INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SECURITY SERVICES LLC d/b/a/ NEUSTAR SECURITY SERVICES

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/20/7)

REPLY MEMORIAL ON JURISDICTION AND THE MERITS
29 JULY 2022

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1. Security Services LLC d/b/a/ Neustar Security Services (**"Neustar"** or **"Claimant"**)[1] submits this Reply Memorial on Jurisdiction and the Merits in this arbitration proceeding against the Republic of Colombia (**"Respondent"** or **"Colombia"**) pursuant to the Trade Promotion Agreement between the Republic of Colombia and the United States of America (**"the TPA"**), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the **"ICSID Convention"**), and in accordance with the revised Annex B of Procedural Order No. 1 dated 18 October 2021.

I. INTRODUCTION

2. Respondent asserts (incorrectly) in its Counter Memorial that Neustar has only one claim. Respondent describes that claim as follows:

> "Neustar's only real claim is that it wrongfully felt entitled to continue gorging on profits of 93% a decade later."[2]

3. This assertion by Respondent says a lot about Respondent's defenses in its Counter Memorial and reveals much about the Respondent and its officials.

4. As an initial matter, Respondent erroneously states that Neustar (meaning its former investment .CO Internet) received "profits" of 93% in connection with the 2009 Concession. Not surprisingly, given the manner in which Respondent's officials have acted, Respondent confuses "profits" with "revenue." The 2009 Concession provided that .CO Internet would 93% of the revenue or proceeds received from the domain sales.[3] As is obvious, revenues are not profit. Based on the expectation that the 2009 Concession would be renewed, Neustar invested more than US$60 million in the

[1] *See* Letter from Claimant to the ICSID Secretariat and Tribunal (29 July 2022), attaching exhibits C-0134 to C-0138.

[2] Respondent's Counter Memorial, para. 29.

[3] .CO Internet's 2009 Concession, Exhibit C-0017.

development and marketing of the domain. Neustar, with its expertise in the registry business with respect to security and operations, made the .co domain one of the most sought-after domains in the world. Of course, this resulted in revenue to .CO Internet. Importantly, Neustar's investment and expertise led to increased payments to Respondent for proceeds from the domains.[4]

5. But asserting that Neustar's only claim is that it wanted to continue receiving 93% of the proceeds is as much of a mischaracterization as the revenue/profits assertion. Neustar laid out serious claims that are supported by contemporaneous documentary evidence. These contemporaneous documents showed that Respondent refused to negotiate meaningfully with .CO Internet or Neustar, despite having the renewal provision in the 2009 Concession. Respondent asserts that renewal was only a mere possibility and that it had no obligation to negotiate or discuss a renewal of the 2009 Concession. Neustar addresses below these arguments. In short, Respondent's arguments do not consider both the language of the concession and, importantly, the practice in Colombia in which domestic investors and investors from third countries receive such renewals.

6. Respondent asserts that, because its reading of the language of the 2009 Concession is that this is only a possibility of renewal, Respondent had no obligation of any type to negotiate meaningfully for such a renewal, much less extend one. Respondent's assertion, even if it were correct, which it is not, runs against the general principle of good faith. What is the purpose of having such a provision if Respondent can ignore it at will and without consideration? Respondent's attitude that it can simply decide how

[4] According to the 2009 Concession, Respondent received a fixed percentage, making their portion of this amount "profit."

it wants to interpret a provision and then ignore its actions with respect to other investors explains the rash of investment cases against it.

7. Putting aside whether the 2009 Concession required a negotiation and renewal, or whether it was a provision that Respondent could unilaterally ignore, Respondent has repeatedly extended or renewed concessions or contracts with other investors with similar language or in similar circumstances. Respondent cannot treat Neustar's investment less favorably or otherwise discriminate against it because it thinks the language of the 2009 Concession allows it to do so. Doing so violates Article 10.5 of the TPA, as well as the provisions on national treatment and MFN.

8. Not being able to defend the discrimination and disparate treatment, Respondent is left to argue that none of the comparators are relevant because the Internet is not in the telecommunications sector, as well as similar but also feckless alleged distinctions. But, in one part of the Counter Memorial, Respondent argues that it was too risky to renew the 2009 Concession because of the Constitutional and legal framework that governs government contracts or concessions. This assertion by Respondent makes all government contracts or concessions comparators, as these contracts or concessions are subject to the same legal framework.

9. In addition to the discrimination and disparate treatment, Respondent acted in an arbitrary manner, without transparency or candor, and as to violate Neustar's legitimate investment backed expectations, among other violations.

10. One does not need to read only the investor's Memorial to determine that Respondent acted in violation of Article 10.5 of the TPA. The evidence, instead, is set out in Respondent's Counter Memorial.

11. As an initial matter, the assertions in Respondent's witness statements by its officials is often contrary to contemporaneous documents or otherwise unsupported. Contrariwise, few if any of the statements made by Respondent's officials in the relevant timeframe (2017-2019) correspond to their assertions now or reflect reality. Rather, Respondent's contemporaneous statements were aimed at political constituencies in Colombia. In addition, it is now apparent from the record that Respondent's contemporaneous statements in 2017-2019 were made without a factual basis to support those statements. As one example, Respondent in July 2018 told .CO Internet that it needed to change the economics of any new concession in order to avoid a tender; Respondent now admits that it did not have the information at that time to make such an assertion.

12. In addition, Respondent's own documents show that it altered the composition of Ministry committees for months until these committees provided the politically expedient answer regarding renewal—meaning the refusal to renew and related adverse actions against Neustar's investment. After these committee alterations, committee decisions would be made in days without any corresponding discussion in the minutes to support these conclusions.

13. Also, Respondent admits in the Counter Memorial that crucial administrative decision-making did not take place in a timely manner because presidential elections were soon to occur. This is obviously on its face a wrongful justification to delay important administrative functions. This is all the more problematic when one considers that this meant that Respondent's officials were waiting from direction from the Office of the President with respect to the renewal – even though Respondent now claims that this is simply a contract by MinTIC that didn't involve the Office of the President. What possible basis for delaying important discussions regarding an increase in revenue in a

public-private partnership could be gained from waiting for direction from the political wing of the administrative process? Deference to political actors in such matters is not good governance. And, in this context, such deference and waiting for political instructions violates the TPA.

14. The facts, undeniably and uncontested, remain this: Neustar was not "gorging" on profits made from the .co domain, while Respondent suffered but rather had improved upon the fiscal terms put out to bid by Respondent itself after ample consultation.[5] Respondent was not even to make a single counterproposal about new economic terms for the 2009 Concession after it forced Neustar to the negotiation with a threat of putting out the .co internet concession to a bid again. Respondent then used Neustar's willingness to negotiate as the very reason to put the 2009 Concession out to re-bidding. This assertion ignores the fact that the only reason that the investor made the economic concession in the first place was that the government demanded it in July 2018. Taking the government at its word that it merely wished to adjust the fiscal terms, the investor came to save as much of its contractual rights as possible.

15. In any event, notwithstanding Respondent's accusations of gorging, the general financial requirements of the 2009 Concession were set by Respondent. Respondent – through Resolution 1652 of 2008 – "defined the financial model of the contract to be concluded between the selected third-party and MinTIC, under which the third-party would pay MinTIC a percentage of the income generated by the sale of domain names."[6] Respondent did this after it "launched a national consultation process" with members of Colombia's internet community in 2003,[7] established an Advisory

[5] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 8, 10, 29, 52, 56-65, 71-73, 145, 157-158.

[6] Respondent's Counter-Memorial, para. 52.

[7] Respondent's Counter-Memorial, para. 41.

(continued)

Committee,[8] and met with international representatives from ICANN.[9] Thus, the idea that Neustar was gorging is not accurate, and can only be said when one did not consider the investments (time and money) that Neustar made to develop the .co domain to where it is today.

16. Respondent's officials may believe that they have no cause to be held to account for their actions. But the TPA, which provides substantial economic benefits to Respondent provides otherwise, as does customary international law. Neustar was harmed substantially at the hand of Respondent's actions. And this harm has a remedy.

II. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

17. Respondent raises a number of jurisdictional objections in this case. All of these jurisdictional objections are technical or otherwise irredeemably flawed, as set out below. Respondent's jurisdictional objections seem reflexive rather than being based on facts and law. As such, Neustar requests that the Tribunal consider these objections when determining whether to shift the costs and fees in this proceeding.

A. Neustar Did Not Make a "Definitive Forum Selection" in Requesting Interim Measures Under Article 10.18 of the TPA

18. Colombia first asserts that Neustar made a "definitive forum selection" under Annex 10-G of the TPA by bringing Council of State proceedings on 19 September 2019,[10]

[8] Respondent's Counter-Memorial, para. 46.

[9] Respondent's Counter-Memorial, paras. 47-51.

[10] Respondent's Counter-Memorial, paras. 181-191. Respondent's refers to .CO Internet's request for identical provisional measures on 18 September 2018, which is irrelevant in these proceedings, rather than Neustar's request on 19 September 2019. *See* Respondent's Counter-Memorial, paras. 170-171. Not only are both proceedings requests for interim measures as permissible under Article 10.18(3) of the TPA, but .CO Internet is not a claimant in these proceedings. Consequently, even if .CO Internet's request for interim measures were considered to be a "definitive forum selection" (which, under Article 10.18(3), it was not), it is irrelevant to the question of whether *Claimant* has acted in accordance with Annex 10-G. *See*, *e.g.*, *LG&E Energy Corp., LG&E Capital*

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and therefore was precluded from filing its Request for Arbitration on 23 December 2019.

19. Annex 10-G of the TPA 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. (emphasis added)

20. Annex 10-G thus clarifies that a claimant from the United States will have "elected" to bring a dispute in a Colombian court or administrative tribunal where it submits "a claim that a Party has breached an obligation under Section A" of the TPA. Section A of the TPA sets out the protections to be afforded to investors under Chapter 10, including a prohibition on national and most-favored-nation ("MFN") treatment (Articles 10.3 and 10.4), and requirements of the minimum standard of treatment (Article 10.5).

Corp. & LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/01/1, Decision on Jurisdiction (30 April 2004), para. 76, **CL-051**; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para. 95, **RL-017**; *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), paras. 330-331, **CL-084**.

21. Respondent's jurisdictional objection under Annex 10-G fails, because: (1) Neustar did not allege a breach of an obligation under Section A of the TPA in proceedings before a Colombian court or administrative tribunal, but only requested interim measures as permissible under Article 10.18(3) of the TPA; and (2) even if the Tribunal considered that the Council of State proceedings were not requests for interim measures under Article 10.18(3) (*quod non*), Respondent has failed to demonstrate that Neustar made a "definitive forum selection" under Annex 10-G of the TPA.

1. Neustar's Request for Interim Measures before the Council of State Falls Under Article 10.18(3) of the TPA

22. Respondent's jurisdictional objection is based on its narrow reading of Annex 10-G, which fails to take account of the broader parameters for submitting a claim to arbitration under the TPA – including Article 10.18(3). Article 10.18(3) of the TPA expressly carves out actions for interim relief, stating:

> 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.

23. Because Article 10.18(3) of the TPA expressly provides for potential recourse to domestic courts to seek interim measures, such action is also permissible under ICSID Rule 39(6), which states:

> 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.

24. Neustar's application to the Council of State in Colombia was a request for interim measures under Article 10.18(3) of the TPA and ICSID Rule 39(6), not a "definitive forum selection" as Respondent now claims. This is evident by an analysis of the pleadings and judgments in those proceedings.

25. On 18 September 2019, Neustar filed a request for "urgent provisional measures" before the Council of State under Articles 230 and 231 of the Colombian Code of Administrative Procedure ("CCAP"). These articles fall under Chapter Eleven of the CCAP ("Precautionary Measures") and are entitled "Content and scope of precautionary measures" and "Requirements to order precautionary measures", respectively.[11] In, requesting the Court order interim measures under these provisions, Claimant expressly stated that:

> [W]hile 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 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…[12]

26. In its specific requests for relief, Neustar asked the Court to, *inter alia*, 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 of the FTA".[13] The request went on to confirm that:

> [T]he "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

[11] Articles 230 and 231 of Law 1437 of 2011, **C-0113**.

[12] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6, **R-0009**.

[13] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6, **R-0009**.

(continued)

> the subsequent enforcement of a favourable final award on the dispute, and entail a disregard by the Colombian Government of its obligations under the FTA…[14]

27. It is clear from the above that Neustar filed its request for urgent interim measures precisely for "the sole purpose of preserving the claimant's… rights and interests during the pendency of the arbitration" as set out under Article 10.18(3) of the TPA.

28. This fact is also evident from the Council of State's ruling on 30 October 2019. In declining Neustar's request, the Council of State specifically noted that the request for interim measures to preserve rights while the arbitration was ongoing was predicated on the existence of an arbitration itself. The judgment noted that, because the Request for Arbitration had not yet been filed (only that the Notice of Intent to file had been submitted), the request for interim measures to preserve the rights in that arbitration was not yet admissible.[15] In this respect, clearly the Colombian court itself did not consider the request for interim measures to be a "definitive forum selection" under the TPA, as Respondent now erroneously claims, but expressly recognized the link between the request for interim measures as being in aid of the ongoing arbitration.

29. Neustar requested that the Council of State review this decision on 14 November 2019, to revoke the order from 30 October 2019 and issue interim measures in order to protect Neustar's investment. In particular, Neustar reaffirmed that the purpose of the request was both to prevent MinTIC from taking actions to aggravate the dispute and to maintain the investment while the arbitral tribunal considered the merits of the claim

[14] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6, **R-0009**.

[15] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), pp. 10-13, **R-0009**.

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(noting that Neustar was required to wait 90 days under the TPA after filing its Notice of Intent to file the Request for Arbitration).[16]

30. In support of this request for review, Neustar argued, *inter alia*, that:

- On 7 June 2019, Neustar notified the Respondent of the existence of an investor-State dispute for violations arising under the TPA.[17] However, after the dispute was notified, the Respondent disregarded its international obligation to suspend any action that could hinder or frustrate the negotiation and aggravate the international dispute.

- The request for urgent provisional measures satisfied the requirements of domestic law set out in Article 231 of the CCAP, because, among other reasons:

    - Neustar was entitled to the formalization of the renewal in order to preserve the *status quo* while the arbitration proceeded and to ensure non-aggravation of the dispute under the TPA.[18]

    - there were serious reasons to consider that if the provisional measures were not ordered, the effects of any ultimate arbitration award would be null and void.[19]

[16] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 5.1, **R-0080**.

[17] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 3.16, **R-0080**.

[18] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 3.19(i), (ii), **R-0080**.

[19] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 3.19(iv), **R-0080**.

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- there existed a *prima facie* case based on Article 2 of Law 1065 of 2006 and the rights enshrined in the TPA.[20]

31. Thus, it is clear that Neustar never submitted a claim for breach of a violation under Section A of the TPA to Colombian courts or made any request for damages relating to such breach. Instead, Neustar was quite clearly seeking to obtain interim relief to protect its investment and preserve the *status quo* while the arbitration proceeded, as well as to protect any ultimate arbitration award issued by a tribunal.

32. Despite this clear position, Respondent asserts that Neustar "clearly alleged breaches of the TPA standards which it has also raised in the present ICSID proceedings", and that the Council of State "undertook an examination of the merits of Neustar's claims under the TPA in order to reach its 12 March 2020 decision."[21] Respondent's position is willfully misleading.

33. As required by Colombian law in order to obtain interim measures to preserve its position, Neustar was required to show that such *prima facie* rights existed under both the CCAP and the TPA.[22] With respect to the latter, Neustar referred to the provisions of the TPA solely to obtain the interim relief it desired, in order to preserve its "rights and interests during the pendency of the proceedings." Neustar made no submission on the substance of its claims of breach under Articles 10.3, 10.4, or 10.5 (submitted in the

[20] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 3.19(v), **R-0080**.

[21] Respondent's Counter-Memorial, paras. 188-189.

[22] Articles 230 and 231 of Law 1437 of 2011, **C-0113**. Article 230 expressly states that precautionary measures "must have a direct and necessary relationship with the claims of demand". Article 231 sets out requirements for the Court to order interim measures, being: (1) that the claim is reasonably founded in law; (2) that the plaintiff has demonstrated ownership of the right or rights invoked; (3) that the plaintiff has submitted documents, information, arguments and justifications that allow the Court to conclude, through a weighting of interests, whether it would be more burdensome for the public interest to deny the interim measure than to grant it; and (4) that one of the following conditions is met: (a) not granting the measure would cause irreparable damage, or (b) there are serious reasons to believe that the effects of the sentence would be null.

arbitration), and made no claims for damages to address these wrongful actions as a matter of international law.

34. The Court (erroneously in Neustar's view) considered that Neustar did not satisfy the requirements of Colombian law and, on 12 March 2020, denied Neustar's request for review of the decision denying it interim measures. As is evident from the face of the judgment itself, the Court was *solely* concerned with examining whether the Council of State had *prima facie* competence to order provisional measures pending the outcome of an investment arbitration. That is literally the "subject" matter of the judgment itself, on page 1, which states:

> Precautionary measures pending investment arbitration. Competence of the Council of State. The decision that denied them is confirmed because the appearance of good law is not accredited.[23]

35. The judgment itself clearly notes that:

> [Neustar's] request was based, from a procedural point of view, on the provisions of Article 10.18.3 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (hereinafter the "TPA"), Rule 39(6) of the Treaty containing the Arbitration Rules of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") and Article 234 of the Code of Administrative Procedure.
>
> Substantially, it was based on the need to "preserve the rights and interest that the TPA confers to NEUSTAR, INC, including, but not limited to, the rights derived from the investment consisting the Concession Contract 0019 of 2009" concluded with the Ministry of Information Technologies and Communications (hereinafter "MinTIC") to administer the .co domain…[24]

[23] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), p. 1, **R-0080**.

[24] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), paras. 2-3, **R-0080**.

36. It is also evident from the Council of State's judgment on 12 March 2020 that it was assessing whether there was a *prima facie* case for the purposes of ordering urgent interim measures, not a full consideration of the merits of any claim under the TPA (which, as above, had not been claimed or briefed by Neustar). This is unsurprising in light of the fact that Article 230 of the CCAP expressly provides that a "decision on precautionary measures does not imply prejudgment."[25] Respondent's assertion that the Council of State "undertook an examination of the merits of Neustar's claims under the TPA" is thus a gross exaggeration and inconsistent with its own law.[26] In fact, the judgment addresses the protections under the TPA in just four short paragraphs at the end of its decision, finding (incorrectly) that Neustar's rights had not been affected in the manner required to order interim measures. As a matter of logic, if Neustar had "elected" to pursue proceedings before domestic courts instead of initiating arbitration proceedings (*quod non*), four short paragraphs with no reference to any evidence except one footnote with a link to MinTIC's website would not suffice for the "examination of the merits of Neustar's claims."[27] Moreover, and again as a matter of logic, because interim measures ordered under Chapter Eleven of the CCAP are not permanent, and may be revoked or modified at any time,[28] 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.

37. Thus, it is simply inaccurate to characterize Neustar's request for interim relief as "alleging the same breaches of the TPA" and therefore as a "definitive forum selection"

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[25] Article 229 of Law 1437 of 2011, **C-0113**.

[26] Respondent's Counter-Memorial, para. 189.

[27] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), paras. 39-40, **R-0080**.

[28] Article 235 of Law 1437 of 2011, **C-0113**.

(continued)

prior to its Request for Arbitration on 23 December 2019, as Respondent does.[29] It is evident from the face of the decision of the Council of State that Neustar's request for interim relief occurred *after* Neustar had submitted its lengthy Notice of Intent to Respondent, and in an effort to protect its rights during the pendency of the arbitration and to request Respondent to engage in good faith with the arbitration process set out under the TPA.

38. Two other points bear mentioning.

39. The first is that Respondent has argued that Neustar's Request for Arbitration was premature, arguing (incorrectly) that Neustar did not have a claim when it submitted its Notice of Intent and Request for Arbitration. The Respondent therefore should not be heard to argue that Neustar chose a forum when it also asserts that it had no claim.

40. The second is that the purpose of the forum selection clause should not be applied to any proceeding brought by a claimant in an arbitration, as Respondent argues in this case. Neustar was seeking to preserve its rights under the TPA, as is allowed and expressly contemplated by the TPA. Any interim measure (of which we are aware) requires a showing that the party will prevail or, at a minimum, that it has a valid claim. Consequently, Neustar had to argue in its request for interim measures that it had a valid claim under the TPA. Respondent's argument that such an action, because it mentions the claims under the TPA, prevents relief would strip the TPA of value for an investor who needs to seek interim relief.

41. In sum, Respondent's jurisdictional objection based on Annex 10-G must be rejected. Neustar clearly did not make a "definitive forum selection" in filing its request for urgent provisional measures, but in fact was acting well within its rights under Article

[29] Respondent's Counter-Memorial, para. 181.

10.18(3) of the TPA in an attempt to preserve its rights and interests while this arbitration progressed.

2. In Any Event, Respondent has Failed to Demonstrate that Neustar Made a "Definitive Forum Selection" under Article 10.18(2) of the TPA

42. To the extent that the Tribunal considers that Neustar's initiation of Council of State proceedings on 18 September 2019 does not fall under the scope of Article 10.18(3) of the TPA (which, as above, it does), Respondent is incorrect that Neustar made a "definitive forum selection" under Annex 10-G of the TPA.[30]

43. In its Counter-Memorial, Respondent merely asserts that Annex 10-G constitutes a "fork-in-the-road provision", aimed at avoiding "duplication of proceedings and conflicting decisions."[31] Respondent fails to address, however, *how* a jurisdictional objection based on a fork-in-the-road clause should be assessed, including how to determine whether an investor has in fact made a "definitive forum selection."

44. Respondent's reluctance to address the legal standard applicable to fork-in-the-road clauses is telling as it cannot meet the relevant test to support its jurisdictional objection. Tribunals applying fork-in-the-road clauses have consistently relied on a triple identity test drawn from both civil and common law precedents in the area of *res judicata*.[32]

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[30] *See*, *e.g.*, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017), para. 239, **CL-085** ("The Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.").

[31] Respondent's Counter-Memorial, paras. 183-184.

[32] *See*, *e.g.*, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), para. 75, **CL-006**; *Gami Investments v. Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 37,

(continued)

Under this strictly-applied test, in order for a fork-in-the-road provision to apply, the subsequent proceedings must concern the same legal and factual issues, as well as take place between the same parties.[33] Here, Respondent has been unable to meet its burden to demonstrate either that the claims in issue are identical, or even to support its claim that the risks of "duplication of proceedings and conflicting decisions" have arisen in this case.

45. First, and as demonstrated above, the claims in issue in this arbitration are *not* the same as the requests made in the interim measures application before the Council of State proceedings.[34] As clear from the face of the decisions by the Council of State, Neustar did not make any claim on the merits under the provisions of the TPA or for compensation to be awarded as a result of Respondent's violation of international law. Rather, Neustar requested a series of interim measures to "order the Colombian State not to aggravate the international investment dispute, to preserve the concession until

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CL-034; *LG&E Energy Corp., LG&E Capital Corp. & LG&E Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/01/1, Decision on Jurisdiction (30 April 2004), para. 76, **CL-051**; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para. 95, **RL-017**; *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), paras. 330-331, **CL-084**.

[33] *Gami Investments v. Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 37, **CL-034**. Claimant notes that some tribunals have moved to a "fundamental basis" test instead of the triple identity test. However, in light of the clear and consistent approach of tribunals requiring "triple identity" in determining fork-in-the-road clauses, Claimant does not consider it necessary to address the "fundamental basis" standard in depth. However, Claimant notes that Respondent would nonetheless also fail this standard of assessment, for the same reasons articulated with respect to the distinction between requests for provisional measures and treaty-based claims on the merits.

[34] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections (13 March 2020), para. 142, **CL-086** ("Respondent argues that allowing Claimants to pursue reflective loss claims under that Article would circumvent Annex 10-E's bar on a U.S. claimant's pursuing treaty claims (such as "full protection and security"), in circumstances where its local enterprise already has pursued related local remedies (for example, protesting the failures of local policing). This argument fails, for two reasons. First, Annex 10-E by its plain terms attaches only where the local court action already has "alleged that breach of an obligation under Section A," i.e., the same alleged Treaty breach as the U.S. investor seeks to assert under DR-CAFTA.").

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the end of the international investment dispute, so as not to render meaningless the enforcement of a favourable award."[35] This is clearly distinct from its claims on the merits in these proceedings, including allegations of breach under Articles 10.3, 10.4 and 10.5 of the TPA.

46. Respondent submits that because one of the interim measures requested was to "formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .CO Internet", that this amounts to a "definitive forum selection".[36] Respondent's development of this argument with respect to its fork-in-the-road jurisdictional objection is limited, perhaps because it is aware of a multitude of cases confirming that – since contractual claims are different from treaty claims – even if there had been or there currently was a recourse to the local courts for breach of contract, this would not prevent submission of the treaty claims to arbitration under a fork-in-the-road clause.[37]

47. Logic and comity both also run contrary to Respondent's assertions. Had Neustar been complaining of a loss of a mining license of its Colombian project company, for example, one would expect the local project company to challenge the loss of the license. Such a local challenge would not be a waiver of international rights as it is challenging the local decision at issue. The same is true, here, with more acuteness. The

[35] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6, **R-0009**.

[36] Respondent's Counter-Memorial, para. 191.

[37] *See*, *e.g.*, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003), para. 80, **CL-087**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. U.N. 3467, Final Award (1 July 2004), para. 45, **CL-067**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000), para. 55, **CL-088**; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), paras. 211-212, **CL-089**.

