 claim regarding the protection of confidential business information, it had accepted it. Respondent argued that Claimant failed to bring any arguments under Article 10.14 or "*even attempted to demonstrate this allegation nor provided any explanation*". The claim should therefore be dismissed.[601]

(2) The Tribunal's Analysis

710. Claimant has not developed this claim nor provided evidence to show when or how this standard was breached by Respondent. Accordingly, the Tribunal dismisses this claim on grounds of lack of evidence.

D. UNREASONABLE MEASURES IN VIOLATION OF ARTICLE 4(1) OF THE SWISS-COLOMBIA BIT

711. This final section of the Award concerns Neustar's attempt to import into the TPA more advantageous protection and benefits provisions from the Swiss-Colombia BIT, through the MFN provision in Article 10.4 of the TPA.[602]

(1) The Parties' Positions

a. Claimant's Position

712. Neustar complains that by refusing to negotiate the extension of the Concession in good faith, and grant the said extension, Colombia failed "*to protect and not impair Neustar's investment through unreasonable measures*" in violation of Article 4(1) of the Swiss-

600 RFA § 81

601 Counter-Memorial fn 693; Rejoinder § 315

602 Further, in footnote 359 of the Memorial Neustar states that it "*similarly invokes other substantive protections provided for in other treaties between Colombia and other countries, such as the good faith requirement in Article 10 of the Swiss-Colombia BIT, as well as the full protection and security clause in the Colombia-Peru BIT"*. This claimed reliance on other treaties has not been repeated, expanded or any further specific details provided and therefore is not discussed in this Award.

Colombia BIT.[603] Claimant argues that this obligation was applicable "*by operation of the MFN clause of the TPA*" and prohibits interfering with qualified investments through "*unreasonable*" measures.[604] Neustar contends that the obligation to negotiate in good faith required at a minimum that Respondent negotiate in earnest with .Co Internet and under Article 4(1).

713. Neustar argues that Colombia's refusal to engage in negotiations with Neustar and .Co Internet was "*the result of an irrational decision-making process*". This is because .Co Internet "*had performed remarkably well*" and Respondent was satisfied that Neustar was investing substantial amounts of time and money into the business. Respondent also considered **.co domain** to be "*trustworthy, secure and stable.*"[605] This was also because Colombia's decision was "*based on political decisions by the Colombian president and involved dubious circumstances with respect to another potential bidder, AFILIAS*."[606] In addition, Neustar argues that Colombia's conduct was inconsistent with its practice to routinely extend similar concessions for other investors.

b. Respondent's Position

714. Colombia contends that Neustar's attempt to import Article 4(1) of the Swiss-Colombia BIT should be rejected.[607] This is for two reasons. First, the importation of Article 4.1(b) of the Swiss-Colombia BIT is expressly precluded by Article 10.5 of the TPA. Second, even if the MFN standard argued for by Neustar was applicable, Respondent had not acted in bad faith, or irrationally, or unreasonably.

715. The TPA expressly limited the scope of FET to "*the minimum standard of protection*". This was the agreed level to protect the foreign investor and its investment against "*manifest arbitrary measures, not 'unreasonable' ones*".[608] Colombia therefore rejects

603 Memorial § 176
604 Memorial § 266
605 Reply § 363
606 Memorial § 268; Reply § 363
607 Counter Memorial § 303
608 Counter Memorial § 457

Neustar's attempt to expand the FET minimum standard and argues it should be rejected by the Tribunal because it is contrary to the Parties' clear intentions expressed in the TPA.

716. If Article 4.1(b) of the Swiss-Colombia BIT is to be imported, Colombia contends that Neustar has failed to show that Colombia's actions were unreasonable or discriminatory measures which impaired the "*management, use, enjoyment, extension, sale … of such investments*". This is because Neustar has failed to prove any discriminatory measures or irrational decision-making process of Colombia. The decision to launch a new tender process for the operation of the **.co domain** was a "*perfectly valid contractual prerogative*" (which resulted in a new contract awarded to .Co Internet).[609] Colombia also states that Neustar's allegations that "*Colombia acted unreasonably have no factual basis"* and are "*disproved by the record*".[610]

(2) The Tribunal's Analysis

717. There are two issues to be determined under this head. First, whether Neustar can import Article 4.1(b) of the Swiss-Colombia BIT through Article 10.4 TPA in order to widen the scope of applicaion of the FET provision in Article 10.5 of the TPA. Second, whether Respondent's conduct was discriminatory, unreasonable and not in good faith.