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Concession was held by .CO Internet and only it could effectively challenge the refusal to renew the Concession. Neustar's claims go well beyond a simple refusal to renew the Concession, as seen from Neustar's detailed memorial.

48. Second, Respondent's primary concern with respect to its jurisdictional objections (both in relation to Annex 10-G and Article 10.18(2) of the TPA, discussed below) is the avoidance of "duplication of proceedings and conflicting decisions".[38] But there are no duplication of proceedings here, and certainly no prospect of conflicting decisions in light of the limited nature of Neustar's request for provisional measures before the Council of State, which were finalized as of 12 March 2020 (before this Tribunal was even constituted). Even on its own (incomplete) criteria, Respondent therefore fails to support its argument.

49. In sum, Respondent's jurisdictional objection under Annex 10-G cannot be sustained, and should be dismissed. Neustar filed its "trigger letter" on 7 June 2019 and its Notice of Intent to arbitrate on 13 September 2019, starting the process for a claim under Section B of the TPA. On 18 September 2019, Neustar filed a request for interim measures before the Council of State, as expressly permitted under Article 10.18(3) of the TPA, to preserve its rights during the pendency of the arbitration and in an effort to ensure Colombia would not further aggravate the dispute. All of these actions are expressly provided for under the TPA and Neustar properly brought its claim only before this Tribunal with respect to Respondent's wrongful conduct under the TPA.

[38] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 184, 224, 247-248.

B. Neustar's Waiver under Article 10.18 was Properly Formulated and Executed

50. Closely related to its first jurisdictional objection, Respondent's third objection to the Tribunal's jurisdiction also largely rests on a consideration of the Council of State proceedings under Article 10.18 of the TPA. Neustar therefore addresses this third objection here, before turning to the remainder of Respondent's misplaced arguments on jurisdiction.

51. Article 10.18 of the TPA states in relevant part:

> (2) 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.
>
> (3) 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. (emphases added)

52. To recall, Article 10.16 of the TPA refers to a breach of "an obligation under Section A",[39] meaning Neustar's claims with respect 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.

53. Respondent argues that Neustar failed to comply with the requirements of Article 10.18(2) of the TPA because: (a) the waiver submitted by Neustar allegedly contains a formal defect;[40] and (b) Neustar continued the Council of State proceedings in breach of its waiver, as—Respondent argues—that proceeding did not properly fall within the scope of Article 10.18(3) as provisional measures.[41] Respondent's objections cannot be sustained, as discussed in the remainder of this section.

1. Neustar's Waiver Complies with Article 10.18(2) of the TPA

54. Claimant submitted its waiver under Article 10.18.2 of the TPA at the time it filed its Request for Arbitration on 23 December 2019, which stated:

> **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 16, 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;

[39] TPA, Article 10.16.1(a)(i)(A), Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[40] Respondent's Counter-Memorial, paras. 225, 228-235.

[41] Respondent's Counter-Memorial, paras. 238-249.

(continued)

> Resolved, that the waiver of 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 (but not included the interim injunctive relief filed before the Consejo de Estado) be, and hereby is, approved…[42]

55. Thus, in its waiver, Neustar recognized the requirements of Article 10.18.2 (read together with the provision of Article 10.18.3, in relation to permissible actions for interim injunctive relief) and executed the waiver accordingly.

56. Respondent asserts that the waiver is defective in two respects: first, because the waiver addresses application to Colombian courts (and not U.S. courts as well);[43] and second, because the waiver fails to include the words "or continue" in the resolution.[44]

57. Neustar does not consider that these amount to formal defects of the waiver in the manner Respondent claims. The waiver submitted by Neustar expressly noted that it 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".[45] This would include, of course, any U.S. proceedings even to the extent that such proceedings were available or applicable.

58. Neustar's Request for Arbitration reiterates the broad scope of Neustar's waiver, stating:

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[42] 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 and Appointment of Attorneys, **C-0007** (originally submitted as **RFA-7**).

[43] Respondent's Counter-Memorial, para. 232.

[44] Respondent's Counter-Memorial, para. 233.

[45] 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 and Appointment of Attorneys, **C-0007** (originally submitted as **RFA-7**).

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> 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 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.[46]

59. In this respect, the investor's waiver and confirmation in the Request for Arbitration was "clear, explicit and categorical".[47] Consequently, Neustar submitted a valid waiver in filing its Request for Arbitration, as required under Article 10.18.[48]

60. Neustar is not aware of any remedy related to its rights under the TPA that it could bring in courts in the U.S. But even if such remedies did exist, there can be no doubt that Respondent would rely on the waiver provided to argue that such a remedy could not be brought. And Respondent would be correct to do so.

61. However, to the extent that the Tribunal considers that Neustar's waiver was formally defective (*quod non*), Respondent's alleged "formal defects" were inadvertent and not material to this case, and do not operate to cause Respondent any harm.[49]

62. First, Claimant drafted the waiver to account for the specific circumstances in issue in this dispute. Respondent's first claim is that "Neustar sought to limit the waiver to Colombian courts, while failing to waive Neustar's rights to initiate or continue

[46] Request for Arbitration (23 December 2019), para. 118.

[47] *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000), para. 18, **RL-025**. *See also* Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 5.

[48] Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 4 ("The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration.").

[49] *See*, *e.g.*, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), paras. 115-118, **CL-0059**.

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proceedings before the US courts in relation to the measures."[50] As per the Request for Arbitration, and the language in the waiver itself, this is not correct. Neustar notes that at the time the waiver was filed there were no claims raised before the courts of the United States and there were (or are) no prospect of any such claims. This is particularly the case because U.S. courts do not have jurisdiction over Colombia in light of the limited nature of the exceptions to foreign immunity under the U.S. Foreign Sovereign Immunities Act.[51] Consequently, the reference to "Colombian courts" in the third paragraph of its waiver was because Colombia was the *only potential venue* for "any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16,"[52] despite the fact that Neustar waived rights with respect to claims anywhere. Neustar's understanding is confirmed by the second recital excerpted above, which states "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*."[53] Moreover, Claimant's approach is consistent with that adopted in Annex 10-G (discussed above), which specifically states that:

> 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 … 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

[50] Respondent's Counter-Memorial, para. 232.

[51] *See* 28 U.S.C. Section 1604 – Immunity of a foreign state from jurisdiction, **C-0127** ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States…").

[52] TPA, Article 10.18.2(b), Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[53] 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 and Appointment of Attorneys, **C-0007** (originally submitted as **RFA-7**) (emphasis added).

> 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. (emphasis added)

63. By expressly limiting Annex 10-G to an "investor of the United States" bringing a dispute before the "court or administrative tribunal of a Party other than the United States", it is clear that some ambiguity arises in the text of the treaty itself between the fork-in-the-road and waiver provisions (often seen as complementary mechanisms to avoid the duplication of procedures).[54] In light of this ambiguity, Claimant cannot be faulted for tailoring part of its waiver to ensure that it complied with the language contained in the TPA itself.

64. Respondent then asserts that "Neustar also failed to waive its rights to 'continue' proceedings before Colombian courts". Respondent expressly recognizes, however, the Claimant confirmed in its second recital of its waiver and in its Request for Arbitration that it waived any rights to "initiate or continue" any claim, as stipulated by Article 10.18.2.[55] However, Neustar's specific resolution waived "any right to initiate" because there simply were no claims for Neustar to waive its right to "continue" in this dispute as Neustar had no claims against Respondent under the protections of the TPA. As explained in paragraphs 18 to 35 above, the only action Neustar had filed before administrative tribunals or courts under Colombian law was its application for interim

[54] *See*, *e.g.*, G. Kaufmann-Kohler and M. Potestà, 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework', European Yearbook of International Economic Law (2020), para. 81, **RL-0002** ("In broad terms, fork-in-the-road and waiver clauses pursue the same objectives: avoiding parallel proceedings, which entail duplication of costs, risks of double recovery and of inconsistent outcomes.").

[55] *See* Respondent's Counter-Memorial, para. 233; Request for Arbitration (23 December 2019), para. 118.

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measures, which is not a request to decide the merits of the dispute.[56] Because Article 10.18.3 of the TPA expressly carves out such actions from the scope of Article 10.18.2 ("[n]otwithstanding paragraph 2(b), the claimant … may initiate or continue an action that seeks interim injunctive relief…"), there was no action under Article 10.18.2 for Neustar to waive. This is evident from Neustar's note that the waiver did not include "the interim injunctive relief filed before the Consejo de Estado".[57] It is also clear in Neustar's Request for Arbitration.[58]

65. Second, even if Neustar's formulation of the waiver were considered to be "defective" (which, as above, it was not), the alleged "defects" are not sufficient to render Neustar's claim outside the jurisdiction of this Tribunal.

66. In *Thunderbird v. Mexico* (a claim under the NAFTA, which Respondent asserts has an "identically-worded provision[]" to the TPA[59]), the tribunal warned against excessive formalism, stating:

> Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed 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 Tribunal joins the view of other NAFTA

[56] *See* Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), **R-0009**; Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 5.1, **R-0080**.

[57] 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 and Appointment of Attorneys, **C-0007** (originally submitted as **RFA-7**).

[58] Request for Arbitration (23 December 2019), para. 118.

[59] Respondent's Counter-Memorial, para. 224.

> Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.
>
> In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely 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. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.[60]

67. While the tribunal in *Thunderbird* was faced with issues around the timing of the submission of a waiver (rather than the precise language contained therein), the fundamental point remains the same and can be applied to the current circumstance. Even if the waiver itself were defective (which again, Neustar denies), then it was immediately remedied by the Request for Arbitration which expressly confirmed that Neustar waived "any rights 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 of [Section A of the TPA]."[61] Again, had Respondent really viewed Neustar's action as a violation of the waiver provision, Respondent would have raised this argument in its own courts. In any event, parsing between these statements, submitted on the same day, would amount to excessive formalism,[62] and would effectively deny Neustar access to ICSID arbitration

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

[61] Request for Arbitration (23 December 2019), para. 118.

[62] *See*, *e.g.*, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), paras. 117-118, **CL-059**; *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000), para. 23, **RL-025**; *Mondev International Limited v. United States*, Award, ICSID Case No. ARB(AF)/99/2 (11

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and of its only means of obtaining compensation for Respondent's wrongful conduct under the TPA.

68. Moreover, the purpose of Article 10.18(2), by Respondent's own admission, is "to shield the State from the risk of multiple proceedings."[63] In its non-disputing party submission, the United States also explained that the purpose of the waiver provision 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 thus legal uncertainty).'"[64] As in *Thunderbird*, that risk has not eventuated here. No "concurrent domestic and international remedies" have been pursued, meaning that there is no risk of conflicting outcomes, legal uncertainty, or double redress for the same conduct or measure in issue in this arbitration.[65] It would thus be wholly inappropriate for the Tribunal to decline jurisdiction on this basis.[66]

October 2002), para. 86, **CL-024**; *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998), paras. 90-92, **CL-090**.

[63] Respondent's Counter-Memorial, para. 224.

[64] Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 8. *See also Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 808, **RL-026** ("A] prospective claimant is required to withdraw from any municipal procedure, if such procedure: - could give rise to an outcome which conflicts with the result of the investment arbitration, or - can result in claimant being compensated twice for the same loss or damage.").

[65] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 118, **CL-059**; *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000), para. 27, **RL-025**.

[66] To the extent that the Tribunal considers that any of Claimant's claims relate to measures also at issue in the Council of State proceedings (*quod non*), Claimant reserves its rights on the question of whether such finding renders the entire arbitration outside the jurisdiction of the Tribunal, or the specific claim identified as overlapping. *See Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Jurisdiction (17 November 2008), para. 75, **RL-028** ("The Tribunal concludes that the word 'claim' in Article 10.18 means the specific claim and not the whole arbitration in which that claim is maintained."); *Commerce Group Corporation and San Sebastian Gold Mines Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011), paras. 110-111, **RL-027**, ("In Claimants' view, *RDC* stands for the proposition that a partial overlap of claims between a CAFTA arbitration and parallel proceedings cannot render a CAFTA waiver

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69. Respondent points to the findings of the tribunal in *Renco v. Peru* which it states "concluded that it lacked jurisdiction due to claimant's failure to comply with several formal requirements included in the waiver, including inter alia to waive its right to pursue '*any*' proceedings."[67] But the waiver issues before the *Renco* tribunal are entirely distinguishable from those raised by Respondent in these proceedings. The claimant in Renco added an express qualification to its waiver which lacked any basis in the treaty in question (Dominican-Republic Central America Free Trade Agreement ("DR-CAFTA")), stating:

> Finally, as required by Article 10.18(2) of the Treaty, Renco waives its 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, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.[68]

70. Peru objected to the jurisdiction of the Tribunal based on this "reservation of rights" (emphasized in the above), arguing that Renco's attempt to "reserve its right to bring claims in another forum for resolution on the merits if the Tribunal dismisses any claims

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invalid in its entirety … The Tribunal does not disagree with Claimants' reading of the decision in RDC. However, the Tribunal considers reference to RDC in the context of this case to be inapposite, as the Tribunal has not been confronted with separate and distinct claims."). Unlike the situation in *Commerce Group v. El Salvador*, and as discussed below, to the extent that the Tribunal considers Claimant's request to the Council of State for interim measures does not fall within the scope of Article 10.18(3), then the identified claims relating to contractual performance are "separate and distinct" from the treaty claims at issue in this arbitration.

[67] Respondent's Counter-Memorial, para. 230 (emphasis in original).

[68] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016), para. 58, **RL-021**.

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on jurisdictional or admissibility grounds" was non-compliant.[69] The Tribunal agreed, rejecting the qualification inserted by the claimant, stating:

> Renco has purported to qualify its written waiver by reserving its right to bring claims in another forum for resolution on the merits if this Tribunal were to decline to hear any claims on jurisdictional or admissibility grounds.
>
> In the Tribunal's opinion, this qualification is not permitted by the express terms of Article 10.18(2)(b). The only express exception to the waiver requirement set out in Article 10.18(2)(b) is for proceedings seeking "interim injunctive relief and [which do] not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent" (Article 10.18(3)). It is common ground that this exception does not apply here.[70]

71. Unlike the claimant in *Renco*, however, Neustar did not insert a "catch-all" qualification to its waiver to preserve rights to simply bring another dispute if the Tribunal declines to hear its claims. Instead, Neustar submitted its waiver under Article 10.18(2), and expressly noted that its waiver did not extend to the interim relief filed before the Council of State under Article 10.18(3) – an action expressly recognized as permissible by the tribunal in *Renco*.[71] Thus, the *Renco* tribunal's rejection of the claimant's jurisdiction in that case based on the waiver in question does not apply in the circumstances of this dispute.

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[69] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016), para. 61(a)(i), **RL-021**.

[70] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016), paras. 80-81, **RL-021**.

[71] *See also Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017), para. 25, **CL-085** ("Article 10.18.2 provides, *inter alia*, that no claim may be submitted to arbitration under Section B of Chapter Ten unless the claimant consents in writing to arbitration in accordance with the procedures set out in the CAFTA and that the Notice of Arbitration is accompanied by the claimant's written waiver "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." This no-u-turn provision is subject to limited exception in Article 10.18.3.").

72. The *Renco* tribunal then rejected the idea that the broad qualification in that dispute would not give rise to risk of concurrent proceedings, double recovery or inconsistent findings of fact or law, stating:

> The burden and risk of a multiplicity of proceedings arises whether or not the proceedings are commenced in parallel or sequentially. The fact that one set of proceedings terminates, and another set then commences, may be just as prejudicial to the respondent State as two sets of proceedings running in parallel.
>
> Renco's argument also overlooks the possibility that only some of its claims may be dismissed on jurisdictional or admissibility grounds. If Renco then chose to litigate the dismissed claims in a domestic court or tribunal, while at the same time pursuing the remaining claims before this Tribunal, Peru would be forced to litigate concurrent proceedings before a domestic court and before this Tribunal. In this scenario, the respondent State would confront a multiplicity of proceedings. There is also a risk that Renco may recover twice for the same damage and/or that the domestic court or tribunal may reach conflicting findings of fact or law. In the Tribunal's opinion, Article 10.18(2)(b) is designed to avoid these risks from eventuating.[72]

73. By contrast, and as noted above, no duplicative (let alone "multiplicity" of) proceedings have been raised in this dispute. And no duplicative proceedings could occur given Neustar's waiver. In fact, Respondent has not identified any concrete "resulting prejudice" from the alleged defects in Neustar's waiver.[73] Respondent has not had to defend its wrongful conduct on the merits in any other forum but these proceedings. The Council of State proceedings were limited to requesting interim measures (as permitted under Article 11.18(3)) and concluded on 12 March 2020, well over a month before this Tribunal was constituted. No further claim in any forum relating to Respondent's wrongful measures under the TPA has been initiated. Nor would such a

[72] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016), paras. 87-88, **RL-021**.

[73] *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998), paras. 90-92, **CL-090**.

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claim be available in light of available remedies and Neustar's express waiver.[74] As a result, the concern that these arbitration proceedings would somehow result in conflicting decisions or double recovery to the prejudice of Respondent is wholly unfounded.

2. The Council of State Proceedings Did Not Breach Neustar's Waiver

74. Respondent's second limb of its jurisdictional objection under Article 10.18(2) of the TPA is that Claimant "did not discontinue the Council of State proceedings it had introduced on 19 September 2019 after the submission of its Request for Arbitration on 23 December 2019, and in fact continued these proceedings until March 2020."[75] Recognizing the express carveout from Article 10.18(2) for actions for "interim injunctive relief", Respondent then argues that Claimant is just "pretending" that it meets the conditions set out for such actions in Article 10.18(3).[76]

75. Yet, as already described in detail with respect to Respondent's unsustainable arguments under Annex 10-G of the TPA, it is evident from the face of the Council of State decisions that Neustar's request was for interim measures "for the sole purpose of preserving [its] rights" pending resolution of the investment dispute.[77] In the interests of efficiency, Neustar incorporates the arguments set out in Section I(A)(1) by reference here. Unless Respondent also suggests that its own Council of State was "pretending" that the proceedings before it related to "[p]recautionary measures pending investment arbitration" (as the "subject" of the judgment clearly notes on page 1), then Neustar

[74] Moreover, and as described above, U.S. courts do not have jurisdiction over Colombia in light of the limited nature of the exceptions to foreign immunity under the U.S. Foreign Sovereign Immunities Act. Consequently, not claim against Respondent for breaches of the TPA could be raised by Claimant.

[75] Respondent's Counter-Memorial, para. 238.

[76] Respondent's Counter-Memorial, paras. 238-239.

[77] *See* paras. 16 to 31 *supra*.

fails to see how those proceedings violate Article 10.18(3) of the TPA and the waiver submitted under Article 10.18(2).

76. In support of its arguments under Article 10.18(2) in this section of its Counter-Memorial, Respondent focuses in particular on one of Neustar's requests for interim measures with respect to the Concession: that the Council of State order Respondent to "formalize the extension of Concession 019 of 2009 until 2030, approve the guarantees and sign the corresponding document with .CO Internet."[78] According to Respondent, the fact that Neustar "requested specific performance from the Colombian administrative judge further confirms that its claim was not solely intended to preserve its rights during the pendency of the arbitration."[79]

77. But preserving Neustar's rights was precisely the foundation for that requested interim measure permissible under Colombian law.[80] As recognized by the United States in its non-disputing party submission, under Article 10.18(3) "a claimant may wish to seek preliminary injunctive relief before a domestic court to prevent an asset from being sold, destroyed, or impaired while the alleged breach of the TPA is being adjudicated by a Chapter 10 tribunal."[81] Here, Claimant's rights could not be effectively preserved if Respondent were able to tender the Concession to another entity during the pendency of the arbitration. While Respondent argues that "[h]ad this request been granted, the conclusion of the renewal … would have been extremely difficult, if not impossible, to unwind",[82] the same is equally – if not more – true for Neustar. Unwinding a concession

[78] Respondent's Counter-Memorial, paras. 241-242.

[79] Respondent's Counter-Memorial, para. 242.

[80] Article 230 of Law 1437 of 2011, **C-0113**.

[81] Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 12.

[82] Respondent's Counter-Memorial, para. 244.

tendered to another entity would be extremely difficult (if not impossible), whereas Neustar's request to preserve its investment pending the outcome of the arbitration could be revisited in light of the final award. Moreover, unwinding the unlawful tender that Respondent instituted, even though .CO Internet was ultimately awarded a new Concession cannot be unwound to provide .CO Internet with the treatment to which it was entitled under the TPA.

78. In any event, Respondent's focus on this particular request for provisional measures is a red herring because it is not in issue in these proceedings. Article 10.18(2) refers to the submission of a waiver for "any proceeding with respect to any measure *alleged to constitute a breach referred to in Article 10.16*".[83] Article 10.16, in turn, refers expressly to allegations of breach of "an obligation under Section A." As described in Section II(A) below, and notwithstanding Respondent's blatant attempts to mischaracterize Neustar's submissions on this point, Neustar's claims rest on specific acts or omissions by the Respondent that breached Respondent's treaty obligations, including obligations under Section A of the TPA (Articles 10.3, 10.4 and 10.5) and customary international law. Notably, Neustar has not raised a claim before this Tribunal requesting that it order Respondent to formalize the extension of the Concession 019 of 2009.

79. Indeed, tribunals have regularly recognized that – since contractual claims are different from treaty claims – even if there had been or there currently was a recourse to the local courts for breach of contract (which there was not), this would not prevent submission of the treaty claims to arbitration.[84] Likewise, in its non-disputing party submission, the

[83] Emphasis added.

[84] *See*, *e.g.*, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003), para. 80, **CL-087**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. U.N. 3467, Final Award (1 July

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United States expressly noted that "the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in issue in such proceedings are 'separate and distinct' and the measures can be 'teased apart.'"[85] This is the precise circumstance here. Claimant's claims in this arbitration are based on actions taken by Respondent in its sovereign capacity, issues that are separate and distinct from any claim relating to the performance of a contract or interim measures to preserve Claimant's rights. Therefore, even if the request for interim relief relating to the Concession was not considered to fall within the scope of Article 10.18(3), Neustar's alleged "continuation" of the Council of State proceedings with respect to this particular request is inapposite to the question of the Tribunal's jurisdiction because it is not a claim for a breach under Section A subject to the waiver requirement in Article 10.18(2).

80. Finally, Respondent's position that by allowing the Council of State proceedings to finish for a period of four months at the outset of this arbitration "overstepped the boundaries" of Article 10.18 is therefore entirely unsupported.[86] Contrary to its hyperbole, Respondent was never "put in a situation where parallel legal actions stemming from the same measures were brought", nor was it subjected to "as many litigation fronts as possible."[87] Respondent was subject to one request for provisional

2004), para. 45, **CL-067**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000), para. 55, **CL-088**; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), paras. 211-212, **CL-089**.

[85] Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 8 (citing *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011), paras. 111-112, **RL-027**). The United States further confirmed that "Article 10.18.2 does not require a waiver of domestic proceedings where the measure at issue in the U.S.-Colombia TPA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings." *See id*., n. 14.

[86] Respondent's Counter-Memorial, para. 247.

[87] Respondent's Counter-Memorial, paras. 247-248.

measures in domestic proceedings by Neustar (and a related request for review of the initial decision), as is permissible under Article 10.18(3) of the TPA. This proceeding concluded at the outset of this arbitration (even before the Tribunal was constituted) and no further proceedings have been "initiated or continued," meaning that Respondent is only called to answer Neustar's case in this arbitration. Respondent's vague and unsupported assertions that it could be held accountable for its wrongful actions in other forums does not mean that this Tribunal lacks jurisdiction.

C. Neustar Satisfied the Preliminary Requirements Stipulated by the TPA

81. Respondent then turns its attention to Article 10.16 of the TPA to assert that Neustar has failed to comply with the preliminary requirements of that provision because: (1) Claimant submitted its Notice of Intent "prematurely" as the "investment dispute" had not crystallized under Article 10.16(1);[88] and (2) Neustar's Notice of Intent is "defective" because it fails to comply with Article 16.2(2).[89] Neither of these arguments are accurate, and should be dismissed.

1. Neustar Had an "Investment Dispute" at the Time it Filed Its Notice of Intent

82. Article 10.16(1) of the TPA provides in full:

> 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,

[88] Respondent's Counter-Memorial, paras. 196-206.

[89] Respondent's Counter-Memorial, paras. 207-220.

(B) an investment authorization, or

(C) an investment agreement;

and

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

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, 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;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

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.

83. Respondent asserts that under Article 10.16(1), there must exist an "'investment dispute' which should be brought to the attention of the Respondent State through a notice of intent."[90] According to Respondent, Claimant failed to comply with Article 10.16(1) because it submitted both its Notice of Intent and Request for Arbitration "prematurely" on 13 September 2019 and 23 December 2019, respectively. Respondent's accusations have no foundation under the applicable legal standards, or the facts in issue.

[90] Respondent's Counter-Memorial, para. 196.

84. Neustar first notes that there is no dispute between the Parties that Neustar had an "investment" under the TPA and the ICSID Convention. Thus, the question in issue is the definition of a "dispute" and when that dispute crystallized. Neustar addresses this threshold question in Part I(D), before addressing Respondent's additional factual arguments in Part I(E) and (F).

(a) The Dispute Between the Parties Existed as Early as June 2019

85. As outlined above, Article 10.16(1) of the TPA refers to an "investment dispute". For its part, Article 25(1) of the ICSID Convention applies to "any legal dispute arising directly out of an investment", meaning that the dispute "must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[91] Article 36(2) of the ICSID Convention then states that the Request for Arbitration "shall 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."[92] However, neither the TPA nor the ICSID Convention specifically defines "investment dispute" or "legal dispute".

86. As Respondent properly notes, the classic definition of a dispute was outlined by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* as "a disagreement on a point of law or fact, a conflict of legal views or of interests between

[91] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article 25(1).

[92] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article 36(2).

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two persons."[93] ICSID tribunals have consistently adhered to this description.[94] In *Maffezini v. Spain*, the tribunal emphasized that the claimant must have conveyed its position to the opposing party, and received a contrary response (even if indirectly), stating:

> … 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 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.[95]

87. ICSID tribunals have had little difficulty concluding that a "legal" dispute will exist if a claimant has: (1) articulated violations by the host State of substantive or procedural

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[93] *Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A No. 2, 34, p. 5, **RL-003**.

[94] *See Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), paras. 302-303, **CL-091**; *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentina*, ICSID Case Nos. ARB/03/13, ARB/04/8, Decision on Preliminary Objections (27 July 2006), para. 80, **CL-092**; *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB / 04/7, Award (21 August 2007), paras. 245-249, **CL-093**; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010), para. 99, **CL-094**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010), para. 129, **CL-095**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), para. 289, **RL-016**; *ABCI Investments Limited v. Republic of Tunisia,* ICSID Case No. ARB/04/12, Decision on Jurisdiction (18 February 2011), para. 58, **CL-096**; *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, Decision on Jurisdiction (21 December 2012), paras. 110, 119, **RL-043**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013), para. 339, **CL-081**; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014), para. 120, **CL-097**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), Award, para. 447, **RL-087**; *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award (25 July 2017), para. 231, **CL-098**.

[95] *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), para. 96, **RL-007**.

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guarantees owed to the investor; and (2) sought legal remedies.[96] As the tribunal in *Argawal and Mehta v. Uruguay* further noted, the tribunal has "wide discretion" to determine when a dispute has arisen.[97]

88. Neustar initially notified Respondent of the existence of a dispute in its trigger letter of 7 June 2019.[98] Neustar then formally provided notice of its intent to submit a dispute to arbitration on 13 September 2019.[99] In that Notice of Intent, Neustar articulated violations by Respondent of substantive guarantees owed to Neustar under the TPA, with detail that spanned nearly 40 pages. That document included lengthy background on Neustar's investment in Colombia and Respondent's treatment of it, and identified Colombia's wrongful measures under Chapter 10 of the FTA and customary

[96] *See*, *e.g.*, *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal (8 December 1998), para. 47, **CL-099**; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005), paras. 40-47, **CL-100**; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (11 May 2005), para. 55, **CL-101**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005), paras. 67-68, **CL-102**; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction (17 June 2005), paras. 20-23, **CL-103**; *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), paras. 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), para. 74, **CL-005**; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), paras. 93-97, **CL-011**; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 62, **CL-106**.

[97] *Agarwal and Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04 (UNCITRAL), Award (6 August 2020), para. 239, **RL-008** ("These cases reveal that, beyond the acceptance of the definition of *Mavrommatis* by these courts in their decisions, the point at which a dispute arises will be determined by the factual context in which the dispute arises and the wide discretion of a court to decide whether the divergence between the parties has developed into a dispute, which in turn will depend on the factors that are taken into account.").

[98] Claimants' Memorial, para. 112.

[99] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), **C-0004.**

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international law.[100] Moreover, Neustar stated that these wrongful measures caused significant damage to its investment and requested reparation.[101] Respondent never submitted a letter in response asserting that no such violations had yet occurred. Nor could Respondent do so given the impairments identified in the letter.

89. Then, on 23 December 2019, Neustar filed its Request for Arbitration. In this document, Neustar once again articulated violations by Respondent of substantive guarantees owed under the TPA, and sought legal remedies. Neustar specified:

> Respondent's breaches of the TPA based on its conduct to date include: **(i)** breach of the minimum standard of treatment standard, including fair and equitable treatment (Article 10.5); **(ii)** breach of the national treatment standard (Article 10.3); and **(iii)** breach of the most-favoured-nation treatment standard (Article 10.4). Further, Colombia has manifested a clear intention to continue to act in violation of Neustar/.CO's rights under the TPA, including but not limited to expropriating their Investments without regard to the obligations imposed by Article 10.7. Respondent has also breached the observation of obligations clause, as found in the Swiss-Colombia BIT and which protection the Claimants invoke here through the MFL clause of the TPA.
>
> Such 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.[102]

90. Respondent clearly opposed Neustar's position. As recalled in Neustar's Memorial, the Parties met on 26 June 2019 (after Claimant sent the trigger letter) in what Neustar was led to believe would be an opportunity for the parties to discuss a resolution of the

[100] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), paras. 5-8, 66-83, **C-0004.**

[101] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), paras. 9, 84-87, **C-0004**.

[102] Request for Arbitration (23 December 2019), paras. 124-125.

(continued)

dispute and, at a minimum, an exchange of views or proposals.[103] Respondent confirms that this meeting was held by the Ministry of Commerce for the purpose of "afford[ing]" Neustar the opportunity to "present [its] complaint[]".[104]

91. However, during that meeting Respondent's officials said nothing of substance, just listening (ostensibly) to Neustar's presentation and offering nothing in response.[105] Likewise, during the almost 90-day period in which Respondent ignored the Notice of Intent, it likewise ignored all of Neustar's efforts to resolve this dispute. 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.[106] From these actions, Claimant properly understood that Respondent was opposing Neustar's dispute.[107]

92. Respondent's stony silence, and then its letter dated 12 December 2019, are to be deemed opposition to Neustar's claim and, consequently, confirmation of a legal dispute as of this date.[108] Thus, at the time Neustar filed its Request for Arbitration on 23 December 2019, the dispute between the Parties had crystallized.

93. Even assuming this was not the case (*quod non*), a dispute certainly existed at the time of registration of the dispute by ICSID on 3 March 2020. In response to Neustar's Request for Arbitration filed on 23 December 2019, Respondent filed a letter with the

[103] Claimants' Memorial, para. 112.

[104] Respondent's Counter-Memorial, para. 164.

[105] Claimant's Memorial, para. 112.

[106] *See* Request for Arbitration (23 December 2019), para. 74.

[107] *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), para. 96, **RL-008**.

[108] A similar situation arose in AAPL v. Sri Lanka, where the claimant's claim went unanswered for the three-month waiting period provided for in the BIT, and the claimant became entitled to launch arbitration proceedings. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (27 June 1990), para. 3, **CL-107**.

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ICSID Secretariat opposing registration of the dispute on 30 January 2020 and again on 3 March 2020, arguing that it disagreed with Neustar's case.[109] Claimant noted in response on 6 March 2020 that it disagreed with Respondent's legal and factual position.[110] Clearly, as of this point (and actually earlier), there was "a disagreement on a point of law or fact, a conflict of legal views or of interests" between the Parties, meaning that a dispute had crystallized.[111]

(b) Respondent's Arguments to the Contrary Have No Factual Basis

94. Respondent, however, advances a series of inaccurate and inapposite arguments in an attempt to support its position. These can be easily rejected.

95. First, Respondent argues that "when Neustar submitted its Notice of Intent on 13 September 2019, the 2020 Tender Process had not even been put into motion yet",[112] and that these arguments were not raised until the submission of Neustar's Memorial on 22 October 2021.[113]

96. As an initial point, Respondent directly contradicts itself in its later arguments that "Neustar's effort to thwart the 2020 Tender Process and force MinTIC to conclude a renewal of the 2009 Contract continued with the submission of the Notice of Intent and the initial submission of the RFA."[114] Respondent cannot have it both ways. Although Neustar denies Respondent's conspiracy theories with respect to an alleged "abuse of

[109] Letter from Respondent to the ICSID Secretariat (30 January 2020), **C-0128**; Letter from Respondent to the ICSID Secretariat (3 March 2020), **C-0129**.

[110] Letter from Claimant to the ICSID Secretariat (6 March 2020), **C-0130**.

[111] *Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A No. 2, 34, p. 5, **RL-003**.

[112] Respondent's Counter-Memorial, para. 201.

[113] Respondent's Counter-Memorial, para. 202.

[114] Respondent's Counter-Memorial, para. 287.

process" (discussed in paragraphs 134 to 152 below), Respondent's contradictory position simply serves to demonstrate the unwieldy and unsustainable approach Respondent has taken to launching every possible jurisdictional objection it can imagine.

97. In any event, and as described above, Respondent's wrongful conduct had properly been identified by Neustar as early as June 2019. At the time of the filing of the Notice of Intent on 13 September 2019, Neustar had a clear basis of dispute. The fact that Respondent continued with its wrongful actions beyond this date, and that Neustar had to subsequently raise these actions in its Request for Arbitration on 23 December 2019 and its Memorial on 22 October 2021, does not mean that the dispute had not crystallized. It simply means that Respondent's wrongful conduct under the TPA continued after the Notice of Intent. As noted by the tribunal in *Eco Oro v. Colombia*, "[i]t is difficult to see how Colombia could reasonably expect [the claimant] to have identified measures that occurred after the date the Notice of Intent was issued".[115] Claimant properly included the later conduct of Respondent in its subsequent pleadings, as discussed in paragraphs 127 to 133 below.

98. Second, Respondent asserts that "the speculative nature" of Neustar's Notice of Intent is further demonstrated by the inclusion of a potential claim for expropriation, while Claimant ultimately did not plead this claim in its Memorial.[116] This claim is likewise unsustainable. Claimant acted in good faith to notify Respondent of its dispute, including reference to those specific provisions in the TPA which it considered subject to breach. The fact that Claimant subsequently did not advance one of these claims does

[115] *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), para. 326, **CL-023**.

[116] Respondent's Counter-Memorial, para. 203.

not mean that the dispute had not crystallized at the time of filing the Notice of Intent or Request for Arbitration. As proceedings progress, it is normal for claims to take shape and for the issues in dispute to be narrowed, and parties are entitled to amend their pleadings accordingly.[117] The fact that Claimant was judicious in narrowing its claims for the purposes of these proceedings should be appreciated by Respondent, not criticized.[118]

99. Third Respondent asserts that the "lack of crystallization of the dispute" is demonstrated by the evolution of Neustar's pleadings between submission of the Request for Arbitration and the Memorial. This argument is essentially the same as its second argument, discussed above. In that respect, a similar argument was rejected in *Capital Financial Holdings v. Cameroon*, where the respondent argued that the claimant had changed its position on jurisdictional issues between its request for arbitration and its brief, and asked the tribunal to reject the later arguments.[119] The *Capital Financial* tribunal declined to do so, stating that "nothing prevents a party from modifying its arguments during the proceedings."[120] Here, like *Capital Financial Holdings*, Neustar set out its full case in the Memorial. In so doing, the Neustar abided by ICSID Arbitration Rule 31 and was entitled to develop its pleadings.[121] This has no

[117] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017), paras. 185-187, **CL-108**.

[118] The actions of which Respondent complains is precisely what parties should do. Neustar had an arguable basis for an expropriation claim but decided not to press the claim as to burden the Tribunal. The Respondent, on the other hand, raised all sorts of objections that requirement argument and analysis even though such defenses lack merit.

[119] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017), paras. 185-187, **CL-108**.

[120] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017), para. 187, **CL-108** ("Pour le Tribunal arbitral, rien n'interdit à une partie de modifier son argumentation en cours de procedure…").

[121] ICSID Arbitration Rule 31 ("(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal: (a) a memorial by the requesting party; (b) a counter-memorial by the other party; and, if the parties so

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bearing on the fact that the dispute had crystallized as early as June 2019, and by the time Claimant filed its Request for Arbitration on 23 December 2019.

100. Moreover, Respondent's emphasis on the fact that Neustar originally intended to pursue claims on behalf of .CO Internet is entirely irrelevant to the question of whether a dispute had crystallised at the time of the Notice of Dispute and Request for Arbitration. The claims remained the same regardless of whether it was Neustar initiating the arbitration or both Neustar and .CO Internet (as was originally filed). Neustar fails to see how a clarification of the disputing party prior to the registration of the dispute on 3 March 2020 bears any relevance on the question of whether a legal dispute existed as of 13 September 2019 and 23 December 2019 (*i.e.*, three to six months before).

101. Fourth and finally, Respondent asserts that "Neustar's alleged damages at the time of the Notice of Intent were not only uncertain in their quantum, but entirely speculative."[122] According to Respondent, therefore, no dispute could have crystallized as of the date of the Notice of Intent. This argument is illogical. The crystallization of a dispute does not depend on the existence of a full quantum analysis and all that is required under the TPA is that the Notice of Intent specifies the "relief sought and the approximate amount of damages claimed."[123] Neustar did exactly this, as discussed in more detail in paragraphs 120 to 133 below. Moreover, Respondent's argument is also contradicted by its (misguided) belief that the date of the Memorial is the relevant date when the dispute crystallized.[124] Neustar's Memorial does not contain a quantum

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agree or the Tribunal deems it necessary: (c) a reply by the requesting party; and (d) a rejoinder by the other party" and "(3) A memorial shall contain: a statement of the relevant facts; statement of law; and the submissions.").

[122] Respondent's Counter-Memorial, para. 205.

[123] TPA, Article 10.16.2(d), Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[124] *See*, *e.g.*, Respondent's Counter-Memorial, para. 257.

(continued)

analysis as the Parties agreed to bifurcate that issue in the proceeding.[125] By Respondent's own logic, therefore, the dispute *still* has not crystallized because Claimant has not articulated "certain" quantum. Plainly, such a position is absurd and should be rejected out of hand.

2. Neustar's Notice of Intent Complied with Article 10.16(2) of the TPA

102. Respondent also argues that Neustar's Notice of Intent failed to comply with Article 10.16(2) of the TPA as it "did not allow Respondent to 'have a clear framework of the claims from the outset'".[126]

103. Article 10.16(2) provides in full:

> 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 and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
> >
> > (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.

104. Respondent does not dispute that Neustar filed its Notice of Intent 90 days before it filed its Request for Arbitration, as required by Article 10.16(2), and thus that there are no temporal issues in dispute here. Instead, Respondent asserts that Neustar violated

[125] *See*, *e.g.*, Procedural Order No. 1 (9 July 2021), Article 14.2 ("The Parties agree to have a separate phase for damages, to be scheduled following a decision on the merits.").

[126] Respondent's Counter-Memorial, para. 220.

(continued)

subparts (c) and (d) of the provision, *i.e.*, the legal and factual basis for each claim, and the relief sought and approximate amount of damages claimed.[127] The arguments put forward by Respondent in support of this position can largely be grouped into two categories: an assertion by Respondent that Neustar did not provide enough detail or basis in its Notice of Intent; and an argument that Neustar failed to include claims it put forward in the arbitration in its Notice of Intent. Neither of these claims are sustainable in light of applicable legal standards and Neustar's detailed Notice of Intent.

(a) Neustar's Notice of Intent Properly Pled the Law, Facts and Relief Sought

105. Respondent first asserts that Neustar "failed to specify the 'factual and legal basis' of its claims" in the Notice of Intent, because: (1) "the facts and claims that [Claimant] put forward were highly speculative, and in many instances did not materialize";[128] and (2) Neustar's damages were "not certain" at the time it submitted its Notice of Intent.[129]

106. In making these arguments, Respondent overemphasizes the purpose of a notice of intent and attempts to elevate it to the status of a full pleading. However, as a general matter, tribunals have recognized the preliminary nature of a notice of intent and how it is to be viewed. For example, in *Pac Rim v. El Salvador* (a case conducted under the DR-CAFTA, upon which Respondent relies as containing the same provisions as the TPA) the tribunal noted:

> Whilst the request of arbitration must be adequately pleaded, with relevant factual allegations under the ICSID Convention and Rules, it cannot therefore be equated to the fine-tuned instrument which emerges at the later stages of ICSID arbitration proceedings; for example: a party's main pleadings,

[127] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 215-219.

[128] Respondent's Counter-Memorial, para. 215.

[129] Respondent's Counter-Memorial, para. 217.

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> closing oral submissions or comprehensive post-hearing brief. Accordingly, a notice of arbitration, at the very start of the arbitration, is not therefore to be judged by a formalistic standard more appropriate to a later pleading.[130]

107. Instead, 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 a realistic possibility of achieving a settlement of the dispute before the arbitration is commenced."[131] As Respondent notes, what is required is a "*framework* of the claims",[132] not a detailed submission akin to a full pleading.

108. At the time it filed its Notice of Intent, Neustar was seeking to provide Respondent with such a framework.[133] In fact, Neustar hoped that Respondent would agree to at least discuss the issue earnestly with Neustar or otherwise seek to avoid the dispute, which Respondent could easily have done. Neustar thus provided Respondent nearly 40 pages in submitting its Notice of Intent on 16 September 2019, including over 25 pages of factual background and issues in dispute, as well as a comprehensive submission on legal matters underpinning the dispute. Neustar's substantive Notice of Intent can be contrasted to notices of intent provided in disputes with similar provisions (notably, under the DR-CAFTA), which range from 4 to 17 pages.[134]

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[130] *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010), para. 99, **RL-012**.

[131] *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), para. 325, **CL-023**.

[132] Respondent's Counter-Memorial, para. 212 (emphasis added).

[133] *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), para. 325, **CL-023**.

[134] *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Notice of Intent (9 December 2008), **CL-109** (17 pages); *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Notice of Intent to Arbitrate (17 September 2013), **CL-110** (13 pages); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No.

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109. In providing Respondent this lengthy framework of its claims, Neustar also specified its claims as they existed at the time, including that:

- Colombia failed to comply with its obligation under Article 10.5 of the TPA to provide a minimum standard of treatment and fair and equitable treatment, including that Respondent: (i) frustrated Neustar's legitimate expectations; (ii) failed to comply with the standard of stability, predictability within the business and legal environment and the principle of transparency; (iii) violated the principle of good faith; and (iv) failed to protect Neustar against any arbitrary or unreasonable measures;[135]

- Colombia did not comply with its obligation not to discriminate under Articles 10.3 and 10.4 of the TPA;[136]

- Colombia's interference with Neustar's investment gave rise to obligations under Article 10.7 of the TPA with respect to indirect expropriation.[137]

110. Although Claimant subsequently decided not to pursue a claim under Article 10.7 of the TPA in order to limit the issues in dispute, all other claims remained the same in

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ARB/18/43, Notice of Intent (16 May 2018), **CL-086** (16 May 2018) (four pages); *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Notice of Intent (7 March 2016), **CL-111** (10 pages); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Notice of Intent to Submit a Claim to Arbitration (13 January 2009), **CL-112** (eight pages); *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Notice of Intent to Submit a Claim to Arbitration (12 June 2014), **CL-113** (17 pages).

[135] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), paras. 67-76, **C-0004**.

[136] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), paras. 77-80, **C-0004**.

[137] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), paras. 81-83, **C-0004**.

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Neustar's Memorial.[138] Neustar can hardly be accused, therefore, of failing to provide a "clear framework" of the claims in issue.

111. The second complaint of Respondent is that Neustar's Notice of Intent did not specify the basis for compensation requested or the causation between Colombia's wrongful conduct and the loss. But Respondent's position is not supported by the plain terms of Article 10.16(2), which requires "the relief sought and the approximate amount of damages claimed."[139] Neustar's Notice of Intent did just that, under a heading entitled "Reparation Requested and Approximate Amount of Damages",[140] where it:

- reiterated to Respondent its willingness to resolve the dispute through amicable consultations and negotiations;
- requested that Respondent repair the damage caused by the identified breaches, including through restitution and compensation; and
- identified an approximate amount of damages at USD 350 million.

112. Again, as with many well-pled notices of intent, Neustar was hopeful that Respondent would view the Notice as an effort to reach an amicable resolution, which Neustar has repeatedly sought and continues to seek. Sending a demand letter or a notice of dispute is typically designed to cause the other party to engage with respect to the claims and to come to the negotiation table. Respondent appears to have a different (and incorrect)

[138] Claimant's Memorial, Section IV.

[139] TPA, Article 10.16.2(d), Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[140] Notice of Intent of Submission of a Dispute to Arbitration in accordance with Section B of Chapter 10 of the Free Trade Agreement between the United States of America and the Republic of Colombia (September 13, 2019), Section VI, **C-0004**.

view of such notices, which could explain the numerous investment arbitration cases pending against it.

113. In any event, Respondent has been unable to point to any legal authority supporting its proposition that a full case on quantum is required under Article 10.16(2). This is hardly surprising, in light of the preliminary nature of a notice of intent and the understandable difficulties with quantifying loss when a State's wrongful conduct is ongoing, as was the case here.

(b) Neustar Did Not Improperly Exclude Claims from its Notice of Intent

114. Respondent's second line of argument under Article 10.16.2 is that Neustar "did not identify all of the claims it put forward in the arbitration in its Notice of Intent", specifically the failure to protect Neustar's investment against unreasonable measures in violation of the Swiss-Colombia BIT and the failure to protect confidential business information under Article 10.14 of the TPA.[141] However, Respondent's argument ignores the scope of Article 10.16 and the ICSID Arbitration Rules, and ignores the facts in these proceedings.

115. The Parties appear to agree that Article 10.16 must be read as a whole, interpreted in the context of surrounding and related Treaty provisions. Respondent recognizes this by expressly referring to Article 31.1 of the Vienna Convention on the Law of Treaties ("VCLT"),[142] and affirming that Article 10.16(2) "should be interpreted 'in good faith

[141] Respondent's Counter-Memorial, para. 217,

[142] Respondent's Counter-Memoria, para. 209.

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in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*.'"[143]

116. Article 10.16.4 (just two paragraphs below) addresses the date on which a given claim "shall be deemed submitted to arbitration" and then, in a second sentence, provides:

> A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

117. As the tribunal in *Kappes v. Guatemala* noted with respect to the same provision in the DR-CAFTA (which, as Respondent notes, is nearly identical to the TPA):

> Read together, the Article seems to establish requirements for initiating an arbitration, defined to require prior identification of all then-intended claims through a notice of intent, but it also expressly allows for the possibility that an additional claim may be asserted for the first time after such notice of arbitration, without requiring a repetition of the notice of intent and notice of arbitration process.[144]

118. Two observations are warranted in respect of this provision as it applies in this dispute.

119. First, it is clear that it is the Request for Arbitration is the controlling document for claims asserted by a claimant, not the Notice of Intent itself. At the time Neustar submitted its Request for Arbitration, 23 December 2019, Neustar included claims from its Notice of Intent and expressly invoked Article 4(1) of the Swiss-Colombia BIT.[145] Respondent's request that Neustar's claim under the Swiss-Colombia BIT be excluded from the scope of these proceeding is thus outside the scope of its own TPA.

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[143] Respondent's Counter-Memorial, para. 209 (emphasis added).

[144] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections (13 March 2020), para. 195, **CL-086**.

[145] Request for Arbitration (23 December 2019), paras. 123-125, 129-132.

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120. The same is true for the second provision identified by Respondent as outside the scope of this Tribunal's jurisdiction (Article 10.14 of the TPA). To recall, Article 10.14 requires Respondent to protect "any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment."[146] As Neustar described in its Request for Arbitration, Respondent's 2020 Tender Process was designed to exclude Neustar and .CO Internet and to allow Respondent to choose another concessionaire.[147] Furthermore, Neustar identified "[a] further issue arising from the new tender process [as] a fundamental lack of transparency", including Respondent holding meetings with Neustar's competitors "in which proprietary issues related to the .CO selection process were discussed."[148] Although Neustar did not expressly identify Article 10.14, Neustar clearly identified the factual basis underpinning its concerns.

121. Second, any claims advanced after the Request for Arbitration must be considered under the applicable arbitral rules, here the ICSID Arbitration Rules. Notably, Rule 40 states in this respect that "a party may present an incidental or additional claim … arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre." Such a claim shall be presented "not later than in the reply".[149] Tribunals considering this provision have clearly concluded that "where new claims arising after a notice of dispute has been sent relate to the same subject matter as notified claims, the Tribunal has jurisdiction" and that otherwise "where there are

[146] TPA, Article 10.14, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[147] Request for Arbitration (23 December 2019), paras. 77-80.

[148] Request for Arbitration (23 December 2019), para. 81.

[149] ICSID Arbitration Rules, Rule 40(2).

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ongoing breaches of a treaty a claimant would never be in a position to make its claim."[150]

122. Thus, to the extent that Neustar's claims under Article 10.14 of the TPA are not deemed to have been properly raised in the Notice of Intent or Request for Arbitration (*quod non*), these claims clearly relate to the same subject matter as the notified claims under ICSID Rule 40. As the tribunal in *Eco Oro* opined:

> [I]t cannot be the case that a claim becomes frozen in time once a Notice of Intent is filed. Just because an investor takes the step of filing a Notice of Intent does not mean that a State will automatically cease its activity in relation to the disputed property. Claims are not static and Government action may continue in parallel with inter-party consultations and the progress of arbitral proceedings. An investor must be entitled to continue to seek remedies in relation to continuing activity which it asserts is (or may come to be) in breach of the relevant Treaty, even after it has commenced arbitration, insofar as those breaches are related to claims set out in the Notice of Intent. The alternative – to expect an investor to file a new Notice of Intent each time a further measure occurs – is hardly realistic or practical, as it would result in unnecessary waste of time and financial resources.[151]

123. Neustar's claims with respect to Article 10.14 are clearly an appropriate exposition of its claims under the TPA, as set out in detail in both the Notice of Intent and the Request for Arbitration. A more than sufficient nexus exists between the specific circumstances identified in the Request for Arbitration with respect to concerns around transparency and Respondent's violation of Article 10.14 with respect to the protection of confidential business information. Consequently, Neustar is entitled to seek remedies for Respondent's ongoing wrongful conduct including under Article 10.14.