718. The Tribunal recognizes that here have been past investment arbitration awards in which tribunals have concluded that MFN provisions in a BIT can be relied upon to import obligations from other BITs, as argued by Claimant.[611] However, this does not mean that importation is applicable in every case. Rather, such determination should be made on a case-by-case basis, depending on the specific wording of the treaties involved and the circumstances of the case.

719. In the present context, the following provisions are relevant.

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609 Counter-Memorial § 458

610 Rejoinder § 323

611 Reply § 361 referring to *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 § 104 (CL-105); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, n. 16 (CL-094); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011 § 571 (CL-118)

720. Article 10.4 TPA provides:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non- Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

721. Further, Article 10.5 provides:

> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation 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; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*

722. Article 4(1) of the Swiss-Colombia BIT provides as follows:

> *Each Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Party and should not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.*

723. In determining the rights and obligations of the Parties under the TPA, the first step is to determine what the Parties agreed in the TPA. Article 31.1 of the VCLT provides in pertinent part:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*
>
> *2. ...*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) ...*

724. In the context of this case the "*treatment no less favourable*" to be given to an investor or an investment under Article 10.4 is "*customary international law including fair and equitable treatment and full protection and security*" under Article 10.5 TPA. There is no agreed application of the provision between the Parties or accepted international practice. Rather, the question of importing a different standard through an MFN provision is considered in every case taking account of the parties' positions, the treaty language and the specific circumstances in each case.

725. This follows the decision of the tribunal in *Telenor Mobile v. Hungary* where the tribunal stated that when interpreting the scope of an MFN clause, "*what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties*".[612] The intention of the Parties is best determined from the expressed and clearly agreed wording in Articles 10.4 and 10.5 of the TPA: the standard of protection agreed is the lower level of "*customary international law, including fair and equitable treatment and full protection and security*" rather than a higher level of "*unreasonable or discriminatory measures*".

726. In the present case, Claimant has failed to establish that the intention of the contracting States to the TPA was for the MFN clause to be used to bypass the more restrictive FET

612 *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006 § 95 (RL-115). This opinion was also expressed by Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 359 (RL-114)

provision included in the TPA, and instead import a wider obligation. The fact that the United States (as a party to the TPA and an intervener in this Arbitration) was "*silent*" on this point in its written submissions and presentation at the Hearing does not mean that the United States agrees with Claimant's interpretation of the TPA.[613] As was made clear at the hearing "*the United States does not take a position here on how the interpretations offered apply to the facts of the case*", and "*no inference should be drawn from the absence of comment on any issue not addressed*".[614]

727. The Tribunal has interpreted the meaning of the TPA provisions in accordance with the clear wording of the provisions, and the TPA as a whole, and in the circumstances of this dispute. The TPA, like most treaties and BITs, was specifically negotiated between the Contracting States which are the parties deciding on the detail and content of legal obligations the parties wish to accept and impose on one another with respect to investors and investments from the other State. In the case of the TPA, Colombia and the United States explicitly agreed that the FET provision "*includes the obligation 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*". Thus, in the Tribunal's view, the Contracting States to the TPA intended to provide protection to the foreign investor against "*manifest*" arbitrary measures, not "*unreasonable*" measures. In fact, the Contracting Parties to the TPA emphasized the importance of this limitation by specifying in Article 10.5.2 that this Article "[does] *not require treatment in addition to or beyond*" the customary international law minimum standard of treatment.

728. For the above reasons, the Tribunal concludes that Claimant cannot widen the agreed scope of application of Article 10.5 by relying on Article 10.4 TPA in order to import the protections afforded under Article 4(1) Swiss-Colombia BIT.