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[150] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award (24 April 2019), para. 607, **CL-114**.

[151] *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), para. 328, **CL-023**.

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D. Neustar Has Standing to Bring Claims before the Tribunal

124. Respondent asserts that Neustar lacks standing to bring any claims before the Tribunal because Neustar sold its interests in .CO Internet to GoDaddy, Inc. on 3 April 2020.[152] Respondent bases this erroneous assertion on two lines of argument: (1) "the proceedings were only fully initiated upon the submission of Claimant's Memorial, for no dispute had crystallized beforehand";[153] and (2) "Claimant lacked standing when it submitted its Memorial due to its sale of .CO Internet to GoDaddy."[154]

125. Respondent's arguments are fundamentally flawed, and contradicted by the vast majority – if not all – of its own legal authorities. The "institution of proceedings" has been recognized by tribunals under a range of arbitral awards (including ICSID) as referring to the date of the Request for Arbitration, not a claimant's memorial (Part I(D)(1)). Moreover, Respondent's position that no dispute had "crystallized"[155] before the submission of Neustar's Memorial is wrong as a matter of law and of fact (Part I(D)(2)).

1. The Relevant Date to Determine Standing is Not Neustar's Memorial

126. Respondent first properly recognizes 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

[152] Respondent's Counter-Memorial, para. 250.

[153] Respondent's Counter-Memorial, paras. 251-258.

[154] Respondent's Counter-Memorial, paras. 259-264.

[155] Respondent repeatedly refers to some purported requirement that a dispute has to "crystallize," whatever that means. This purported and vague "crystallization" assertion has no place in the TPA or the ICSID rules. It is an invention meant by Respondent to create additional requirements that do not exist.

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proceedings."[156] Incredibly, however, Respondent asserts that the "initiation of the proceedings" is Neustar's Memorial.[157] Respondent has no support for this proposition, and each of the cases it has relied upon clearly and unequivocally shows that the relevant date to determine the "initiation of the proceedings" is the Request for Arbitration. This is true for ICSID cases, and cases heard before the International Court of Justice ("ICJ") and under a range of arbitration rules, as is evident by Respondent's own legal authorities:

- ICSID tribunals have been clear that the relevant dates for determining jurisdiction are the date of the request for arbitration, and the date of registration by ICSID.[158]

- The ICJ has expressly acknowledged that "the date for determining the existence of a dispute is the date on which the application is submitted to the Court."[159]

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[156] Respondent's Counter-Memorial, para. 252.

[157] Respondent's Counter-Memorial, paras. 255, 258.

[158] *See*, *e.g.*, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award (7 July 2004), paras. 84, 86, **RL-037**; *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), paras. 269, 270 and 339, **RL-038**; *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), para. 31, **RL-041**; *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), para. 60, **RL-042**; *Teinver S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 256, **RL-043**; *Mobil v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013), para. 267, **RL-046**.

[159] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Jurisdiction and Admissibility, Judgment, 5 October 2016, I.C.J. Reports 2016 p. 55, paras. 55, 56, **RL-034** (citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30); *Nottebohm case (Lichtenstein v. Guatemala)*, Preliminary Objections, Judgment, 18 November 1953, I.C.J. Reports 1953 p. 111, pp. 13, 15-16, **RL-039**; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002 p. 3, para. 26, **RL-040**.

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- Tribunals constituted under the United Nations Commission on International Trade Law ("UNCITRAL") Rules have confirmed that "arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent".[160]

- Likewise, tribunals under the SCC rules have utilized the dates of the notice of dispute and the request for arbitration.[161]

127. Notably, not a single source submitted by Respondent supports its claim that the date to determine "the institution of the proceedings" is the date of submission of a claimant's memorial, and not the request for arbitration (or even the notice of dispute).

128. As demonstrated by Neustar in its Memorial, at the time it filed its Notice of Intent (13 September 2019) and its Request for Arbitration (23 December 2019), it held investments under the TPA through, *inter alia*, its 100 percent shareholding in .CO Internet.[162] Respondent has not disputed this point. Instead, it asserts that Neustar lacks standing because it "no longer owned nor controlled the investment at stake … upon the filing of its Memorial on 22 October 2021."[163]

129. In the face of its own legal authorities, described above, Respondent's jurisdictional objection on standing should be dismissed without further consideration. However, for the sake of completeness Neustar notes that Respondent's legal authorities also make clear that events subsequent to the filing of a request for arbitration do not affect a court

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[160] *David R. Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 September 2018), para. 296, **RL-011**; *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11 (UNCITRAL), Partial Award (23 May 2011), para. 152, **RL-036**.

[161] *Littop Enterprises Limited et al*., SCC Case No. V 2015/092, Final Award (4 February 2021), para. 355, **RL-045**.

[162] Claimant's Memorial, para. 167.

[163] Respondent's Counter-Memorial, para. 263.

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or tribunal's jurisdiction.[164] Respondent's reliance on *CSOB v. Slovakia* in its Counter-Memorial is particularly baffling in light of the following paragraph cited by Respondent:

> In assessing the effect of the June 25, 1998 assignment (and of the April 24,1998 assignment it superseded) on the Centre's jurisdiction to hear this dispute, the Tribunal notes, in the first place, that the Request for Arbitration in the instant case was filed on April 17, 1997 and that the case was registered on April 25, 1997. Hence, at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, it 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 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.[165]

130. The findings of the *CSOB* tribunal were also expressly recognized by Schreuer *et al*. in their Commentary to Article 25 of the ICSID Convention (another source submitted by Respondent):

> [T]he date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction.

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[164] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002 p. 3, para. 26, **RL-040**; *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), para. 31, **RL-041**; *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), para. 61, **RL-042**; *Teinver S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), paras. 255-259, **RL-043**.

[165] *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), para. 31, **RL-041**.

> The International Court of Justice (ICJ) has developed a jurisprudence constante to this effect. In the *Arrest Warrant Case* the ICJ said:
>
> > The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.
>
> ICSID Tribunals have applied this principle consistently. In some cases the claimants had divested themselves of or had transferred the rights that had given rise to the dispute after the institution of proceedings. Tribunals have rejected the argument that, as a consequence, the claimants in the proceedings were no longer the real parties in interest.[166]

131. As the tribunal in *Vivendi v. Argentina (I)* succinctly stated "events that take place before that date [the request for arbitration] may affect jurisdiction; events that take place after that date do not."[167]

132. In light of this consistent and plain finding, Neustar does not understand how Respondent so fundamentally misunderstood its own legal authorities, and persisted with its legally flawed arguments that Neustar lacks standing as a result of the sale of its interests in .CO Internet to GoDaddy *months after* the proceedings were instituted.

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[166] C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (Second Edition) (2009), 'Article 25 – Jurisdiction', p. 92, paras. 36-38, **RL-044** (citing *Antoine Goetz v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999), para. 72; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), para. 407; *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), para. 178; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006), paras. 135, 136; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), paras. 196–198, 396). *See also id*., paras. 39-40 (discussing the findings of *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), para. 31, **RL-041**; *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, para. 61, **RL-042**).

[167] *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), para. 61, **RL-042**.

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Clearly, Respondent has no foundation for this jurisdictional objection, and it should be dismissed out of hand.

2. The So-Called "Crystallization" of the Dispute

133. Perhaps cognizant of the fundamental flaws in its position, Respondent pivots to assert that the dispute between the Parties only "crystallized" on the date of submission of Neustar's Memorial. This argument is just as specious as its first position, for the reasons set out in Part I(D)(1) and incorporated here by reference.

134. Respondent's position that "the existence of a crystallised dispute – as any jurisdictional requirement, [] must be fulfilled upon the initiation of the proceedings"[168] finds no support under the TPA or the ICSID Convention, nor at general principles of international law.

135. As Neustar demonstrated above, ICSID tribunals have had little difficulty concluding that a "legal" dispute will exist if the claimant has: (1) articulated violations by the host State of substantive or procedural guarantees owed to the investor; and (2) sought legal remedies.[169] Neustar did this as early as 7 June 2019 (by its trigger letter). Neustar did this again on 13 September 2019 (in its 40 page Notice of Intent) and, at the very least, by 23 December 2019 (at the time it filed its Request for Arbitration).

136. Respondent's opposition to Neustar's position throughout this period (including its letter dated 12 December 2019) is deemed opposition to Neustar's claim and, consequently, confirmation of a legal dispute as of this date. To the extent Respondent denies such opposition, the letters it filed with the ICSID Secretariat opposing

[168] Respondent's Counter-Memorial, para. 254.

[169] *See* paras. 79 to 81 *supra*.

registration of the dispute on 30 January 2020 and 3 March 2020 and disagreeing with Neustar's case certainly sufficed.

137. Thus, at the time Neustar filed its Request for Arbitration on 23 December 2019, the dispute between the Parties had "crystallized," using Respondent's formulation. Even assuming this was not the case (*quod non*), a dispute certainly existed at the time of registration of the dispute by ICSID on 3 March 2020. Respondent's position that no dispute had crystallized until Neustar's Memorial was submitted on 21 October 2021 is not only unfounded but illogical.[170] It makes no sense for a tribunal to be constituted or a claimant to unilaterally file a full statement of case where no dispute exists.

138. Finally, Neustar rejects Respondent's erroneous position that Neustar does not have standing because it amended some of its pleadings between submission of the Request for Arbitration and the Memorial. As noted above, a similar argument was rejected in *Capital Financial Holdings v. Cameroon*, which held that "nothing prevents a party from modifying its arguments during the proceedings."[171] Here, like *Capital Financial Holdings*, Neustar set out its full case in the Memorial. In so doing, Neustar abided by ICSID Arbitration Rule 31 and was entitled to develop its pleadings from its initial

[170] The Tribunal, upon consultation with the parties, decides the date of the Memorial submission, unlike the Notice of Intent or Request for Arbitration.

[171] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017), para. 187, **CL-108** ("Pour le Tribunal arbitral, rien n'interdit à une partie de modifier son argumentation en cours de procedure…").

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filing.[172] This is particularly the case where Respondent's wrongful conduct was ongoing.[173]

139. In sum, Respondent's jurisdictional objection that Neustar lacks standing is clearly unsupported and should be rejected.

E. Neustar has Not Engaged in an Abuse of Process in Bringing these Proceedings

140. Respondent further asserts that "Claimant has committed an abuse of process by bringing forward these proceedings",[174] arguing that: (1) "Neustar introduced the Request for Arbitration prematurely for the sole purpose of securing its standing to sue";[175] and (2) Neustar used the ICSID proceedings for purposes other than genuine dispute resolution."[176] As described in the remainder of this section, Respondent's allegations are entirely unsupported. Respondent has been unable to identify any legal support for its position, and has failed to meet its high burden of demonstrating the existence of an abuse of process.

[172] ICSID Arbitration Rule 31 ("(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal: (a) a memorial by the requesting party; (b) a counter-memorial by the other party; and, if the parties so agree or the Tribunal deems it necessary: (c) a reply by the requesting party; and (d) a rejoinder by the other party" and "(3) A memorial shall contain: a statement of the relevant facts; statement of law; and the submissions.").

[173] *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), para. 328, **CL-023**.

[174] Respondent's Counter-Memorial, paras. 265-272.

[175] Respondent's Counter-Memorial, paras. 273-282.

[176] Respondent's Counter-Memorial, paras. 283-290.

(continued)

141. As an initial point, however, Neustar notes that although Respondent's arguments on abuse of process are placed under the heading "Respondent's Jurisdictional Objections", these assertions more appropriately go to questions of admissibility.[177]

1. Respondent Has Failed to Demonstrate the Existence of an Abuse of Process as a Result of Neustar's Initiating This Dispute

142. Respondent asserts that Neustar's submission of its Request for Arbitration on 23 December 2019 constitutes an abuse of process because it was introduced "prematurely for the purpose of artificially securing jurisdiction in the wake of its sale of .CO Internet to GoDaddy."[178]

143. Respondent's assertions are entirely unproven and rest on a faulty and misguided assumption. In any event, as explained below, preserving rights is not an abuse of process but rather a necessary and prudential step for any entity or person.

144. As a general matter, Neustar does not dispute that the abuse of process doctrine (based on certain facts not present here) 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.[179] However, the abuse of process doctrine does not apply in this dispute. First, there is no support for Respondent's theory that an abuse of process

[177] *See*, *e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, (1 June 2012), para. 2.95, **RL-012** (clarifying that an abuse of rights affects the admissibility of a claim rather than the tribunal's jurisdiction *ratione temporis* over the claim); *Lao Holdings N.V. v. Lao People's Democratic Republic I*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014), para. 76, **CL-097** ("[T]he time frame corresponding to a finding of abuse of process is not the same as the time frame corresponding to an objection *ratione temporis*. More precisely, if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of non-retroactivity in the interpretation and application of international treaties.").

[178] Respondent's Counter-Memorial, para. 282.

[179] Respondent's Counter-Memorial, para. 266.

arises where a claimant: was already a protected investor under a treaty; initiated proceedings following the wrongful conduct of a State; and then subsequently – and independently – restructured its corporate holdings. Second, even if there was a legal foundation for Respondent's position, Respondent bears the high burden to demonstrate the existence of an abuse of process, which it has utterly failed to do in this dispute.

(a) There is No Support for the Existence of an Abuse of Process in the Circumstances of this Dispute

145. In investment treaty arbitration, the abuse of process doctrine has largely been considered in two circumstances (neither of which is in issue here):[180] where a claimant has engaged in corporate restructuring to *gain* jurisdiction after a dispute between the parties has become foreseeable;[181] and where a vertically integrated claimant seeks to bring the same claim under multiple investment treaties using different entities in the corporate chain.[182]

146. Respondent focuses (erroneously) on the first of these scenarios, asserting that "[t]he established criterion to assess whether such a corporate restructuring constitutes an abuse of process is whether the investment dispute was '*foreseeable*' at that time."[183] Although somewhat opaque, Neustar understands Respondent to argue that the fact that the dispute between Neustar and Colombia was "foreseeable" means that Neustar used

[180] Respondent also recognizes this point. *See* Respondent's Counter-Memorial, para. 269 ("In the context of investment arbitration, the concept of abuse of process has been applied by numerous tribunals to a wide array of situations, in particular in relation to issues of treaty shopping and parallel litigation.").

[181] *See*, *e.g.*, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009), paras. 142-143, **CL-012**.

[182] *Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017), **RL-061**.

[183] Respondent's Counter-Memorial, para. 274 (emphasis in original).

(continued)

a "scheme[] to secure jurisdiction" by filing the Request for Arbitration before any dispute had crystallized (again, according to Respondent).[184]

147. As demonstrated in Part I(D)(1) above, this position is fundamentally flawed because the dispute between the Parties arose at the latest of the date of the filing the Request for Arbitration (23 December 2019), if not before. That is, not only was the dispute foreseeable, but it had in fact arisen as of the date of the Request for Arbitration. Therefore, at the time the proceedings were instituted,[185] Neustar was a protected investor under the TPA and – as clearly set out above – subsequent corporate transfers do not affect this standing.[186]

148. In any event, Respondent's proposition that a claimant who *already* falls under the protection of an investment treaty has engaged in an abuse of process by bringing a claim is entirely unsupported. In support of this proposition, Respondent relies on, *inter alia*, the findings of tribunals in *Mobil v. Venezuela*, *Phoenix v. Czech Republic*, *Gremcitel v. Peru*, *Philip Morris v. Australia*, *Tidewater v. Venezuela*, and *Abaclat v. Argentina*. However, each of these cases involved a circumstance where the claimant engaged in conduct to *gain access to jurisdiction which it otherwise would not have had*, which is not the case in this dispute. For example:

[184] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 273-277.

[185] As discussed in paras. 120 to 126 *supra*, the relevant date to determine the "initiation of the proceedings" is the Request for Arbitration.

[186] *See* paras. 120 to 133 *supra*.

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- In *Mobil v. Venezuela*, the tribunal held that it lacked jurisdiction where a claimant had restructured its investment in order to gain access to jurisdiction for an existing dispute.[187]

- In *Phoenix v. Czech Republic*, the tribunal considered that the evidence demonstrated that the claimant "made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic."[188]

- In *Gremcitel v. Peru*, the tribunal found that a claimant had committed an abuse of process in light of evidence showing that the claimant had acquired shares for the sole purpose of obtaining access to treaty arbitration, engaging in a pattern of "manipulative conduct" by submitting altered documents.[189]

- In *Philip Morris v. Australia* and in *Tidewater v. Venezuela*, the tribunals likewise found an abuse of process where an investor changed its corporate structure to gain the protection of an investment treaty.[190]

149. Thus, all of these cases involved a situation where an investor otherwise lacked jurisdiction, foresaw a dispute, and committed an abuse of process by making an investment or restructuring its corporate holdings for the sole purpose of obtaining jurisdiction under an investment treaty. Respondent has thus been unable to produce a

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[187] *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paras. 186-205, **RL-058**.

[188] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 142, **CL-012**.

[189] *Renée Rose Levy and Gremcitel v. Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015), paras. 182-195, **RL-064**.

[190] *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12 (UNCITRAL), Award on Jurisdiction and Admissibility (17 December 2015), paras. 570-588, **RL-063**; *Tidewater Investment SRL and Tidewater Caribe C.A v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 February 2013) paras. 143-149, **RL-065**.

single legal authority where a tribunal had found an abuse of process where the claimant already qualified for protection under the investment treaty and then restructured its holdings in the ordinary course such that ownership was transferred to another entity shortly after the arbitration had commenced. In fact, and to the best of its knowledge, Neustar is unaware of such a finding in *any* case.

150. Instead, Respondent attempts to equate a restructuring undertaken specifically to gain access to arbitration in advance of a reasonably foreseeable dispute to the circumstances in this dispute. But these circumstances are entirely distinguishable: Neustar already held long-term investments in Colombia, was already an "investor" protected by the TPA, and properly brought a dispute under the terms of the TPA in relation to Respondent's wrongful conduct. The dispute was not just "foreseeable", as Respondent wrongly posits, and Neustar had taken steps to notify Respondent of its objection to Colombia's wrongful behavior as early as 7 June 2019 – six months before filing the Request for Arbitration.[191] Respondent's attempt to shoehorn the facts of this case into an "abuse of process" theory is therefore as pointless as it is desperate.

(b) Respondent Has Failed to Meet its High Burden to Demonstrate an Abuse of Process in this Dispute

151. Even if Respondent had produced a single legal authority in support of its position, tribunals have consistently emphasized that the threshold for finding an abuse of process is high and must be borne by Respondent.[192] In *Chevron v. Ecuador*, the tribunal explained:

[191] *See* paras. 19 to 21 *supra*.

[192] *See*, *e.g.*, *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction (4 March 2020), para. 6.9, **CL-115** (recognizing that "the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith"

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As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.

The nature of these defenses as exceptions to a general rule that lead to the reversal of the burden of proof stem from, among other factors, the presumption of good faith. A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense.

[. . . .]

[T]he doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the Oil Platforms case, there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on."

The threshold must be particularly high in the context of a *prima facie* examination where the Claimants' submissions are to be presumed true. This Tribunal could only dismiss the Claimants' claims at the jurisdictional stage if it concluded that the Respondent's submissions and evidence are sufficient to cross the high threshold for the exceptions invoked to such an

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and rejecting the respondent's abuse of process objection based on the possible application of two different treaties and the resulting potential for multiple proceedings) (citing *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12 (UNCITRAL), Award on Jurisdiction and Admissibility (17 December 2015), para. 539, **RL-063**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017), para. 395, **CL-116** ("Based on the foregoing, and in light of the fact that the Tribunal has found that it must adopt a cautious approach when applying the abuse of process doctrine and a high threshold regarding the burden of proof, the Tribunal concludes that the Respondent has not convincingly shown that the Claimants are committing an abuse of process by asserting their claims based on the Contract and the FIL in this Arbitration.").

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> extent that the Claimants have not even shown a *prima facie* justification for the claims they have raised.[193]

152. Moreover, the tribunal in *Rompetrol v. Romania* was clear that questioning the motives of a claimant in bringing an arbitration – in the absence of supporting evidence – is a serious undertaking for ICSID tribunals.[194] While the *Rompetrol* tribunal ultimately considered the question to be moot based on the development of the proceedings in issue, it explained:

> It remains therefore to consider the Respondent's final fall-back argument, that the Claimant's application for arbitration constitutes an abuse of process and should not therefore be entertained by the Tribunal. Marshalled as it is as an objection at this preliminary stage, this is evidently a proposition of a very far-reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at least prima facie) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute. Given that an ICSID tribunal, under the Washington Convention as interpreted, is bound to exercise a jurisdiction conferred on it, so far-reaching a proposition needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it. However that may be, it is plain enough to the Tribunal that, as the question has been put by the Respondent in the specific circumstances of this case, the abuse of process argument is one that seeks essentially to impugn the motives behind the Claimant's Request for Arbitration. It may or it may not be appropriate for an ICSID tribunal to enquire into the question of whether a Claimant or a Respondent party is actuated by a proper motive in advancing or defending its interests in prosecuting or defending an arbitration. That question remains at large, and the Tribunal expresses no view on it now. But, if it were appropriate to do so, the decision would obviously be very

[193] *See Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award (1 December 2008), paras. 138-139, 143-144.

[194] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008), para. 115, **CL-117**.

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> closely dependent on the special circumstances of the particular case.[195]

153. This requirement of "special circumstances" as part of the high burden to demonstrate an abuse of process is echoed by the ICJ. Although Respondent asserts that the ICJ, in *Immunities and Criminal Proceedings* has recognized the possibility that the introduction of proceedings may be constitutive of an abuse of process,[196] Respondent once again fails to properly consider its own cited legal authority. In that case, the ICJ rejected France's objection based on an abuse of process, making clear that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process." In that case, the Court unequivocally stated that it did "not consider the present case to be one of those circumstances."[197]

154. Thus, even if it were appropriate for an ICSID tribunal to enquire into the motives of a claimant properly bringing a dispute against a responding state under an investment treaty (which Respondent has failed to demonstrate), there are no "special" or "exceptional" circumstances in dispute here that would warrant a finding of an abuse of process. This is particularly the case where tribunals have been clear that in the context of abuse of process objections involving corporate restructurings, a respondent must show that the restructuring was for the sole or predominant purpose of gaining access to arbitration to warrant dismissal of the claimant's claims.[198]

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[195] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008), para. 115, **CL-117**.

[196] Respondent's Counter-Memorial, para. 267.

[197] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, 6 June 2018, I.C.J. Reports 2018, paras. 149-151, **RL-051** (emphasis added).

[198] *See*, *e.g.*, *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), para. 334, **RL-107** ("But most relevant is the fact that there is nothing in the record to question whether the timing of the transactions entered into by Claimants leading to the purchase of the Plants was not done in good faith and with the sole purpose of gaining access to the jurisdiction of this

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155. Respondent has failed to fulfil its burden and has not been able to demonstrate how Neustar has allegedly "fabricate[d] an appearance of good standing for the present proceedings"[199] or why it considers Neustar's sale to GoDaddy after this arbitration had been instituted constitutes an abuse of process. Instead, Respondent makes three flawed and unsupported factual claims:

a. First, that Neustar's sale to GoDaddy "was well advanced (if not already concluded) when Neustar submitted its RFA on 23 December 2019 and when this RFA was registered by ICSID on 6 March 2020."[200]

b. Second, that Neustar "kept silent about the GoDaddy purchase" when filing its Request for Arbitration on 23 December 2019, and in correspondence with ICSID on 2 March 2020.[201]

c. Third, that "the delay regarding the announcement of the sale appears to have been deliberate" because the sale was announced on 6 April 2020, after the registration of this claim by ICSID and after .CO Internet had been awarded to 2020 Contract.[202]

156. All of these "arguments" can be dealt with expeditiously. As of 23 December 2019 and 2 March 2020 (the two dates identified by Respondent), the deal between Neustar and GoDaddy had not concluded. As is common with commercial transactions, there was no guarantee that the deal would close, that terms would be reached between the parties, or when this might occur. The reason Neustar did not publicly disclose the sale to

Tribunal. The burden of proof to support this allegation rests on Respondent, and it has failed to meet it. Therefore, this line of the objection is equally rejected) (emphasis added).

[199] Respondent's Counter-Memorial, para. 277.

[200] Respondent's Counter-Memorial, para. 279.

[201] Respondent's Counter-Memorial, para. 280.

[202] Respondent's Counter-Memorial, para. 281.

GoDaddy at the time identified by Respondent is thus because there was no sale to speak of. If Neustar *had* disclosed the potential transaction while the parties were in contractual negotiations, this undoubtedly would have placed the sale in jeopardy and caused commercial confidentiality concerns, among other reasons. For a company to disclose every potential sale or transaction before being concluded would operate to undermine the commercial functioning of the company, its operations, and profitability. For Respondent to suggest otherwise is absurd. This is especially true when a publicly traded company like GoDaddy (NYSE: GDDY). Had Neustar disclosed in this proceeding the existence of mere negotiations with GoDaddy, it could have violated the U.S. Securities and Exchange Commission's rules and regulations regarding disclosure of "material non-public information."[203]

157. Moreover, Respondent's position that the announcement of the sale was deliberately delayed for purposes of this arbitration is false, being nothing more than empty speculation. Respondent's speculation certainly does not meet the high burden required to show that there has been an abuse of process. As is evident on the face of the Unit Purchase Agreement ("UPA") between Neustar, Inc. and GoDaddy Inc. (produced to Respondent in the course of this arbitration) on 3 April 2020, the transaction encompassed a number of interests, and not just the sale of .CO Internet.[204] The finalization of the UPA and its subsequent announcement was solely based on commercial considerations. It certainly was not linked to this arbitration, which involved only one part of the transfer of holdings. Consequently, even if the sale to GoDaddy were somehow relevant to Neustar's standing in these proceedings (which,

[203] *See*, *e.g.*, 17 C.F.R. § 250.10b5-1, "Trading 'on the basis of' material nonpublic information in insider trading cases", **C-0131**.

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

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as above, Respondent has failed to demonstrate at law), the fact that the corporate restructure was "justified independently of the possibility of bringing [] a claim" further supports a finding that no abuse of process exists.[205]

158. In sum, there is simply no basis – in law or in fact – for Respondent's position that Neustar has engaged in an abuse of process and thus should be precluded from bringing its claims before this Tribunal. At the time Neustar filed its Notice of Intent on 13 September 2019 and its Request for Arbitration on 23 December 2019, it identified a myriad of factual allegations detailing Respondent's wrongful conduct under the TPA that gave rise to this dispute. Neustar had no reason to "artificially secur[e] jurisdiction" because the claim *already* existed, and proceedings had been instituted in relation to this conduct. Neustar's subsequent sale of its holdings to GoDaddy is entirely irrelevant to these proceedings.

2. Respondent Has Also Failed to Support its Contention that Neustar is Using these Proceedings for Purposes Other Than "Genuine Dispute Resolution"

159. Perhaps cognizant of the shortcomings of its novel "abuse of process" theory, Respondent asserts that Neustar "also … sought to use the ICSID proceedings for purposes other than genuine dispute resolution."[206] This assertion fares no better than the previous one.

160. As an initial point, and once again, Respondent is unable to point to any legal authority supporting its position. Instead, it relies on two pieces of academic commentary on the abuse of rights doctrine at international law. But as Neustar has already stated, there is

[205] *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12 (UNCITRAL), Award on Jurisdiction and Admissibility (17 December 2015), paras. 539-554, **RL-063**.

[206] Respondent's Counter-Memorial, para. 283.

no dispute between the parties on the existence of this doctrine. What Respondent has failed to show, however, is that the alleged standard of "using proceedings for purposes other than genuine dispute resolution" forms part of this doctrine and, if so, whether it exists on the facts of this case.

161. Only one of the two academic commentaries even touches upon the first question. In his article "Abuse of Process in International Arbitration", the late Professor Gaillard grouped potential abuses of process into three categories: (1) schemes designed at securing jurisdiction under an investment treaty (which, as Claimant explained above, does not apply here); (2) the multiplication of arbitral proceedings to maximize chances of success (another circumstance not in issue in these proceedings); and (3) gaining a benefit which is inconsistent with the purpose of international arbitration. As to this third category, Professor Gaillard explained that this could include circumstances where a claimant sought to evade or block ongoing criminal investigations against an investor by a State, or where shareholders at various levels of the corporate chain "initiate multiple arbitrations in respect of the same dispute to exert maximum pressure on the host State and to exhaust its resources."[207] Once again, none of these circumstances arise in this dispute.

162. Yet without any legal support, Respondent persists in its allegation that Neustar's claim is one designed to "exert undue pressure on Colombia for the renewal of the 2009 Contract and/or the awarding of the 2020 Contract."[208] Respondent's examples of alleged "abusive behavior" by Neustar are both misplaced and insufficient.

[207] E. Gaillard, 'Abuse of Process in International Arbitration', ICSID Review – Foreign Investment Law Journal 32(1) (2017), pp. 11-12, **RL-056**.

[208] Respondent's Counter-Memorial, para. 285.

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163. First, Respondent complains that Neustar sent a trigger letter to Respondent in June 2019 notifying Respondent of the dispute and seeking to amicably resolve the issue.[209] Respondent complains that Neustar's alleged nefarious behavior is evident because in this trigger letter "Neustar mentioned the TPA" to both of the Ministry of Commerce and the Ministry of Information and Communications Technology.[210] According to Respondent, this was designed to "create confusion". Claimant fails to see how notifying relevant ministries of the existence of a dispute, identifying the legal basis of that dispute, and seeking consultations is "confusing" or "abusive". Neustar repeatedly tried to avoid the current situation of having to bring a claim. Neustar would have much preferred if Respondent abided by its obligations and renewed the Concession as it has repeatedly done with other investors. Of course, the Neustar made repeated entreaties to try to convince Respondent to abide by its obligations. The fact that Respondent views efforts to engage in negotiations as coercive demonstrates much about Respondent's actions in this case and generally.

164. Second, after Respondent failed to engage with Neustar in respect of this dispute and specific claims identified, Neustar submitted a formal notice of dispute on 13 September 2019, and then the Request for Arbitration on 23 December 2019. Respondent asserts that these actions were designed to "thwart the 2020 Tender Process and force MinTIC to conclude a renewal of the 2009 Contract."[211] However, the President of Colombia had already announced that he had decided to launch a public tendering process for the administration of the .CO domain on 30 March 2019.[212] Neustar fails to see how submitting its formal Notice of Intent under the TPA on 16

[209] Respondent's Counter-Memorial, para. 286.

[210] Respondent's Counter-Memorial, para. 286.

[211] Respondent's Counter-Memorial, para. 287.

[212] *See* Claimant's Memorial, para. 81.

September 2019 in respect to this conduct (and other unlawful actions) could have "exerted pressure" on MinTIC once the President had already clearly confirmed his position (even though it was not his position to take).

165. In addition, at the time Neustar submitted its formal Notice of Intent under the TPA on 16 September 2019, the 2020 Tender Process had not even been formally announced. The filing of the Request for Arbitration on 23 December 2019 followed the mandatory 90-day period requirement under Article 10.16(2) of the TPA which expired on 15 December 2019 (two days after the announcement of the 2020 Tender Process on 13 December 2019).[213] Neustar filed its Request for Arbitration a week later to ensure that it was well outside of the 90-day requirement under the TPA, and not in direct response to Respondent's continued wrongful behavior or to "exert pressure" as Respondent speculates.

166. Again, Respondent's viewpoint about pressure is misplaced and telling. The purpose of letters stating rights and even lawsuits is to create pressure where warranted. Respondent had impaired Neustar's investment when its President stated that he would not renew .CO Internet's Concession despite the fact that it had repeatedly done so for other investors. Neustar of course wanted to cause Respondent to honor its obligations and treat Neustar as it treated other investors. The fact that Respondent viewed such efforts as coercive damns Respondent and not Neustar.

167. Third, Respondent asserts that Neustar's application for domestic interim measures on 18 September 2019 was an attempt to "multiply[] proceedings for the resolution of the same dispute to increase its chances of success."[214] As discussed above, Neustar's

[213] Respondent's Counter-Memorial, para. 21.

[214] Respondent's Counter-Memorial, para. 287.

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request for interim measures was filed with the sole purpose of protecting its investment while the dispute between the parties was resolved by arbitration under the TPA.[215] Despite Respondent's best efforts to assert otherwise, this situation is entirely distinct from a case where a group of entities in a corporate chain bring separate disputes under multiple investment treaties.[216] Claimants routinely seek to protect their investments through interim measures (either domestically or through an interim order of a tribunal), and Respondent has failed to demonstrate why Neustar's attempt to preserve its rights while the arbitration was proceeding is "abusive".

168. Fourth, Respondent argues that there are "several indications of bad faith" regarding Neustar's initiation of the proceedings. Respondent lists just two examples, neither of which supports its position.

a. Respondent argues that the alleged amendment of Neustar's claims between the Request for Arbitration on 23 December 2019 and its Memorial filed on 22 October 2021 is a "telling example of Neustar's general lack of substantiation."[217] But as Neustar has already demonstrated, "nothing prevents a party from modifying its arguments during the proceedings",[218] particularly when that modification arises from Respondent's own ongoing wrongful

[215] *See Supra*.

[216] *Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017), **RL-061**.

[217] Respondent's Counter-Memorial, para. 288.

[218] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017), para. 187, **CL-108** ("Pour le Tribunal arbitral, rien n'interdit à une partie de modifier son argumentation en cours de procedure…").

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conduct.[219] In any event, and in light of the high threshold for proving bad faith, a variation in a claimant's claims clearly does not suffice.

b. Respondent then states that "Neustar's claims are based on the supposition that Colombia was under an obligation to renew the 2009 Contract, in spite of the very clear contractual language to the contrary" and that Claimant is aware of the "fundamentally flawed premise of their [*sic*] claims and their [*sic*] lack of good faith in initiating these proceedings."[220] Setting aside Respondent's blatant mischaracterization of Neustar's claims (as discussed below), Respondent's argument goes to the merits of the dispute in question. A difference of view between the parties on an issue relating to the merits does not indicate a lack of good faith, but instead demonstrates the genuine existence of a dispute. Respondent cannot simply allege an abuse of process or a lack of good faith simply because it disagrees with Neustar, particularly in circumstances where a high burden of proof is required.

169. Finally, Respondent asserts that "the fact that Neustar is still pursuing the present arbitration despite .CO Internet having been awarded the 2020 Contract is also indicative of the fact that Neustar is using the present proceedings for purposes which are unrelated to the proceedings and Colombia more generally."[221] Respondent's argument is directly contrary to its argument that Neustar only initiated this dispute to disrupt the Tender Process and award Neustar's investment the Concession. If this were true (which it is not, as described above), then Neustar would have no incentive to

[219] *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), para. 328, **CL-023**.

[220] Respondent's Counter-Memorial, para. 288.

[221] Respondent's Counter-Memorial, para. 289.

continue with its claim. Moreover, and as Neustar has described in its Memorial, the continuation of this proceeding despite .CO Internet being awarded the 2020 Concession does not evidence an abuse of process. As explained more fully in the merits section, the 2020 Concession 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 promulgated by Respondent and suffered by Neustar. Clearly, then, Claimant is not "using" the present proceedings for any purpose but to remedy the international wrongs committed by Respondent.

170. In addition, Respondent seems to allege that Neustar is using this arbitration as a forum "to air any claims it might have against Arcelandia relating to the 2014 acquisition."[222] Despite the weak foundation of all of Respondent's claims in this section, this position may be the most baffling. Respondent has not even bothered to try and demonstrate the substance of its allegation or why Neustar would even theoretically be trying to "air any claims" it might have against Arcelandia in these proceedings, let alone that it has done so. Respondent's argument is a complete fabrication, and one that it has not even linked to any actions by Neustar or the demonstration of "exceptional circumstances" that would be sufficient to give rise to a finding of an abuse of process. Respondent's argument is a complete red herring, and is entirely untethered to the questions before this Tribunal.

171. Overall, it is clear that Respondent has not met the high burden required of it to demonstrate that Neustar has committed an abuse of process. Attempting to hold Respondent to account for its wrongful actions under the TPA does not cause "significant prejudice" to Respondent, nor does it undermine the fair and orderly

[222] Respondent's Counter-Memorial, para. 289.

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resolution of disputes by international arbitration.[223] If anything, it is Respondent who is acting in bad faith by raising every conceivable objection to jurisdiction of this Tribunal, in a bid to avoid the consequences of its actions.

F. This is Not a Contract Dispute

172. In its Memorial, Neustar addressed Respondent's preliminary position that this dispute is a contract claim.[224] As described by Neustar, this position is wrong, primarily because Neustar's claim is based on specific governmental actions, measures, and wrongdoing that are specific to the government, and are not contractual in nature.[225]

173. In its Counter-Memorial, Respondent maintains its assertion that "Claimant's claims are mere contractual claims under the 2009 Contract",[226] erroneously claiming that Neustar is simply "pretend[ing]" otherwise.[227] Respondent essentially advances two primary arguments in support of its position: (1) that Neustar's case is a contractual claim "dressed up" as a treaty case;[228] and (2) that the inclusion of an arbitration clause in the contract provides the appropriate dispute resolution mechanism, not this ICSID proceeding.[229] As with all of Respondent's jurisdictional objections, neither of these arguments is persuasive in light of the legal standards in issue and the facts in dispute.

174. As a general point, however, Neustar recalls the general principle that a claimant is only required to make a *prima facie* case that its claims are capable of constituting treaty

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

[224] Claimant's Memorial, para. 176.

[225] Claimant's Memorial, para. 176.

[226] Respondent's Counter-Memorial, Section 3.6.

[227] Respondent's Counter-Memorial, para. 293.

[228] Respondent's Counter-Memorial, paras. 295-299.

[229] Respondent's Counter-Memorial, para. 300.

(continued)

breaches rather than mere contract claims.[230] That is, the Tribunal need not at this juncture determine whether the treaty has in fact been breached, but merely that Neustar's claims are *prima facie* capable of constituting a violation of Colombia's treaty obligations and are not solely contractual in nature. As described below, Neustar easily fulfils this burden.

1. Neustar's Claim is a Treaty Dispute

175. Respondent focuses on explaining the importance of distinguishing treaty claims from contractual claims in international arbitration,[231] without elaborating on the legal framework the Tribunal should apply in making such a distinction. In this respect, Respondent's exposition of the jurisprudence is largely irrelevant: Claimant does not dispute the proposition that treaty protection is distinct from purely contractual claims.

176. However, Respondent simply reciting this uncontroversial proposition is insufficient. This is particularly the case where tribunals have repeatedly recognized that an

[230] *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), n. 33, paras. 195-197, **CL-010** ("The Tribunal notes that the approach has been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor, including *Methanex v. USA*, *SGS v. Philippines*, *Salini v. Jordan*, *Siemens v. Argentina* and *Plama v. Bulgaria*. In the last of these cases, 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'. Likewise, the tribunal in *Impregilo* considered that 'it must not make findings on the merits of those claims, which have yet to be argued, but rather must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant'. The Tribunal is in agreement with this approach, which strikes a helpful balance between the need 'to ensure that courts and tribunals are not flooded with claims which have no chance of success or may even be of an abusive nature' on the one side, and the necessity 'to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate' on the other. Accordingly, the Tribunal's 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. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.").

[231] *See*, *e.g.*, Respondent's Counter-Memorial, para. 292.

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investment based on a contract may nonetheless give rise to treaty-based claims.[232] As the *ad hoc* annulment committee in *Vivendi v. Argentina (I)* – a case submitted by Respondent – noted:

> 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.[233]

177. In determining how to distinguish between these claims, tribunals have considered whether the respondent State has acted in its sovereign capacity (or *puissance publique*).[234] Although Respondent cited the findings of *Abaclat v. Argentina* for the

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[232] *See Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), para. 258, **CL-091**; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (11 May 2005), paras. 88-89, **CL-101**; *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), para. 18, **RL-057**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), paras. 557-559, **CL-009**; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005), para. 193, **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), para. 255, **CL-119**; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016), para. 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), para. 221, **CL-121**.

[233] *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), paras. 95-115, **RL-067**.

[234] *See*, *e.g.*, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011), para. 103, **RL-074**; *Casinos Austria International GmbH and Casinos*

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proposition that there is "no jurisdiction where the claim at stake is a pure contract claim",[235] it notably omits the fact that the *Abaclat* tribunal considered the claimant's claims to be treaty claims based on Argentina having acted in its sovereign capacity. The tribunal clearly noted:

> 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 <u>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</u>.
>
> [. . . .]
>
> [T]he present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that <u>it intervened as a sovereign by virtue of its State power</u> to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants.
>
> [. . . .]
>
> Consequently, the Tribunal considers that the claims brought forward by Claimants in the present arbitration are not pure contractual claims but treaty claims based on acts of a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT.[236]

Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction (29 June 2018), paras. 215-222, **CL-122**; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para. 215, **CL-089**; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014), para. 354, **CL-123**.

[235] Respondent's Counter-Memorial, para. 292.

[236] *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Liability (4 August 2011), paras. 318-326, **RL-057**.

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178. Tribunals have also considered that, in addition to whether the State has acted in its sovereign capacity,[237] the formulation and nature of a claimant's claims will be a relevant factor in determining whether the claim is based on treaty rights. In *CMC v. Mozambique*, the tribunal considered:

> The Claimants have asserted multiple claims under the BIT. The Claimants assert claims for denial of fair and just treatment, for unjustified and discriminatory measures, for failure to observe specific undertakings in good faith, and for treatment of their investment that is less favorable than that afforded by the Respondent to investments of nationals of third countries. Whatever merit each of those claims may have, each is stated as a claim arising under the BIT, not under the settlement agreement or any other contract.[238]

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[237] *See*, *e.g.*, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), paras. 557-559, **CL-009** ("The dispute does not derive from the fact that CPC failed to comply with its payment obligations to Deutsche Bank under the Hedging Agreement, but from the fact that Respondent intervened as a sovereign by virtue of its State power to modify its payment obligations towards Claimant"); *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013), para. 193, **CL-100** ("In addition, the alleged breaches directly relate to the promulgation and the application of Kazakh law by Kazakh administrative and judicial authorities. The enactment of laws is necessarily an exercise of state power and is thus different from a dispute over the performance or non-performance of contractual obligations.").

[238] *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), para. 221, **CL-121**. *See also Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award (19 December 2016), para. 247, **CL-120** ("All that is required to confer on this Tribunal jurisdiction to consider the Claimant's treaty claims is for one of the Claimant's claims to arise under the BIT. The Tribunal finds that the Claimant's claims for direct and indirect expropriation, for denial of fair and equitable treatment, for unreasonable and discriminatory measures, and for denial of full protection and security all concern "obligation[s] of [the Respondent] under [the BIT] in relation to an investment of the [Claimant]." … These claims are sufficient to invoke the jurisdiction of the Tribunal."); *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013), para. 193, **CL-100** (the "Claimants' claims as submitted before the present Arbitral Tribunal are not of a purely contractual nature. … Claimants' claims are based on the argument that the alleged breach of the Altai Agreement also constitutes (i) a breach of Claimants' legitimate expectations thereunder of such nature that it violates the substantive protections afforded by the provisions of the 1994 FIL, the ECT and the BIT, and (ii) a breach of the Umbrella Clause of the ECT and BIT. …); *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016), para. 255, **CL-119** ("The Tribunal notes that the Claimants claim breaches of various standards under the Treaty in relation to the Gas Supply Dispute, including fair and equitable treatment, unlawful expropriation and breach of the umbrella clause. As to the first two standards, the Tribunal accepts that, in order for it to find that there has been a breach of those standards in relation to the Gas Supply Dispute, it will need to determine as an incidental question whether the Source GSPA was validly terminated. However, this does not change the fact that the key

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179. Based on the applicable legal standards, a Tribunal must therefore consider whether Neustar's claims arise from Respondent's actions in its sovereign capacity, and whether these actions violate Neustar's substantive protections as an investor under the TPA. As described below, Neustar clearly meets these legal thresholds.

180. First, Respondent's actions indisputably amount to those taken in its sovereign capacity, rather than a commercial capacity.[239] This much is clear from the general legislative framework of Respondent's engagement with the "public asset" of the .co domain, and Respondent's sovereign actions to interfere with Claimants' investment over the course of a number of years. For example:

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issue under the Treaty in respect of a claim for unlawful expropriation or breach of the fair and equitable treatment is whether there has been a loss of property right constituted by the contract or whether legitimate expectations arose under the contract.").

[239] *See*, *e.g.*, *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para. 215, **CL-089** ("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."); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 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 Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014), para. 354, **CL-123** ("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*"); *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal (22 December 2017), para. 838, **CL-124** ("Moreover, the breach by a State of a representation made in a contract may not suffice to give rise to a breach of the standard of fair and equitable treatment since a distinction must be made between pure contract claims and treaty claims. The Tribunal considers that, as a general rule, a breach of contract is unlikely on its own to amount to a breach of the standard of fair and equitable treatment, and the State would have to have acted in its sovereign capacity"); *Muhammet Çap & Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (4 May 2021), paras. 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"); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010), para. 155, **CL-126** ("This Tribunal views the dispute between the Claimants and Argentina concerning the termination of the Concession as essentially contractual in nature. Indeed, Argentina's action in terminating the Concession purportedly in accordance with the Concession's terms was not an act of expropriation but rather the exercise of its alleged contractual rights").

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- The legal framework for the regulation of the .co domain makes clear that it is a "public asset" to be regulated by the State. In this respect, Respondent lists numerous laws (passed by the Colombian legislature in its sovereign capacity) and resolutions (issued by MinTIC in its sovereign capacity as an executive arm of the State) establishing the governmental regulation of .co, including:

    - Law 1065 of 29 July 2006,[240] which declared the .co domain to be a "public asset."

    - Resolution 600 of 2002,[241] which further confirmed that the.co domain is "public asset in the telecommunication sector, the administered, maintenance and development of which shall be planned, regulated and controlled by the State."[242]

    - Resolution 284 of 2008, which formally adopted a "total exclusive outsourcing model" according to which "the policies [would] be defined by the Ministry of Communications [a member of the State's executive arm]…"[243]

    - Law 1341 of 2009, which clarified "MinTIC's policy-setting role in respect of the .co domain.[244]

[240] Respondent's Counter-Memorial, paras. 42-43. Law 1065 of 29 July 2006, Article 1, para. 1, **Exh. C-0009**.

[241] Respondent's Counter-Memorial, para. 40.

[242] Respondent's Counter-Memorial, para. 40.

[243] Respondent's Counter-Memorial, para. 48. Resolution 284 of 21 February 2008, Article 1, **Exh. R-0001**.

[244] Respondent's Counter-Memorial, para. 53; Law 1341 of 30 July 2009, Article 18, para. 20, **Exh. C-0013**.

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- In addition, although Respondent asserts that "the decision not to renegotiate and renew the 2009 Contract was a contractual decision made by MinTIC in the exercise of its contractual prerogatives",[245] this *post hoc* proclamation is contradicted by the evidence. Despite Respondent's efforts to muddy the timeline of events, the facts make clear that the decision to launch a new tender came from the President of Colombia, although the actual parties to the Concession (.CO Internet and MinTIC) were still in the process of negotiation and discussion.[246] In fact, MinTIC only (finally) informed .CO Internet that a decision had been taken not to extend the Concession, some two weeks *after* the President had made his abrupt announcement.[247]

- Moreover, Respondent's Counter-Memorial itself demonstrates that the actions of Colombia taken in respect of the Claimant's investment were exercised in its sovereign capacity. For example:

    - While the report of the Vice Ministry of Digital Economy had recommended engaging in negotiations for the extension of the Concession in July 2009,[248] Respondent asserts that work on this recommendation was delayed because "presidential elections were set to take place during the second quarter of 2018" and "the new administration [] would assume office by mid-2018".[249] In other words, work on extending the .CO Concession

[245] Respondent's Counter-Memorial, para. 298.

[246] *See*, *e.g.*, Claimant's Memorial, para. 11.

[247] Claimants' Memorial, para. 87.

[248] Claimant's Memorial, paras. 65, 75.

[249] Respondent's Counter-Memorial, para. 79.

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was delayed by Respondent for purely political, not commercial, considerations.

- MinTIC, forming part of the executive, issued Resolution 3278 of 2018, which deliberately excluded .CO Internet from attending Advisory Committee meetings which, up until 3 December 2018, .CO Internet had attended on a regular basis.[250] That is, by an action taken by the executive branch of government (in its sovereign capacity), MinTIC overrode the terms of the Concession (concluded in a commercial capacity), which prescribed attendance at Advisory Committee meetings as long as the Concession was in force.[251]

- The Advisory Committee was then distinctly composed of government officials acting in their sovereign capacity, including as explained by Respondent "the Vice Minister of Digital Economy, the Director of Telecommunications Industry Development, the General Secretary of MinTIC, the Legal Director of MinTIC, and the Director of the Revenue Management Office of MinTIC."[252]

- Respondent also confirms that, "[t]hroughout this decision-making process, Ms. Constaín also kept President Duque updated about the actions that were being taken by MinTIC regarding the future of the .co domain."[253] If the actions taken by Respondent were solely in its capacity as a contractual

[250] Respondent's Counter-Memorial, para. 92. *See also* Claimant's Memorial, para. 74.

[251] Claimant's Memorial, para. 74.

[252] Respondent's Counter-Memorial, para. 93.

[253] Respondent's Counter-Memorial, para. 108.

party, it would make little sense to brief the President of Colombia on such "actions."

181. The Colombian government used its public power to interfere with the extension of the Concession, notably via the intervention of the President of Colombia, which resulted in MinTIC's refusal to negotiate the extension of the 2009 Concession and its decision to launch a new tendering process.

182. Most damningly, Respondent admits that its political processes guided its actions with respect to the Concession, and not commercial, contractual decisions. Respondent stated that the decision was delayed due to an impending presidential election in Colombia.[254]

183. Second, Neustar's claims are treaty-based and go far beyond the obligation to merely extend the Concession based on the contractual language. Respondent asserts that "Neustar's entire case depends on the assertion that MinTIC had the alleged obligation to renew the 2009 Contract",[255] erroneously arguing that "Neustar's so called treaty claims are entirely predicated on a question of contractual interpretation."[256]

184. This is a remarkably false statement, as can be seen from Neustar's Memorial, among other paragraphs. Neustar's Memorial spends a few paragraphs discussing the contractual language and dozens of pages discussing Respondent's wrongful actions, including but not limited to the Presidential interference into the process.

[254] Respondent's Counter-Memorial, para. 79.

[255] Respondent's Counter-Memorial, para. 296.

[256] Respondent's Counter-Memorial, para. 299.