729. In any event, even if this were not the case, for good order and completeness, the Tribunal has concluded on the evidence that Claimant's claims still would have failed for the some of the same reasons as those relating to the MFN and FET alleged breaches, discussed at

613 Reply § 362
614 Tr. Day 1 [ENG] 187: 12-17

§§ 607-647, and 686-704 above. Neustar failed to discharge its burden of proof and establish its allegations that the Respondent's decision not to renew the 2009 Contract was "arbitrary" or "unreasonable" conduct (or irrational or in bad faith). As stated above at § 619, MinTIC had the contractual prerogative to decide whether or not to renew the 2009 Contract; there was no obligation to negotiate or extend the Concession for a further period. do so. The Tribunal considers that Respondent's decision and actions to proceed with a public tender for the continuing **.co domain** concession was not arbitrary or irrational. The commercial environment had changed during the 2009-2019 period of the original Concession, and whatever the successes of .Co Internet in increasing the number of subscribers, Respondent was entitled to seek an additional financial return from the Concession, and to investigate alternative approaches and possible further investment from companies wishing to take on the Concession. In the end, after the tender was completed, the decision was that Neustar was awarded a new contract, albeit for a shorter period and on different remuneration terms.[615]

VII. COSTS

730. In their reliefs sought (set out at paragraph 168-173 above, each Party requested the Tribunal to order the other Party to pay the legal fees and other costs (including expert fees and expenses) they have incurred in connection with this Arbitration, and the fees paid to the ICSID in respect of this Arbitration. On 9 July 2024 the Tribunal invited the Parties to file a statement of their costs by no later than 30 July 2024. Both Parties filed a statement of costs on 30 July 2024.

A. CLAIMANT'S COST SUBMISSIONS

731. Claimant contends that Respondent should bear the total arbitration costs incurred by Claimant, including legal fees and expenses totalling USD 2,545,293.64. This is broken down as follows:

(i) Legal fees USD 2,072,776.42;

615 In this respect the Tribunal refers to its analysis and reasoning on this issue in § 648 above.

(ii) ICSID Costs USD 400,000;
(iii) ICSID lodging fee USD 25,000; and
(iv) disbursements USD 47,520.22.

B. RESPONDENT'S COST SUBMISSIONS

732. Respondent submits that Claimant should bear all the costs and expenses of these proceedings, including Respondent's legal fees and expenses totalling USD 2,283,351.79 as well as pre-award and post-award interest. This is broken down as follows:

(i) Legal fees USD 1,848,468.79;
(ii) ICSID costs USD 400,000; and
(iii) Expenses USD 34,883.

C. THE TRIBUNAL'S DECISION ON COSTS

733. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

734. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

735. The costs of this Arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Julian D.M. Lew	339,863.91
Kaj Hobér	44,150.00
Yves Derains	94,460.46
ICSID's administrative fees	220,000.00
Direct expenses	130,701.58
Total	**829,175.95**

736. The above costs have been paid out of the advances made by the Parties in equal parts.[616] As a result, each Party's share of the costs of arbitration amounts to USD 414,587.98.

737. The Tribunal has decided that each Party shall pay its own costs and expenses incurred with this Arbitration and shall share equally the costs of this Arbitration, i.e. the fees and expenses of the Tribunal members and ICSID's fees and administrative charges. This decision is based on the fact that neither party has been successful in this Arbitration in light of the reliefs sought. Respondent's raised seven challenges to jurisdiction, six of which have been rejected; only one is partially accepted and it did not result in the Tribunal's jurisdiction being denied or narrowed. Claimant's claims for breaches by Respondent of the FET, and national treatment and MFN obligations under Articles 10.3, 10.4, 10.5 and 10.14 TPA respectively, and the importation of unreasonable or non-discriminatory measures under Article 4.1(b) of the Swiss-Colombia BIT have also failed.

VIII. AWARD

738. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal finds it has jurisdiction over Neustar;

(2) The Tribunal finds it does not have jurisdiction over Vercara;

(3) The Tribunal rejects all claims on the merits;

(4) The Tribunal decides that each Party shall bear its own fees and expenses incurred with this Arbitration and shall share equally the costs of the Arbitration;

(5) All remaining claims are rejected.

616 The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

[Signed]

Prof. Yves Derains
Arbitrator

Date: September 16, 2024

Prof. Dr. Kaj Hobér
Arbitrator

Date:

Prof. Dr. Julian D.M. Lew, KC
President of the Tribunal

Date:

[Signed]

Prof. Yves Derains
Arbitrator

Date:

Prof. Dr. Kaj Hobér
Arbitrator

Date: September 16, 2024

Prof. Dr. Julian D.M. Lew, KC
President of the Tribunal

Date:

Prof. Yves Derains
Arbitrator

Date:

Prof. Dr. Kaj Hobér
Arbitrator

Date:

[Signed]

Prof. Dr. Julian D.M. Lew, KC
President of the Tribunal

Date: September 18, 2024