(continued)

185. Contrary to Respondent's allegations, Neustar has not "merely evoked" the TPA in a bid to "pretend" that this is not a contract dispute.[257] Neustar's Memorial is devoid of any claim that Respondent breached a particular term of the Concession; a request for damages based on breach of the Concession; a request that the Tribunal settle issues of contractual interpretation or application; or even the invocation of an umbrella clause.[258]

186. Rather, Neustar has alleged that specific acts by the Respondent constitute exercises of public power that breached Respondent's treaty obligations, including under Articles 10.3, 10.4 and 10.5 of the TPA and customary international law. As confirmed by numerous tribunals, Neustar's claims are therefore not of a purely contractual nature but are based on the various standards established in the TPA.[259]

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[257] Respondent's Counter-Memorial, para. 294. Claimant also notes that the cases relied upon by Respondent in support of its assertion are entirely inapposite to the facts in issue in this proceeding. For example, in *RSM v. Grenada*, the claimant had already lost its case before a prior tribunal that had jurisdiction over its contract claims, and attempted to restyle its claims for purposes of a second arbitration. *See RSM and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010), paras. 7.3.5-7.3.7, **RL-073**. In *Malicorp v. Egypt*, the claimant based its claim on a breach of contract, and no other acts of the State. *See Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011), para. 103, **RL-074**.

[258] *Cf.*, *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 August 2003), **RL-069**. *See also Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), para. 87, **CL-127** ("The subject-matter of this dispute is not a contractual claim that would be cognizable by this ICSID Tribunal established under the BIT only by virtue of an umbrella clause under which a purely contractual claim would have been converted into a Treaty claim. The Tribunal is rather presented here with a claim based on the alleged breach by Argentina, through its legislative and other measures of 2001 and 2002, of the legal regime applicable to Telefónica's investment in the telecommunication sector in Argentina in violation of various terms of the BIT. The jurisdiction of this Tribunal on such claims must be upheld…").

[259] *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), para. 221, **CL-121**; *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award (19 December 2016), para. 247, **CL-120**; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013), para. 193, **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), para. 255, **CL-119**.

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187. The fact that those acts relate to MinTic's decision not to renew the 2009 Concession, and thus to the terms of the 2009 Concession, does not transform those acts into ordinary commercial behavior outside the scope of this Tribunal's jurisdiction. As described by the tribunal in *Hydro v. Albania*:

> The offending conduct is said to be constituted by a broad range of abusive measures that go beyond those matters the Respondent asserts are contractual but that are alleged to be interrelated to them as part of this attack on the Claimants.
>
> If the Claimants' factual claims were made out, they would be capable of constituting a breach of Articles 2(2), 3 and 5 of the BIT, as alleged. As in *Vivendi*, the claims are not "simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate" the Concession Agreement. As such, the claims are admissible.[260]

188. The same circumstance is applicable here. The challenged actions go beyond any contractual matter asserted by Respondent and instead derive from Colombia's exercise of sovereign State power in intervening to deprive Claimant of its rights in violation of the guarantees offered by the TPA.

189. This reality can be seen by considering that many investments relate to what could be considered a contractual right, such as a mining license. The decision by a sovereign to not renew a mining license could be argued in the same manner to be a contractual right, but the facts surrounding a government's failure to renew a mining license would all be considered in determining whether a treaty obligation had been breached by the state.

[260] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award (24 April 2019), paras. 591-592, **CL-114**.

2. Forum Selection Clauses in Contracts are Not Relevant

190. Respondent further asserts that Article 19 of the 2009 Concession is a "contractually-agreed dispute resolution mechanism" that is "therefore the appropriate forum for addressing the question of whether MinTIC had an obligation to negotiate and renew the 2009 Contract, not the present ICSID proceedings."[261] This assertion is likewise unsupported.

191. As an initial matter, and as discussed immediately above, Respondent mischaracterizes Neustar's claims. The question in issue is not whether MinTIC "had an obligation to negotiate and renew the 2009" Concession, but whether the actions taken by Colombia against Neustar's investment violate the TPA.

192. In any event, Respondent's position is entirely incorrect as a matter of law. Tribunals have consistently considered that the existence of a contractual remedy does not deprive the Tribunal of jurisdiction over treaty claims, nor does it preclude the Tribunal from interpreting the contract when determining whether a treaty breach has occurred.[262]

[261] Respondent's Counter-Memorial, para. 300.

[262] *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), paras. 98-101, **RL-067**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), para. 76, **CL-133** ("Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute."); *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 85, **CL-127** ("Telefónica's investments qualify for investment protection under the BIT, so that recourse to its dispute settlement mechanism provided in Art. X is possible as a matter of right. The claim that the host State has breached the BIT in respect of a given investment can be entertained by this Tribunal irrespective of the existence of contractual remedies available to TASA or to Telefónica as provided in the Transfer Agreement. The exclusive choice of forum clause contained in such contract operates therefore in respect of such contractual claim and cannot prevent the discharge by this Tribunal of its obligations in accordance with the BIT."); *Muhammet Çap & Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (4 May 2021), paras. 701-702, **CL-125** ("'[A] forum selection clause contained in a contract between the investor and the host State does not affect the competence of an ICSID tribunal based on a treaty.'").

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This is also consistent with the more general principle that tribunals may consider contractual matters when determining whether a respondent State breached its treaty obligations without exceeding the scope of their jurisdiction.[263]

193. For example, in *Vivendi I*, the *ad hoc* committee confirmed that "a State cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty".[264] The *Vivendi* committee further stated that "it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties."[265] Likewise, in *Telefónica v. Argentina* the tribunal found that the existence of a forum selection clause in a contract did not

[263] *See*, *e.g. Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (14 January 2004), paras. 89-94, **RL-017** ("The indemnity clause is no doubt a contractual provision that relates to tax indemnification of the investors, together with other parties to the Transfer Agreement, if certain conditions are met. The present dispute concerns tax assessments by the Provinces that in the opinion of the Claimants trigger the operation of that clause. Should this be so, then the breach of the clause becomes instantly a violation of the Treaty rights. … There is no practical way in this context to separate the operation of the indemnity clause from the treaty rights…"); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 470, **CL-029** ("On the other hand, in determining the treaty claims as between BGT and the Republic, it is impossible to disregard the way in which the Lease Contract was concluded, performed, renegotiated and terminated. The Lease Contract was, after all, the principal asset in question in this dispute. Both sides' cases entailed the presentation of extensive evidence on all aspects of the contractual position. None of the acts of the Republic about which BGT complains can be evaluated in the abstract, without considering the precise circumstances in which they occurred, which in turn necessarily involves consideration of the contractual position").

[264] *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), para. 103, **RL-067**.

[265] *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), para. 102, **RL-067**.

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determine whether the tribunal could exercise jurisdiction over the claimant's claims. Instead, the tribunal noted, "the exclusive choice of forum clause contained in such contract operates therefore in respect of such contractual claim and cannot prevent the discharge by this Tribunal of its obligations in accordance with the BIT."[266] Other tribunals have consistently made similar findings.[267]

194. In light of this line of jurisprudence, it is little wonder Respondent limited its discussion on this point to one paragraph, shoved at the very end of its numerous jurisdictional objections. The Tribunal should give it the same limited consideration, as being wholly without merit.

III. COLOMBIA'S ACTIONS ARE IN VIOLATION OF ITS OBLIGATIONS UNDER THE TPA AND CUSTOMARY INTERNATIONAL LAW

195. In its Memorial, Neustar detailed Respondent's violations of the TPA, including the fair and equitable treatment (**"FET"**) standard and non-discrimination obligations, as well as the national treatment and most-favored-nation (**"MFN"**) protections.[268] Neustar also explained how Respondent violated its duty to protect Neustar's investment against unreasonable measures, as provided for in Article 4(1) of the Colombia-Swiss Agreement on the Promotion and Reciprocal Protection of Investments (the **"Swiss-Colombia BIT"**).[269] For the avoidance of doubt, Neustar

[266] *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), paras. 84-87, **CL-127**.

[267] *See*, *e.g.*, *Impregilo S.p.A. v. Argentine Republic I,* ICSID Case No. ARB/07/17, Award (21 June 2011), paras. 180-189, **CL-091**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), paras. 557-565, **CL-009**.

[268] *See* Claimant's Memorial, paras. 178-265.

[269] *See* Claimant's Memorial, paras. 266-270.

(continued)

continues to pursue these claims and incorporates its articulation of those claims into this Reply by reference.

196. In its Counter-Memorial, Respondent denies each of these claims stating at the outset that "Colombia was fully entitled not to renew the 2009 Contract and to launch the 2020 Tender Process which resulted in the award of the 2020 Contract to .CO Internet, Neustar's former Colombian subsidiary."[270]

197. While Neustar addresses Respondent's unsupported position on each breach on the merits in turn below, at the outset Neustar rejects Respondent's attempts to paint this dispute as simply a dispute over a "discretionary contractual prerogative",[271] and as irrelevant because Respondent ultimately awarded the 2020 Tender to .CO Internet.[272]

198. Respondent's mischaracterization of Neustar's claim cannot be accepted: as discussed above, Neustar's claim is not based on the Concession but on the violations of international law promulgated by Respondent through its unfair and inequitable treatment.[273] Neustar does not deny Respondent's right to regulate as a sovereign state, but that right is not unfettered. Just because Respondent may (or may not) have a right under the law, the exercise of such an action must comply with Respondent's international legal obligations, including not to act in an arbitrary or discriminatory way and to act in good faith. Here, as explained in detail below, Respondent violated the minimum standard of treatment under Article 10.5 and the non-discrimination requirements of Articles 10.3 and 10.4 of the TPA, and cannot explain away its wrongful actions by mischaracterizing Claimant's position.

[270] Respondent's Counter-Memorial, para. 302.

[271] Respondent's Counter-Memorial, para. 325.

[272] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 142-146, 335, 367, 449.

[273] *See* paras. 217 to 310 *supra*.

199. Respondent relies on .CO Internet's and Neustar's participation in the new tender as a basis to excuse Respondent's wrongdoing. These arguments are flatly wrong, as explained in paragraphs 194 to 199 below. Such an assertion tacitly (and wrongly) assumes that Neustar and .CO Internet acquiesced in the process because they believed it to be justified. This is not the case. .CO Internet was entitled to an extension of the terms of the 2009 Concession on its terms (or relatively similar terms) and was further entitled as a matter of justice to retain its contractual share of the earnings it helped generate.

200. .CO Internet and Neustar never freely entered into negotiations. Rather, Neustar and .CO Internet always acted in the reality they faced: that Respondent was not complying with its obligation under the TPA but was rather conducting a new tender. Neustar had made significant investments in the domain, including both marketing and operational improvements. In addition, and importantly, as it was expected that the 2009 Concession was to be renewed, the award of the Concession to another entity would be seen as a defect of .CO Internet and Neustar, meaning that Neustar faced serious and meaningful reputational damages if it did not retain the tender. Neustar had to protect this investment to the best of its ability, which involved attempting to mitigate the damage done to it by the new tender.

201. Because Neustar had no choice but to participate in the new tender, which was drastically disadvantageous, Neustar suffered the damage done by having a disadvantageous concession far removed from its earlier terms and the expected basis for a renewal. The economic difference therefore is the difference between an extension of the 2009 Concession and the pricing terms of the second tender process. But for the treatment in violation of customary international law by Respondent, this is what Neustar would have received.

202. This leaves the question as to what to make of the offers advanced by Neustar during the coercive tender process. In the first place, should Neustar be held to its contractual offer to renegotiate the 2009 Concession? Given that this offer was elicited by coercion and without rational basis, the answer must be no.

203. In the second place, should Neustar's bid in the 2019 tender process be seen as an appropriate, competitive valuation? The answer is again no. Neustar's bid was not a competitive bid. It was sub-competitive bid to safeguard its reputation and to ensure it would prevail in the tender to avoid such reputational damage. Neustar at that point had no confidence in Respondent's transparency or fair-mindedness with respect to the tender. Neustar had no confidence that confidential details would not be passed on to Neustar's competitors. Neustar had no confidence that the bid terms would not be changed after bids were opened. Consequently, Neustar was forced to make the bid it did to mitigate the reputational damage (for which it is not claiming due to this mitigation) and to safeguard its long-term investments. Given that its bid was itself tainted by the opacity created by Respondent, and given that the tender included significantly different terms, such a five-year concession rather than a ten-year one, the new tender and concession can at most be used to set off damages during the damages phase.

204. Respondent in its own brief suggests this same conclusion. As discussed in Part II(B), Respondent confirms that the other comparator concessionaires in the telecommunications sector were only subject to minor alterations to the financial terms of the original concession in the extension term, if any. Given this practice, only small changes to the financial terms could fairly have been expected from Neustar in 2018 and 2019. Neustar was forced to make massive changes to its rights instead. Neustar did so knowing that it was had no choice and was being coerced.

205. Therefore, Respondent's opening premise is fundamentally flawed, and should not be accepted as the context in which Neustar makes its claims and asks the Tribunal to remedy the international wrongs committed by Respondent. As detailed in the following sections, these acts breach Article 10.5 of the TPA (Part II(A)), Articles 10.3 and 10.4 of the TPA (Part II(B)), and Article 4(1) of the Swiss-Colombia BIT (Part II(C)).

A. Respondent Failed to Accord Neustar Fair and Equitable Treatment in Violation of Article 10.5 of the TPA

1. Respondent Unduly Seeks to Narrow the Standard Applicable under Article 10.5 of the TPA

(a) The Legal Standard Applicable to Claims Arising under Article 10.5 of the TPA

206. At the outset, and like all respondent States seeking to avoid responsibility at international law, Respondent denies Claimant's claims under Article 10.5 of the TPA, and attempts to unduly narrow the legal standard applicable under the provision.[274]

207. While acknowledging that both Parties agree that Article 10.5 of the TPA sets out the "minimum standard of treatment",[275] Respondent largely dismisses Claimant's careful consideration of how a tribunal should assess the content of the minimum standard of treatment, as a developing body of law. To recall, Claimant outlined the findings of multiple tribunals considering the minimum standard of treatment which have found that the *Neer* standard need not be rigidly applied.[276] Claimant also recalled that the tribunal in *Eco Oro v. Colombia* (ruling in September 2021) highlighted that Colombia

[274] Respondent's Counter-Memorial, paras. 306-314.

[275] Claimant's Memorial, para. 179.

[276] *See*, *e.g.*, Claimant's Memorial, paras. 182-186.

(continued)

in that proceeding "correctly accepts that the Tribunal is not rigidly bound by the standard set out in *Neer* and it is the Tribunal's view that the standard today is broader than that defined in the *Neer* case."[277]

208. Respondent largely ignores this development of the case law (and, apparently, its own position from 2021), expressly citing the *Neer* standard and concluding that "the fundamentals of the *Neer* standard are still relevant."[278] Consequently, Respondent asserts that: (1) "[t]he Tribunal should therefore be guided by this high threshold of State responsibility when assessing the Claimant's FET allegations";[279] (2) Claimant's reliance on the jurisprudence is "misleading[]";[280] and (3) Claimant bears the burden of proving the existence of customary international law by demonstrating the existence of *opinio juris* and State practice.[281] These arguments are unsupported, contradictory and inapposite, for the reasons that follow.

209. First, simply parroting that "the standard is high" time and time again does not aid this Tribunal, nor does it address the arguments set forth in Claimant's Memorial. Both Neustar and Respondent have in fact submitted the same tribunal considerations as to the meaning of the minimum standard of treatment.[282] Respondent accuses Neustar of "conveniently omit[ting]" that "the threshold for establishing a State's conduct has breached [the FET] standard is particularly high." In support of its point, Respondent

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[277] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 744, **CL-023**.

[278] Respondent's Counter-Memorial, para. 312.

[279] Respondent's Counter-Memorial, para. 311.

[280] Respondent's Counter-Memorial, paras. 309-310.

[281] Respondent's Counter-Memorial, para. 312.

[282] See, e.g., *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 616, **CL-017**;

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then excerpts *the exact same quote relied upon by Neustar* in its Memorial in discussing the modern content of FET under customary international law from the *Waste Management* tribunal. To recall, as set out in Neustar's Memorial, the modern content of fair and equitable treatment under the customary international law minimum standard has been explained by the *Waste Management* tribunal, and endorsed by many others,[283] in the following terms:

> [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.

210. The Parties thus seem to largely agree that the modern content of FET under customary international law, based on the definition proffered by the *Waste Management* tribunal.[284] Where Respondent then diverts – after expressly stating the above standard – is to argue that the international minimum standard of treatment of aliens has not changed since 1926.[285] This assertion is remarkable (and thus falls apart) when one

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[283] See, e.g., *William 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), paras. 442-444, **CL-026**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 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.").

[284] *See also 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), para. 152, **CL-019**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**.

[285] Respondent's Counter-Memorial, paras. 312-313.

(continued)

considers how the world has changed since 1926.[286] It is also remarkable in light of the consistent findings by recent tribunals that customary international law cannot be "frozen in time" and that the standard is "broader than that defined in the *Neer* case."[287] Respondent's position that Neustar's arguments on the evolution of customary international law is "misleading" is belied by these tribunal's findings, which Respondent chooses to just simply ignore.

211. To be clear, and as is evident from its Memorial, Neustar does not assert that the *formula* of the minimum standard of treatment has changed or that extra protections have been added. Neustar does not assert for example that "careless" treatment should be added to the international minimum standard of treatment alongside extant protections such as against "arbitrary" actions. The point is that the substance of the standard changed, meaning what is seen as "arbitrary" has changed since 1926 and continues to change. What was not considered "arbitrary" in 1926 may now be

[286] Just to provide one example, in 1944 the United States Supreme Court (the highest court of one of the Parties to the TPA) ruled that the internment of ethnic Japanese residents of the U.S. in concentration camps (whether they were citizens of the United States or no) was constitutional. *See Korematsu v. United States*, 323 U.S. 214 (1944), **CL-128**. The decision was finally denounced as wrong on the day it was made by the same famously conservative court in 2018. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018), **CL-129**. To assert that this Tribunal has to judge Respondent's actions through the lens of 1926 is incorrect and would lead to absurdities.

[287] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 744, **CL-023**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 115, **CL-024** (due to this dissimilarity in circumstances, "there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA […] are confined to the Neer standard of outrageous treatment…"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 181, **CL-025** ("There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of foreign investors and their investments by a host or recipient State."); *William 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), para. 433, **CL-026** ("NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.").

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considered arbitrary, as numerous tribunals have confirmed,[288] including actions that are arbitrary, discriminatory, lack due process, lack transparency and candor, and which amount to subsequent repudiations of "clear and explicit representations […] reasonably relied on by the investor."[289] Speaking of a standard as being "high" is to miss the point that the standard includes a myriad of obligations to the State and protections to the investor.[290] Consequently, Respondent's attempts to unduly restrict the content of the FET standard under Article 10.5 of the TPA and the minimum standard of treatment should be rejected, as further elaborated with respect to the standards for each particular violation below.

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[288] *See*, *e.g.*, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 560, 1087, **CL-017**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 119, **CL-024** (To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith ... 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.); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 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…").

[289] See, e.g., *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), para. 152, **CL-019**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**.

[290] For example, the applicable standard is not just "high" but is "arbitrary", "grossly unfair", "unjust", "discriminatory". *See*, *e.g.*, *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 752, **CL-023**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *William 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), paras. 442-444, **CL-026**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 501, **CL-028**; *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), para. 152, **CL-019**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**.

(continued)

212. Second, and related, Respondent's accusation that Claimant "misleadingly relies on cases where the FET clauses at stake were not linked to the minimum standard"[291] is a blatant mischaracterization of Neustar's submission. In its discussion of the standard applicable under Article 10.5 of the TPA, Neustar almost exclusively relied upon cases where the tribunal was considering the minimum standard of treatment. The *one exception* to this was reference to the findings of the tribunal in *Biwater v. Tanzania* to demonstrate that the tribunal's findings in *Waste Management v. Mexico* have had broad application. To recall, Neustar stated that "[t]he tribunal in *Biwater* extensively cited *Waste Management* in explaining that the general standard of fair and equitable treatment includes a number of components, including '[t]ransparency, consistency, nondiscrimination: the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.'"[292] In context, it is hard to discern how this statement is "misleading[]", particularly in circumstances where Respondent itself has also cited the *Waste Management* tribunal's findings (in the very next paragraph of its brief, no less).[293] Respondent's attempt to present Neustar's position on the minimum standard of treatment as misleading or selective is entirely unsupported in light of Neustar's actual submissions in this dispute.

213. Finally, Respondent's (underdeveloped) submission that Neustar bears the burden to demonstrate customary international law through the *opinio juris* of States and State practice is inapposite to this dispute. As a general point, tribunals assessing the minimum standard of treatment have recognized indirect evidence in order to ascertain

[291] Respondent's Counter-Memorial, paras. 309-310.

[292] Claimant's Memorial, para. 186 (emphasis added).

[293] Respondent's Counter-Memorial, para. 310.

(continued)

that standard, including decisions by tribunals as well as legal scholarship.[294] As the tribunal in *Windstream v. Canada* explained, where the parties have not produced evidence of State practice and *opinio juris*:

> In the circumstances, the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.
>
> The Tribunal notes that other NAFTA tribunals have adopted a similar approach when seeking to determine the contents of the minimum standard of treatment in Article 1105(1) of NAFTA. Both Parties have also extensively cited to NAFTA awards and legal scholarship…[295]

214. This position reflects the well-established view – including in the legal authorities upon which Respondent itself relies – that arbitral awards serve as indicators of customary international law. In *Glamis Gold v. United States*, for example, the tribunal observed that arbitral awards may "serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[296] In *ADF v. United States*, the tribunal similarly observed that "any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law."[297] Notably, Respondent itself does not hesitate to rely on arbitral jurisprudence

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[294] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 351, **CL-031**.

[295] *Id.*, paras. 351-352.

[296] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 605, **CL-18**.

[297] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 184, **CL-025**.

when articulating its own, more restrictive view of the minimum standard, rather than providing evidence of State practice and *opinio juris*. Yet in faulting Claimant for taking the same approach, Respondent encourages this Tribunal to apply a double standard to its benefit.

215. In any event, the overall purpose of Respondent's submissions on this point is unclear, as there appears to be little debate that the standards articulated by Neustar are, in fact, recognized rules of customary international law. Respondent appears to accept that the fair and equitable minimum standard of treatment includes those claims advanced by Neustar in this case (*i.e.*, arbitrariness, discrimination, due process, *etc*.).[298] Likewise, Respondent cannot dispute that legitimate expectations are – at least – a "relevant factor" to be taken into account by a tribunal when assessing an allegation of breach of the minimum standard of treatment.[299]

216. Thus, the Respondent's arguments on this point bear no discernible relevance to the issues actually in dispute,[300] which turn on how the standard is applied to the facts in issue in these proceedings. As outlined in detail in the following sections, it is clear that the Respondent is in breach of Article 10.5 by virtue of its unfair and inequitable actions.

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[298] Respondent's Counter-Memorial, para. 184.

[299] *Mobil Investments Canada Inc. v Canada* (ICSID Case No ARB(AF)/07/4) Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**. *See also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**. *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), para. 147, 194-196, **CL-17**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 621, 627, **CL-18**.

[300] The Claimants of course reserve their rights to further address these issues if the Respondent does demonstrate the relevance of its arguments.

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(b) The Scope of Protection of Article 10.5 of the TPA

217. Respondent then asserts that Neustar's FET claims fall outside the scope of Article 10.5 of the TPA, because these claims relate to treatment afforded to Neustar as an "investor."[301] This argument reflects nothing more than Respondent's desperate attempts to avoid responsibility for its wrongful actions.

218. To recall, Article 10.5 of the TPA states in full:

> 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.

219. Annex 10-A then 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."[302]

220. Clearly, Article 10.5.1 cannot be interpreted without considering Article 10.5.2 and Annex 10-A, both of which expressly refer to the "customary international law

[301] Respondent's Counter-Memorial, paras. 318-321.

[302] TPA, Article 10.5, n. 3, **C-0002** ("Article 10.5 shall be interpreted in accordance with Annex 10-A.").

minimum standard of treatment of aliens," and not the alien's investment. The scope of the protection therefore is linked via its text to the person (as well as the assets of the person). It is Respondent which insists – in the opening paragraph of its section on Article 10.5 – that Article 31.1 of the VCLT must apply in assessing the FET standard.[303] Article 31.1 requires that a treaty 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*."[304]

221. Respondent's proclamations of textualisms and fidelity to the Vienna Convention notwithstanding, the only evidence it submits for its submission is the interpretive practice of the United States. But the interpretative practice of a single treaty state is not a means of interpretation recognized by the Vienna Convention on the Law of Treaties.

222. In this case, this is a distinction without a difference. To reiterate, Neustar's investment includes its shares in .CO Internet, .CO Internet itself., as well as the 2009 Concession. .CO Internet is the party to the 2009 Concession Agreement in privity with MinTIC, not with the State as a whole and certainly not with the Office of the President of Colombia. The arbitrary treatment at issue concerns .CO Internet and the rights under, arising out of, and connected to the 2009 Concession as Respondent understands and has conceded. The distinction therefore makes no difference in this case as both Neustar and Respondent agree that the arbitrary treatment fundamentally concerns the rights of .CO Internet, meaning the investment itself.

[303] Respondent's Counter-Memorial, para. 306.

[304] VCLT, Article 31.1, **RL-010**.

2. Respondent Violated Neustar's Right to Fair and Equitable Treatment under Article 10.5 of the TPA

(a) Colombia's Measures were Arbitrary

223. In its Memorial, Claimant recalled the standards applicable to determining the meaning of arbitrariness, including the findings of multiple tribunals on the "indicia" of arbitrary measures,[305] explained by the *Eco Oro v. Colombia* tribunal in 2021 as follows:

> 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.[306]

224. In its Counter-Memorial, Respondent does not directly engage with these standards,[307] and seems to tacitly accept their application.[308] Instead, Respondent argues that the standard only prohibits "manifestly arbitrariness."[309] But in the very next sentence,

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[305] Including, for example, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 263, **CL-036**; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), para. 303, **CL-037**; *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), para. 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), para. 1449, **CL-039**; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020) [Redacted], para. 561, **CL-040**.

[306] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 760, **CL-023**.

[307] While Respondent asserts that some of these cases are not relevant because the cases were not considering the minimum standard of treatment, Neustar notes that the test remains the same, as recognized by tribunals such as *Eco Oro v. Colombia* (addressing the minimum standard of treatment).

[308] Respondent's Counter-Memorial, paras. 312, 322.

[309] Respondent's Counter-Memorial, para. 324.

(continued)

Respondent quotes the ICJ's findings in the *ELSI* case – which it describes as a "landmark decision on the meaning of arbitrariness"[310] – which refers to the standard as "arbitrariness" and not manifestly arbitrary.[311] The distinction Respondent seeks to draw is therefore unclear, and should be given little weight.

225. As a factual matter, Respondent disagrees with the application of these standards, disputing Neustar's position that Respondent's conduct: (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.[312] As demonstrated below, Respondent's position is untethered to the law applicable to, and facts of, these proceedings.

(1) Colombia's Conduct Was Not Justified

226. Respondent asserts that "Colombia's refusal to renew the 2009 Contract could in itself give rise to a claim for arbitrariness is highly questionable",[313] and that Colombia had a "legitimate policy objective" for its actions.[314] However, while Respondent now claims that these objectives included the fact that "economic" and "market conditions" had changed, and that renewal "could breach fundamental principles of Colombian administrative law,"[315] these rationales are inconsistent with the position it takes throughout its own submission.

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[310] Respondent's Counter-Memorial, para. 324.

[311] *Elettronica Sicula SpA (ELSI) (USA v. Italy)*, Judgment, 20 July 1989, I.C.J Reports 1989 p. 15, **RL-032**.

[312] Claimant's Memorial, para. 194; Respondent's Counter-Memorial, para. 322.

[313] Respondent's Counter-Memorial, para. 325.

[314] Respondent's Counter-Memorial, paras. 326-327.

[315] Respondent's Counter-Memorial, para. 327.

(continued)

227. First, Respondent readily admits that Neustar submitted – and followed up numerous times – a unilateral offer in the hope that it would serve to formalize the extension and as a basis to negotiate the extension of the Concession (the **"22 May Offer"** or the **"Offer"**).[316] To recall, that Offer provided far more benefits to Respondent than the then-existing Concession, which was supposed to be the basis of the negotiation. Under the 22 May 2019 Offer, .CO Internet would have assumed the risks of the operation, of the technological trends in the use of domains, and of the competition in the market by paying almost five times the existing royalties to Respondent (approximately USD 110 million over ten years). The Offer would also pay USD 50 million to Respondent in advance, thereby completely removing any commercial risk to Respondent during the next ten years – including the risks that the domain becomes less relevant, an abuse of the domain, and any technical and cyber-security risks. In addition, Neustar and .CO Internet offered to sponsor IT programs for a sum of up to USD 10 million over the ten years, offering local scholarships and to support certain other MinTIC programs. Furthermore, Neustar offered to provide a free online presence to all the Small Businesses in the country ("Pymes") for an estimated value of USD 90 million. The total monetary value of the 22 May 2019 Offer over the life of the ten-year extension period was approximately USD 200 million and provided significant support for the Government towards its digital economy development agenda.[317]

[316] Respondent's Counter-Memorial, para. 110. *See also* Claimant's Memorial, paras. 107-110.

[317] Claimant's Memorial, para. 108, citing Letter from .CO Internet to MinTIC, Concession No. 19 of 2009 (21 May 2019), MinTIC Reference No. 191025099, **C-0069** (note that the letter is dated 21 May 2019, but was received by MinTIC on 22 May 2019. As in the Claimant's Memorial, it will thus be referred to as "22 May Offer" for ease of reference).

(continued)

228. Respondent could easily have negotiated with .CO Internet for renewed terms if its true goal was obtaining "better economic conditions".[318] These negotiations would have cost Respondent nothing and, if nothing else, could have helped it to establish a bid ceiling for a later tender. But Respondent did not even take the simple of engaging in good faith negotiations with .CO Internet, and simply proceeded with its preconceived decision to launch a tender process.[319] This is not the conduct of a party wishing to maximize value for the State. Rather, as the evidence tends to show, this is the conduct of an entity seeking to replace the current concessionaire with its favored concessionaire.[320]

229. Second, Respondent's position developed in this arbitration that renewal of the Concession "could breach fundamental principles of Colombian administrative law" is nonsensical and unsupported. As developed in greater detail in the following Section at paragraphs 342 to 347, it makes little sense for Colombia to have incorporated the clause on renewal if it were contrary to its own administrative and constitutional law (the same law that would govern the Concession).[321] Moreover, in its July 2018 Report, Respondent barely addressed the importance of competition or the administrative function of public procurement but, instead, focused on the importance of improved fiscal terms (addressed above). If Colombian administrative and competition law could be at risk of "fundamental breach", as Respondent now claims, surely it would have been front and center of the government's consideration in 2018.[322] The *post hoc*

[318] Respondent's Counter-Memorial, para. 327.

[319] *See*, *e.g.*, Claimant's Memorial, para. 109.

[320] *See*, *e.g.*, Claimant's Memorial, paras. 190, 195, 211, 268.

[321] *See*, *e.g.*, Respondent's Counter-Memorial, para. 44, citing Decree Law 222 of 2 February 1983, Art. 58, **R-0002**; Constitutional Court, Judgment No. C-949/01 of 5 September 2001, p. 74 of the PDF, **R-0003**.

[322] *See* Respondent's Counter-Memorial, paras. 79-80; MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 3, **C-0027**.

rationalization of Respondent's actions does not remedy the blatant arbitrariness of Respondent's actions, nor does it support a claim of a "legitimate public policy".

230. Finally, and despite its best efforts to present its actions as "legitimate", Respondent throughout its Counter-Memorial candidly admits that MinTIC put aside the non-partisan exercise of public administration in favor of political favoritism. Conduct that is politically motivated, departs from ordinary processes for political reason, or is undertaken in the admitted absence of sufficient knowledge for some political purpose, violate of the minimum standard.[323] As elaborated below, this alone suffices to demonstrate that the indicia listed above have all been fulfilled (inflicting damage on the investor without serving any apparent legitimate purpose, based on discretion, prejudice or personal preference, is discriminatory, or otherwise taken in willful disregard of due process and proper procedure).[324]

231. Respondent's admissions throughout its Counter-Memorial are somewhat stunning. They begin with an admission of what should have happened – by Respondent's own understanding of its own public law – in "late 2017."[325] At that point, MinTIC, by Respondent's own reckoning, was supposed to "carry out an evaluation of the 2009 Contract."[326] Respondent admits that MinTIC did not do so. Respondent states that "presidential elections were set to take place during the second quarter of 2018" as the

[323] *See*, *e.g.*, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award (14 December 2017), para. 279, **CL-130**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 174, **CL-058**.

[324] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 760, **CL-023**.

[325] Respondent's Counter-Memorial, para. 79.

[326] Respondent's Counter-Memorial, para. 79.

(continued)

reason for why they refused to carry out an evaluation of the Concession.[327] Elections, needless to say, should have little to do with the dispassionate application of public law by the administrative state. Respondent's own brief places partisan politics at the center of the current case.

232. This alone is a clear sign that .CO Internet was subjected to political determinations made by the executive rather than a public administration of the Concession and Neustar's rights at a key point in this case: the point when MinTIC was supposed to extend the 2009 Concession. Political risk materializes where the host government undermines the enjoyment of the investment more drastically than was anticipated at the time the investment was made. As Respondent itself admits, political factors (that is, an election) interfered with the even-handed application of public law (that is, what was anticipated by a reasonable investor). This admission thus makes clear that this case does not involve a purely contractual disagreement between .CO Internet and MinTIC as Respondent has asserted elsewhere. This case involves the use of Neustar's investment in non-commercial, political calculations made by Respondent's officials at the highest levels.

233. The admission of a departure from ordinary processes for partisan political reasons is, in the words of the *ELSI* case relied upon by Respondent, "surprising" in its own right.[328] One expects public administrators to follow the law and not to make decisions based on presidential elections. A rational basis of a policy should be because it furthers a compelling and legitimate state interest and not because the executive demands it. Such state action, even on the basis of the *ELSI* test urged by Respondent, is arbitrary.

[327] Respondent's Counter-Memorial, para. 79.

[328] Respondent's Counter-Memorial, para. 324.

234. But, here, a chronological look at what happened at the relevant times shows that matters were far worse with respect to political interference and maladministration. Respondent does not specify how "late in 2017" it internally decided to delay its "real" review of the 2009 Concession. It is clear, however, that Respondent's internal decision "late in 2017" contradicted its public, external communications about the 2009 Concession from November 2017 through June of 2018 (meaning chronologically at and after "late in 2017" but before the transition of power to the new MinTIC minister in August 2018):[329]

- On 21 November 2017, the relevant advisory committee set up under MinTIC to review the performance of .CO Internet, the ccTLD.CO Domain Policies Advisory Committee ("Advisory Committee"), declared the .CO Domain "trustworthy, secure and stable."[330]

- On 17 June 2018, the Advisory Committee remained similarly impressed with .CO Internet shortly before the time Iván Duque Márquez was elected President on 17 June 2018. The Advisory Committee noted, for example, on 13 June 2018 that .CO Internet performed well with respect to core performance management indicators.[331]

- In July 2018, Respondent released a report noting that extending the 2009 Concession would be a "guarantee of uninterrupted continuity of the service because it is the same concessionaire, the avoidance of a transition period that may generate some inconvenience or technical, logistical, administrative or operational

[329] *See* Respondent's Counter-Memorial Section 2.4(a).

[330] *See* Minutes of Meeting 2-2017, **C-0025**.

[331] MinTIC, Minutes of Advisory Committee Meeting (13 June 2018), p. 5, **C-0026**.

(continued)

risk, not assuming the transactional costs of a new structuring and selection process, nor the procedures for the redelegation of the domain before ICANN."[332]

- The same July 2018 report concluded that "it is therefore essential to emphasize the need that an extension of the current concession contract would be advisable and reasonable 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.[333]

235. As the Counter-Memorial admits, .CO Internet (that is, one of the "investments" of Neustar) on 20 September 2018 "expressed its interest in concluding a renewal of the 2009 Contract" by way of official communication.[334] As the Counter-Memorial further highlights, .CO Internet in its official communication affirmed that "a renewal of the contract would entail working on a restructuring of the compensation package [that …] would improve the contribution of the .co ccTLD to the digital transformation efforts in Colombia."[335] That is, .CO Internet was directly responsive to the recommendations communicated in Respondent's July 2018 report.

236. From "late in 2017," Respondent admits to having looked to partisan politics as a reason for harboring reservations about an extension of the 2009 Concession. Importantly, during this time, Respondent (through MinTIC or otherwise) did not communicate its reservations. To the contrary, Respondent continued to publicly support .CO Internet

[332] *See* Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia (July 2018), p. 70, **C-0027**.

[333] *See* Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia (July 2018), p. 9, **C-0027**.

[334] Communication from .CO Internet to MinTIC of 20 September 2018, **C-0028**.

[335] *See* Respondent's Counter-Memorial para. 84.

(continued)

in its public statements and gave it every hope of a renewal of the 2009 Concession.[336] Respondent's relevant Advisory Committee signed off on the technical performance of Neustar's investment. Respondent's relevant Advisory Committee signed off on the managerial performance of Neustar's investment.[337] And Respondent's Vice Minister considered that such an extension would be appropriate.[338]

237. Respondent's Counter Memorial draws a direct line between alleged mental reservations "late in 2017" and the eventual decision not to extend the 2009 Concession. That is, "Sylvia Constaín and key members of her administration […] were promptly briefed on the .co domain question" after assuming office on 7 August 2018.[339] This 'prompt briefing' went significantly beyond, and in fact against, the work that had been done before 7 August 2018 (for instance, in the July 2018 report[340]). It was this new – and inherently contrary advice to the advice given in public statements "late in 2017" (*i.e.*, November 2017 to July 2018) that Respondent claims was the reason not to extend the 2009 Concession.

238. Respondent's Counter Memorial alleges that the crucial determinant in its decision occurred in this period from November 2017 to July 2018. Respondent quotes with emphasis a "15 February 2019" communication from MinTIC to .CO Internet that it was acting "on the basis of the information received from the previous

[336] *See*, *e.g.*, Minutes of Meeting 2-2017, **C-0025**.

[337] MinTIC, Minutes of Advisory Committee Meeting (13 June 2018), p. 5, **C-0026**.

[338] *See* Claimant's Memorial, paras. 65-66; Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia (July 2018), p. 70, **C-0027**.

[339] *See* Respondent's Counter-Memorial, para. 82.

[340] MinTIC (Vice Ministry of Digital Economy), Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia, July 2018, pp. 5-6, **C-0027**.

(continued)

administration."[341] The publicly communicated information in this time period was supportive of .CO Internet and led .CO Internet to communicate with Respondent in terms that were expressly responsive to the public July 2018 report.[342] For Respondent's contemporaneous statement made to .CO Internet about its reasoning, to be true, the private communications between MinTIC and the new administration must have taken a fundamentally inconsistent position with the publicly available advice communicated to .CO Internet. Again, this is all based on a telling of Respondent's story at its best interpretation.

(2) Colombia's Conduct was not Based on Legal Standards and was Discriminatory

239. In its Memorial, and above, Neustar explained Colombia's conduct was not based on legal standards, but on discretion and prejudice.[343] In particular, Neustar noted, tribunals have consistently found the failure to grant regulatory approvals for an ulterior, political motive to be arbitrary, and thus a violation of the fair and equitable treatment standard.[344]

240. In denying that its conduct was discriminatory or not based on legal standards, Respondent asserts that non-nationality based discrimination does not fall under the minimum standard of treatment in Article 10.5 of the TPA and, in any event, there was

[341] Respondent's Counter-Memorial, para. 101; Letter from MinTIC to .CO Internet of 15 February 2019, **C-0031**.

[342] *See*, *e.g.*, Claimant's Memorial, para. 66; Letter from .CO Internet to MinTIC, (20 September 2018), MinTIC Reference No. 935805, **C-0028**.

[343] Claimant's Memorial, Section II.E; paras. 201-209.

[344] Claimant's Memorial, para. 201, citing *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 92, **CL-044**; *Eureko B.V. v. Republic of Poland* (Ad Hoc Arbitration) Partial Award (19 August 2005), para. 233, **CL-045**; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001), paras. 221, 232, **CL-046**.

(continued)

no discrimination in this case.[345] Respondent's submissions on this point are entirely unconvincing.

241. First, Respondent asserts that Claimant has failed to demonstrate that Article 10.5 of the TPA "covers non-nationality based discrimination" because it has not shown *opinio juris* and State practice.[346] But, as explained in paragraphs 207 to 210 above, tribunals assessing the minimum standard of treatment have readily accepted decisions by tribunals as well as legal commentary as indirect evidence to ascertain the content of that standard.[347] Neustar provided a significant amount of such evidence, demonstrating that there is a wide consensus that the minimum standard of treatment covers non-nationality based discrimination, including the specific targeting of a foreign investor.[348] Respondent barely acknowledges these authorities, and simply states that "case law is unsettled on this point".[349] Instead, Respondent falls back on its constant refrain that "the threshold for finding a breach on this basis would still be high."[350]

242. Even if Respondent were able to overcome the consistent findings on the scope of discrimination under the minimum standard of treatment (which it has failed to do), Neustar nonetheless has met the so-called "high threshold" for establishing a breach. As described in Neustar's Memorial, Respondent engaged in blatant discrimination with respect to Neustar, without any justification. Neustar provided multiple examples

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[345] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 328-337.

[346] Respondent's Counter-Memorial, para. 329.

[347] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 351, **CL-031**.

[348] Claimant's Memorial, paras. 202-205.

[349] Respondent's Counter-Memorial, para. 329.

[350] Respondent's Counter-Memorial, para. 330.

(continued)

of concessionaires in the telecommunications sector, the mining sector, and the port sector – all of which had their concessions extended.[351] Respondent has no answer to these facts, and in one single paragraph states that Claimant's position is "based on the misconception that Colombia was under an obligation to negotiate with Neustar and renew the 2009 Contract."[352]

243. But Respondent willfully misses the point. Respondent's discriminatory treatment of Neustar as compared to all other concessionaires is not somehow validated by Respondent's misguided belief on the terms of the Concession. Respondent's arbitrary and discriminatory treatment is clear based simply on its refusal to even negotiate with Neustar or to engage in good faith in the way it has done with all other concessionaires.[353] The motive for Colombia's conduct was apparently to install a favored operator, Afilias. While Neustar addresses Respondent's actions with respect to Afilias in more detail below, Respondent's position that this allegation is "purely speculative and factually incorrect"[354] is contrary to contemporaneous evidence. As reported by the media at the time (and not for a witness statement in this arbitration), this belief was widely held by the internet community in Colombia:

> The Colombian government has been accused by its own internet community of fixing a contract so that just one North American company in particular is eligible to operate the .co top-level domain-name registry.
>
> [. . . .]
>
> [I]ncredibly, even VeriSign – the operator of the world's largest registry, dot-com – may not [be] eligible because of that requirement to have migrated one million domain names in one go. Other registry operators, including Donuts, which runs over 200 top-level domains, and Nominet, which runs over 13

[351] Claimant's Memorial, paras. 206-207.

[352] Respondent's Counter-Memorial, para. 336.

[353] Claimant's Memorial, Section II.E; paras. 210-212.

[354] Respondent's Counter-Memorial, para. 333.

> million .uk names, as well as a number of other registries, are also excluded.
>
> In fact, the technical requirements listed by the Colombian government mean that just a single company on the planet is eligible to run the .co registry, despite it being ranked somewhere between 18 and 24 in global registries in terms of size (depending on whose statistics you go with).
>
> That peculiar situation may not have been a mistake, some are beginning to suspect, given the strange behavior of the South American nation's Ministry of Technology (MinTIC) that is running the process.[355]

244. While Respondent now asserts that Colombia wanted to ensure that the "technical requirements would be high in order to ensure that the proponents would have adequate experience operating a domain as large as the .co domain",[356] this position is untenable in light of the contemporaneous reports about the size and experience of registries excluded (as outlined above). It is also untenable based on Respondent's proffered evidence in support of this point, the witness statement of Ms. Trujillo. In the cited portion of Ms. Trujillo's statement, she confirms 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".[357] Despite admitting to not being involved, and basing her comments on speculations, Ms. Trujillo then affirmatively states "[h]owever, we never sought to favour a specific operator".[358] Ms. Trujillo has no basis upon which to make that statement, and offers no evidentiary support of her "understanding."

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[355] *See*, *e.g.*, Kieran McCarthy, "One company on the planet, US-based Afilias, meets the criteria to run Colombia's trendy .co registry – and the DNS world fears a stitch-up" (15 January 2020) THE REGISTER, **C-0096**.

[356] Respondent's Counter-Memorial, para. 333.

[357] Witness Statement of Luisa Fernanda Trujillo (23 February 2022), para. 20, **RWS-03**.

[358] Witness Statement of Luisa Fernanda Trujillo (23 February 2022), para. 20, **RWS-03**.

(continued)

245. Third, and as mentioned in brief above, at the heart of Respondent's case (and its claim that its conduct was based on "legal standards") is that the extension of the 2009 Concession was inconsistent with Colombian principles of competition law. Respondent centrally submits that automatic renewal clauses allegedly are "contrary to, inter alia, the fundamental principle of free competition enshrined in the Colombian Constitution."[359] The principle of free competition is Respondent's chief factual defense in this arbitration. More importantly perhaps, the principle of competition also was the chief contemporaneous justification provided by MinTIC witnesses for the path towards a tender process. In fact, the public recommendation of the Advisory Committee on 18 March 2019 to engage in a tender process instead of an extension (allegedly followed by Respondent) was that any renegotiation with .CO Internet of fiscal terms would create "an unnecessary risk regarding compliance with the legal framework for the administrative function and contractual activity of the state."[360]

246. Whatever might have been Respondent's motivation, competition and public good could not have been the driving factors. In fact, Respondent's own excerpted passages from the July 2018 report put a lie to this characterization. Respondent admits that "in light of the low remuneration perceived by MinTIC under the 2009 Contract, the report specified that, in case of a renewal, it would be imperative to 'renegotiate the Colombia's share of the revenues.'"[361] Respondent further admits that this observation specifically caught the eye of the new political appointees following the election.[362]

[359] *See* Respondent's Counter-Memorial, para. 44.

[360] Minutes of the Advisory Committee session of 18 March 2019, p. 5, **C-0039**.

[361] *See* Respondent's Counter-Memorial, para. 82.

[362] *See* Respondent's Counter-Memorial, para. 82.

(continued)

247. Respondent in July 2018 therefore did not highlight the importance of competition or the administrative function of public procurement but, instead, focused on the importance of improved fiscal terms.[363] And it was clear, in July 2018, that these improved fiscal terms could be – and typically were – achieved as part of contractual extensions.[364] Given that it was this advice that caught the eye of the new administration, competition could not have been the imperative concern, whatever Respondent's witnesses suggest to the contrary.

248. The assertion that competition or the administrative function of public procurement drove the Respondent's decision falls completely apart when one considers the fact that Respondent has routinely renewed such contracts or concessions for domestic investors, including in the telecommunications sector, as discussed above.[365]

249. A careful reading of Respondent's July 2018 report in light of Respondent's contractual practice paints a far truer different picture that flatly contradicts Respondent's narrative.[366] Respondent used the threat of a renewed tender as a means to cause .CO Internet to come to the table to negotiate better fiscal terms with Respondent. This was Respondent's contemporaneous concession structure. In fact, that is precisely what the July 2018 report contemporaneously communicated to .CO Internet given its letter in

[363] *See* MinTIC (Vice Ministry of Digital Economy), Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia, July 2018, **C-0027**; First Witness Statement of Sylvia Constaín, para. 6, **RWS-01**.

[364] Claimant's Memorial, paras. 88-97, 206.

[365] Claimant's Memorial, paras. 88-97, 206.

[366] MinTIC (Vice Ministry of Digital Economy), Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia, July 2018, **C-0027**. *See* Respondent's Counter-Memorial, para. 82.

(continued)

September 2018: .CO Internet came willing to bargain with Respondent to meet its fiscal demands.[367]

250. Respondent in this context makes key concessions that the complaints in the July 2018 report, as well as the entirety of the process following it, was completely pretextual:[368]

- In July 2018, "MinTIC's technical knowledge of the .co domain operation remained relatively limited."[369]

- In July 2018, "MinTIC almost exclusively relied on the information provided by .CO Internet for the supervision of the [2009 Concession]."[370]

- "MinTIC's knowledge of the domain name industry in general, and of the technical aspects of the operation of a ccTLD such as the .co domain in particular, was relatively limited in late 2018."[371]

- In December 2018, according to Sylvia Constaín, "there was limited expertise in Colombia" about how ccTLDs "were administered and operated."[372]

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[367] Letter from .CO Internet to MinTIC, (20 September 2018), MinTIC Reference No. 935805, **C-0028**.

[368] Offering pretexts for a decision is by definition conduct that lacks transparency and candor. Pretext is "an appearance assumed in order to cloak the real intention or state of affairs." *See* Meriam Webster Dictionary, Definition of Pretext, **C-0132**. Cloaking something is to render it non-transparent. Candor requires a forthrightness that is antithetical to any cloaking. Pretextual conduct is complete in its lack of transparency and candor because it not only passively lacks transparency or forthrightness but purposefully conceals the actual reasons. Pretextual conduct violates the international minimum standard of treatment. *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027** (which includes in its list of conduct that violates the international minimum standard of treatment "a complete lack of transparency and candour in an administrative process" by a State).

[369] *See* Respondent's Counter-Memorial, para. 78.

[370] *See* Respondent's Counter-Memorial, para. 78.

[371] *See* Respondent's Counter-Memorial, paras. 78, 86.

[372] *See* Respondent's Counter-Memorial, para. 95; First Witness Statement of Sylvia Constaín, para. 10, **RWS-01**.

(continued)

- It was only "[b]y early 2019" that Respondent submits that it had a sufficient team "to make an informed decision on the future of the .co domain."[373]

- MinTIC only learned in 2019 how pricing terms for the domain name industry had evolved.[374]

251. These concessions mean that Respondent had absolute no factual basis to assert in July 2018 that it received insufficient compensation from .CO Internet. Respondent admits that it did not have that information until 2019 at the earliest.[375] The statement in the July 2018 Report that Respondent was undercompensated therefore was entirely pretextual as Respondent simply could not know this.[376]

252. Had Respondent asserted that this meant that it was not in a position to renew the 2009 Concession, it might have salvaged itself from pretextual reasoning. But it did not.[377] At best for Respondent, Respondent submitted that new fiscal terms must be negotiated and used a tender process as a mechanism to coerce .CO Internet into an unfavorable economic deal. (At worst for Respondent, it planned to give the tender through Neustar's then competitor through a rigged and corrupt deal.)

253. Far more perniciously, it was Respondent's alleged position in the July 2018 report (which position was made in bad faith to at best coerce .CO Internet) that led to .CO

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[373] *See* Respondent's Counter-Memorial, para. 98.

[374] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), Consultancy services related to the .co domain, May 2019, **C-0067**.

[375] Minutes of the Advisory Committee session of 18 March 2019, p. 6, **C-0039**. *See also* Respondent's Counter-Memorial, paras. 94, 104.

[376] MinTIC (Vice Ministry of Digital Economy), Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia, July 2018, **C-0027**. *See also* Respondent's Counter-Memorial, para. 82.

[377] Minutes of the Advisory Committee session of 10 December 2018, Section 2.1, **C-0037**.

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Internet statement that it would negotiate better terms for the renewal. Respondent now uses .CO Internet's willingness to provide better economic terms as part of the renewal process to assert that "all the parties involved (including .CO Internet itself) precisely acknowledged that a renewal of the contract should entail a modification of the share of proceeds allocated to MinTIC."[378] .CO Internet sought to negotiate the economic terms of the renewal based on Respondent's statements and positions which we now know were pretextual. It is the epitome of bad faith to hold .CO Internet's acquiescence out as a reason for non-renewal when the July 2018 was not grounded in fact or good faith.

254. At the same time, Respondent's refusal to negotiate with .CO Internet could not have been motivated by a desire to achieve better fiscal terms. As an initial matter, Respondent was not even trying to obtain better economic terms from .CO Internet. Rather, Respondent was refusing to engage in good faith negotiations with Neustar over the economic terms of the rest of the renewal.[379]

255. In any event, Respondent asserted at that time (when .CO Internet was seeking the renewal) that Respondent had received information on best international practices from the prior administration.[380] Respondent now admits, as it must, that it did not have such information or expertise at that time.[381] The initial refusal to negotiate was therefore premised in pretext as Respondent did not have the information to which it claimed.

256. Perhaps more importantly, Respondent's final choice to terminate negotiations before they had begun was similarly pretextual, as set out below:

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[378] *See* Respondent's Counter-Memorial, para. 106.

[379] *See* Claimant's Memorial, paras. 65-73.

[380] *See* Respondent's Counter-Memorial, paras. 79-82.

[381] *See* Respondent's Counter-Memorial, para. 78.

- The recommendation to enter into a tender process was made within weeks of MinTIC assembling a team "to carry out research and investigations necessary to make an informed decision of the future the .co domain."[382] This timeframe is inconsistent with genuine research and deliberation.

- The recommendation to enter into a tender process was made within weeks if not days of learning of "market conditions of the ccTLD market."[383]

- The recommendation was made on the basis of what Respondent calls "initial research" only.[384]

- The recommendation was adopted despite the fact that Respondent admits to lacking the internal capacity to understand it just weeks before.[385]

- Days prior to the decision, Respondent held out to .CO Internet that it was still considering a renewal of the contract.[386]

- Respondent never entered into negotiations with .CO Internet over fiscal terms after learning of "market conditions of the ccTLD market."[387]

257. In this case, it is apparent that Respondent was not interested in process or reaching a rational decision. In addition, it appears that Respondent was not even interested in simply increasing revenue for the Colombian State.

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[382] First Witness Statement of Sylvia Constaín, para. 13, **RWS-01**.

[383] Minutes of the Advisory Committee session of 18 March 2019, p. 6, **C-0039**.

[384] *See* Respondent's Counter-Memorial, para. 104.

[385] *See* Respondent's Counter-Memorial, paras. 78, 86, 95; First Witness Statement of Sylvia Constaín, para. 10, **RWS-01**.

[386] *See* Claimant's Memorial, para. 69.

[387] Respondent's Counter-Memorial, para. 104.

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258. Respondent now makes high-minded competition law arguments that any negotiations with a concessionaire for a renewal of a concession was allegedly risky or illicit. If this is true, which it is certainly not, Respondent would not have included the renewal option in its July 2018 report.[388] And, as stated elsewhere, Respondent routinely renews contracts and concessions with domestic investors.[389]

259. In sum, Respondent's position that its conduct was based on legal standards and was not discriminatory fails on the basis of its own evidence (or lack thereof), and therefore amounts to a breach of the minimum standard of treatment and Article 10.5 of the TPA.

(3) Colombia Failed to Act in Good Faith

260. In its Memorial, Neustar recognized that – while not required – the existence of bad faith or intent to injure by a State is persuasive in establishing a violation of the minimum standard of treatment.[390] Neustar further demonstrated that Respondent had acted in bad faith through is conduct, including refusing to negotiate based on its intention to install Afilias as the concessionaire, the design of the original Terms of Reference (**"TORs"**) to exclude every company for Afilias, and its refusal to discuss

[388] 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**.

[389] *See*, *e.g.*, Claimant's Memorial, paras. 88-97, 206.

[390] Claimant's Memorial, para. 210, citing: *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 754, **CL-023**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 296, **CL-018**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 560, **CL-017**; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 280, **CL-057**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 93, **CL-027**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 153, **CL-058**; Andrew Newcombe & Luis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer 2009), p. 277, **CL-053**.

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an extension of the Concession with Neustar even though other concessionaires regularly received such extensions.[391]

261. Respondent argues that Neustar's claims "could not be further from the truth", arguing in two short paragraphs that: (1) Neustar's argument is speculative; and (2) bad faith cannot be presumed, and is subject to a high standard.[392] Unfortunately for Respondent, the "truth" is laid bare in its own Counter-Memorial, demonstrating its failure to act in good faith and rendering its objections irrelevant.

262. First, Respondent argues that Neustar's claim is "speculative" because Colombia did not have an intention to install Afilias as the new operator of the .co domain and because ".CO Internet was ultimately awarded the 2020 Contract following a transparent public tender process."[393] These claims can be dealt with expeditiously.

263. As outlined above, Respondent has provided no evidence in support of its denial that the TORs were tailored specifically to Afilias, despite wide recognition in the internet community that MinTIC had "rigged" the system.[394] The witness statements developed for the purposes of this arbitration, several years later, and without any supporting evidence is not enough to overcome contemporaneous third-party evidence.[395]

264. Moreover, Neustar has already addressed Respondent's blanket position that .CO Internet was awarded the 2020 Concession, therefore Respondent cannot possibly be in

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[391] *See*, *e.g.*, Claimant's Memorial, paras. 126-137.

[392] Respondent's Counter-Memorial, paras. 338-341.

[393] Respondent's Counter-Memorial, para. 339.

[394] *See*, *e.g.*, Kieran McCarthy, "One company on the planet, US-based Afilias, meets the criteria to run Colombia's trendy .co registry – and the DNS world fears a stitch-up" (15 January 2020) THE REGISTER, **C-0096**.

[395] *See* paras. 237 to 239 *supra*.

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breach.[396] In addition, Respondent's position on this point is non-sensical. The fact that .CO Internet was ultimately awarded the 2020 Concession does not automatically mean that Respondent acted in good faith throughout 2018 to 2020. In fact, as evidenced at length in Neustar's Memorial, Respondent failed to act in good faith by refusing to negotiate with Neustar, ignoring communications and offers, and treating Neustar in a discriminatory way for an improper intent.

265. Respondent has confirmed this improper intent in its Counter-Memorial, by admitting that MinTIC put aside the non-partisan exercise of public administration in favor of political favoritism.[397] Indeed, the reason that Respondent did not engage with respect to the 2009 renewal was because of the upcoming presidential elections.[398] Holding a purely political mental reservation at the same time as being supportive in public statements with a long-term contracting partner is duplicitous and the very definition of acting in bad faith.[399] Moreover, one can safely assume that every administration – no matter its political affiliation or network – would not object to increasing revenue from foreign (non-voting) taxpayers whenever possible to the maximum extent it could. So why would Respondent postpone analysis of the contract due to an impending presidential election? The simplest answer is that increasing state revenue was not the issue driving Respondent's decision to not even engage in good faith discussions and that instead Respondent's officials were engaged in a potential political patronage/

[396] *See* paras. 71 to 74*supra*.

[397] *See* Respondent's Counter-Memorial, para. 79. *See also* First Witness Statement of Sylvia Constaín, paras. 5-6, **RWS-01**.

[398] Respondent's Counter-Memorial, n. 6, para. 79.

[399] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 22, **CL-017**. As the Glamis Gold v. United States decision relied upon by Respondent explains, "although bad faith may often be present in such a determination and its presence will certainly be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1)" of the NAFTA. *See id*. The presence of such duplicity, in other words, is precisely the kind of wrongdoing for which Glamis Gold would advise tribunals to be on the lookout.

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payback scheme involving .CO Internet's competitor, Afilias.[400] Why else would an agency not even begin a process of establishing market conditions that apparently require mere weeks to bring to conclusion, much less engage in good faith negotiations?

266. Without engaging in any of these simple questions, Respondent pivots to argue that Colombia had "legitimate reasons not to renew the 2009 Contract" and therefore bad faith cannot be presumed.[401] But, as outlined above, this position is wrong on all counts: Claimant's claim does not rest on the failure to renew the 2009 Concession, but on the way in which Respondent acted in bad faith in dealing with Neustar and its investment. Moreover, while Neustar is not required to demonstrate the existence of a motive, the evidence is clear that Respondent's bad faith conduct was due entirely to domestic political considerations, and not for any "legitimate purpose".

(b) Colombia Failed to Afford Due Process to Neustar

267. As Neustar explained in its Memorial, under the minimum standard of treatment set out under Article 10.5 of the TPA, Colombia has an obligation to afford due process.[402] Claimant further demonstrated that key factors relevant to the assessment of a failure to provide due process include: (1) whether the powers exercised by a host State

[400] *See* Claimant's Memorial, paras. 126-137.

[401] Respondent's Counter-Memorial, para. 340.

[402] Claimant's Memorial, para. 213, citing *inter alia*: *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; UNCTAD, *Fair and Equitable Treatment* 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), pp. xv-xvi, **CL-043**; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 200, **CL-059**; *Murphy Exploration & Production Company International v. Republic of Ecuador*, (PCA Case No. 2012-16), Partial Final Award (6 May 2016), para. 206, **CL-028**; *Deutsche Telekom v. India,* (PCA Case No. 2014-10), Interim Award (13 December 2017), para. 336, **CL-068**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), para. 219, **CL-060**.

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administrative body have been misused for improper purposes;[403] (2) whether the State has failed to act in a transparent and candid manner;[404] and (3) a mechanism to raise claims against actions taken or about to be taken by a host State.[405]

268. Respondent denies that the obligation of due process is encompassed in Article 10.5 of the TPA outside of claims for denial of justice,[406] and then states – in any event – that none of Neustar's claims have merit.[407] However, Respondent's lengthy arguments in this Section of its Counter-Memorial fail on all counts.

269. As an initial point, Respondent's position that "a breach of due process can only amount to a breach of the FET standard when it results in a denial of justice" is manifestly incorrect.[408] Respondent asserts that the language contained in Article 10.5.2 of the TPA "explicitly links the FET under the treaty and the 'obligation not to deny justice'". To recall, Article 10.5.2(a) states in relevant part:

> "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

270. As an initial point, the plain language of Article 10.5.2(a) does not exclude claims for a lack of due process, nor does it expressly require that a lack of due process be inherently linked to a claim of a denial of justice. It simply states that the FET standard "includes the obligation not to deny justice … in accordance with the principle of due process." There is nothing exclusive about this provision. In addition, Respondent

[403] Claimant's Memorial, para. 216.

[404] Claimant's Memorial, paras. 217-221.

[405] Claimant's Memorial, paras. 222-224.

[406] Respondent's Counter-Memorial, paras. 345-349.

[407] Respondent's Counter-Memorial, paras. 350-368.

[408] Respondent's Counter-Memorial, para. 345.

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ignores footnote 3 to Article 10.5 which states that "Article 10.5 shall be interpreted in accordance with Annex 10-A."[409] For its part, Annex 10-A states in full:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

271. As tribunals interpreting the minimum standard of treatment have clearly held, this standard includes "a lack of due process leading to an outcome which offends judicial propriety", and a "complete lack of transparency and candour in an administrative process."[410]

272. Respondent relies on the findings of the tribunal in *Aven v. Costa Rica*, which it says confirms that "a breach of due process can only amount to a breach of the FET standard when it results in a denial of justice."[411] But the tribunal's comments in *Aven* are entirely inapposite to this dispute. The *Aven* tribunal was addressing whether the claimants in that case validly filed a claim for full protection and security, and whether claimants were required to exhaust local remedies under domestic law (issues not relevant in this dispute). In that context, the Aven tribunal concluded (in the preceding, and omitted, paragraph cited by Respondent):

> This Treaty, as most of those that deal with the international protection of investments differentiates itself clearly from diplomatic protection. DR-CAFTA does not require prior

[409] TPA, Article 10.5, n. 3, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

[410] Respondent's Counter-Memorial, para. 310, citing *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000), para. 98, **RL-025**. *See also Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 22 and 616, **CL-017**.

[411] Respondent's Counter-Memorial, para. 345, *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 September 2018), para. 357, **RL-011**.

> exhaustion of internal remedies as a requirement of admissibility to access international investment arbitration. This, however, does not mean that the DR-CAFTA does not recognize denial of justice as an unlawful act, which may be caused against an investor of one of the Parties to the Treaty. On the contrary, DR-CAFTA suggests that fair and equitable treatment has as a fundamental component of denial of justice; "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; Article 10.5.2.a DR-CAFTA.

273. The Tribunal went on to conclude, as Respondent notes, that "to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty, access to justice and due process for the resolution of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards."[412] As a result, the tribunal found that "Claimants late filed claim for breach of full protection and security is rejected."[413]

274. Thus the *Aven* tribunal did not find – as Respondent misleadingly argues – that claims based on a lack of due process must be linked with a denial of justice claim. The tribunal was solely concerned on the relationship between exhaustion of remedies, and the scope of the FET standard with respect to denial of justice claims. That is not the circumstance in issue in this dispute.

[412] *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 September 2018), para. 357, **RL-011**.

[413] *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 September 2018), para. 358, **RL-011**.

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275. However, tribunals considering the application of Article 10.5 of the DR-CAFTA (which Respondent recognizes is "identical to that in Article 10.5.2(a)")[414] have clearly acknowledged that:

> [A] lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard. In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules.
>
> Based on such principles, the Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.[415]

276. This position of the *TECO* tribunal was confirmed on application for annulment, and other DR-CAFTA tribunals have endorsed the definition of the minimum standard of treatment adopted by the NAFTA *Waste Management* case, which refers explicitly to the obligation of due process as being part of the minimum standard of treatment.[416] Neustar provided this background in its Memorial, but Respondent chose simply to largely ignore these authorities and focuses its discussion on the standard for a claim of denial of justice, not in issue in these proceedings.

277. Perhaps aware of its shortcomings, Respondent then quickly turns to its favorite refrain: "tribunals have consistently applied a very high threshold to appreciate whether the conduct of a State may amount to a violation of due process."[417] Incredibly, in support

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[414] Respondent's Counter-Memorial, para. 345.

[415] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), paras. 457-458, **CL-030** (emphasis added).

[416] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), para. 219, **CL-060**.

[417] Respondent's Counter-Memorial, para. 347.

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of this statement, Respondent refers to the precise legal authorities it ignored in arguing that due process claims must be linked to denial of justice claims.[418] It also refers to the tribunal's finding in *Al Tamimi v. Oman*, which considered the minimum standard of treatment and which expressly held that "due process" was a "basic principle" protected under that standard.[419] Thus, Respondent's attempt to cover the field fail dismally: its contradictory and inconsistent submissions on this point can provide little comfort to the Tribunal in terms of the standards it should apply to determine whether a State has failed to provide due process.

278. Unlike Respondent, Neustar clearly set out the key factors tribunals have focused on in determining whether a failure to provide due process has violated the minimum standard of treatment.[420] While Respondent has rejected these claims (detailed below), it has nonetheless failed to adequately rebut Neustar's position on the standards to be applied, which is supported by the weight of authority.

(1) Colombia Exercised its Administrative Powers Improperly

279. Respondent makes two brief and unconvincing arguments in response to Claimant's position. First, it asserts that "Neustar's allegations that there was a misuse of administrative powers have nothing to do with a denial of justice and therefore cannot amount to a breach of due process."[421] As discussed above, however, Respondent's

[418] Respondent's Counter-Memorial, para. 349.

[419] Respondent's Counter-Memorial, paras. 347-348.

[420] Claimant's Memorial, paras. 213-223.

[421] Respondent's Counter-Memorial, para. 351.

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position is manifestly incorrect as a matter of law, and need not be further addressed here.[422]

280. Second, Respondent repeats its inaccurate claim that its actions were "solely … acts of contractual execution", unrelated to the exercise of administrative power.[423] As discussed with respect to Respondent's jurisdictional objection in Part I(C) above, however, its own submissions confirm that its actions were taken in a sovereign (rather than commercial) capacity.[424] While Neustar maintains that the direction to refuse to extend and move ahead with the tender came from the President's office in the first instance, MinTIC's administrative actions in furtherance of this improper direction were clearly beyond the scope of its position as a party to the Concession. As the tribunal in Tecmed v. Mexico noted, an investor has a fair expectation that the powers of a government agency will be used for the proper purpose of the law – not to further improper political directives as MinTIC did here.[425]

(2) Colombia Did Not Act Transparently or with Candor

281. Respondent denies that its actions were taken in willful disregard of due process and proper procedure by arguing, again, that: (1) the concept of transparency is not part of the minimum standard of treatment, including because the TPA is limited to claims of denial of justice;[426] and (2) even assuming that the concept of transparency did form part of the minimum standard of treatment, it would be subject to a "high threshold".[427]

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[422] *See* paras. 261 to 272 *supra*.

[423] Respondent's Counter-Memorial, para. 352.

[424] *See* paras. 171 to 176 *supra*.

[425] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 174, **CL-058**.

[426] Respondent's Counter-Memorial, para. 354.

[427] Respondent's Counter-Memorial, para. 355.

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Again, Neustar will not repeat its submission on these points, which have been addressed in detail above.[428] Suffice to say, Respondent's rote position on the content of the FET standard cannot be sustained.

282. Despite heavily criticizing Neustar for exhibiting some legal authorities that considered an autonomous FET standard (as above, largely in support of findings made by tribunals discussing the minimum standard of treatment),[429] Respondent abandons this objection when it comes to its own case. Respondent relies on the tribunal's analysis in *Urbaser v. Argentina* to assert that a State cannot be required to act under "complete disclosure", and that transparency only requires that "documents and regulations be readily accessible."[430]

283. This restrictive reading is unsupported. As explained by a leading treatise, "[t]ransparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework."[431] In a passage frequently cited by subsequent tribunals, the *Tecmed v. Mexico* award (considering the minimum standard of treatment) elaborated on this principle, as follows:

> The Arbitral Tribunal considers that this provision of the Agreement [i.e. FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its

[428] *See*, *e.g.*, paras. 203 to 210 *supra*.

[429] Respondent's Counter-Memorial, para. 309.

[430] Respondent's Counter-Memorial, para. 356.

[431] "Chapter VII.1 – Fair and Equitable Treatment", in R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd Ed. (Oxford: OUP, 2012), p 149.

> investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[432]

284. Thus, tribunals have been far more nuanced in their expression of the requirement that a host State act transparently, and there is no established principle that a "complete lack of transparency" is required. In any event, even if the Tribunal finds that there must have been a "complete lack of transparency", this threshold is satisfied in the current case.

(3) Colombia Did Not Provide Mechanisms for Review

285. In its Memorial, Neustar explained that – under the principle of due process – Respondent had the obligation to consult with Neustar and .CO Internet and to give them the opportunity to address any issues of concern.[433]

286. Respondent, predictably, denies this standard and asserts that it "does not entail for the State to have endless discussions with the investor as Neustar seems to imply."[434] Respondent then asserts that there were legal mechanisms available to Neustar or .CO

[432] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 154, **CL-058** (emphasis added). See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL, Final Award of 23 April 2012), para 222, **RL-096**; *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), paras 307 and 309, **CL-049**; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15, Award of 3 March 2010), para 438, **CL-052**.

[433] Claimant's Memorial, paras. 223-224.

[434] Respondent's Counter-Memorial, para. 364.

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Internet to "raise claims", including commercial arbitration under the terms of the Concession, and the Council of State Proceedings.[435]

287. But Neustar was not asking for "endless discussions", but simply that Respondent provide to it a "full opportunity to be heard and to present evidence" with respect to the renewal negotiations.[436] As outlined at length in Neustar's Memorial, Respondent ignored Neustar's attempts to negotiate, and failed to provide clear, consistent, or truthful reasoning.[437]

288. Respondent then asserts that it is "equally surprising" that Neustar would assert that Respondent's conduct in the 2020 Tender Process lacked transparency.[438] Respondent feigns surprise, stating that Neustar had the opportunity to submit comments to MinTIC regarding the conduct of the tender process and "[w]hat is more … MinTIC actually proceeded to implement some of Neustar's suggested amendments."[439] Neatly omitted from this glossy narrative is MinTIC's engagement with representatives from Afilias, and the development of its TORs to ensure that Afilias was the only company that could meet the requirements for tender – as widely recognized by the industry at the time.[440]

(c) Colombia Violated Neustar's Legitimate Expectations

289. In its Memorial, Neustar noted that tribunals applying the minimum standard of treatment have consistently recognized that it protects investors against unfair treatment

[435] Respondent's Counter-Memorial, para. 366.

[436] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 198, **CL-059**.

[437] *See*, *e.g.*, Claimant's Memorial, paras. 103-137, 190, 219-224.

[438] Respondent's Counter-Memorial, para. 367.

[439] Respondent's Counter-Memorial, para. 367.

[440] *See* paras. 237 to 238 *supra*.

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arising from a state's repudiation of commitments made to encourage the investor to invest, and of the investor's legitimate expectations.[441] Neustar further demonstrated that Colombia's actions violated Neustar's legitimate expectations regarding the extension of the Concession and the negotiation of the extension of the Concession in good faith.[442]

290. In response, Respondent falls back on its well-trodden argument that Neustar's claims are not within the scope of the minimum standard of treatment under Article 10.5 of the TPA,[443] and in any event fail on the facts.[444] Once again, however, Respondent's submissions are selective, and inconsistent with its own position and reliance on authorities throughout the Counter-Memorial.

291. For example, in attempting to rebut Neustar's arguments under Article 10.5 of the TPA, Respondent relies upon the standards articulated by *Al Tamimi v. Oman*.[445] That tribunal noted that the minimum standard also incorporates a State's willful or egregious "failure … to protect a foreign investor's basic rights and expectations".[446] This position is supported by numerous tribunals, which have held that the protection of an investor's legitimate expectations is fundamental to the obligation to accord an investment treatment that comports with the customary international law minimum standard.[447] As the tribunal in *Thunderbird v. Mexico* explained:

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[441] Claimant's Memorial, paras. 226-230.

[442] Claimant's Memorial, paras. 225, 231-237.

[443] Respondent's Counter-Memorial, paras. 370-377.

[444] Respondent's Counter-Memorial, paras. 378-396.

[445] Respondent's Counter-Memorial, para. 347.

[446] *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390, **RL-097**.

[447] *See*, *e.g.*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *Mobil Investments Canada Inc. and*

(continued)

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation 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, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[448]

292. While the relevance, and indeed fundamental importance, of legitimate expectations to the international minimum standard of treatment cannot reasonably be questioned, Respondent offers a short selective brief rebuttal of some of the cases relied upon by Neustar.[449] This effort is unconvincing, and Neustar refers to its exposition of case law addressing legitimate expectations in its Memorial to incorporate here.[450] Respondent also ignores the fact that "legitimate expectations" is considered to be part of the "good faith" principles, a general principle of international law and a guiding principle in applying the minimum standard of treatment.[451]

293. In any event, Respondent admits – at the very least – that legitimate expectations are a "relevant factor" in determining whether a respondent State has breached the minimum standard of treatment.[452] While Neustar does not agree that this is in fact the correct

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Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), paras. 152, 154, **CL-019**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 621, **CL-017**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 233, **CL-033**.

[448] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), para. 147, **CL-17**.

[449] Respondent's Counter-Memorial, para 376.

[450] *See* Claimant's Memorial, paras. 225-230.

[451] For example, the tribunal in *Merrill & Ring v. Canada* has explained that "general principles of law also have a role to play in this discussion." The *Merrill & Ring* tribunal noted in particular that the principle of good faith is a general principle of international law. *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 187, **CL-033**.

[452] *See*, *e.g.*, Respondent's Counter-Memorial, para. 376.

(continued)

expression of the standard, the facts of this case clearly demonstrate that Respondent violated Neustar's legitimate expectations – whether an independent standard or a relevant factor – and thus must be held to account.

(1) Colombia Engaged in Specific Conduct or Representations

294. As described in Neustar's Memorial, Neustar held legitimate expectations deriving from Article 2 of Law 1065, and the terms of the 2009 Concession itself.[453] Neustar also held an expectation that Colombia would act in good faith, and engage with Neustar to ensure a transparent and predictable framework for business planning and investment.[454]

295. Respondent rejects this argument, and asserts that it made no specific commitments "to renew the 2009 Contract."[455] In particular, it asserts that the consistent course of conduct by Colombia in negotiating and extending concessions with other investors cannot give rise to legitimate expectations, because it "cannot trump the clear contractual terms of the 2009 Contract".[456] It also asserts that both the 2009 Concession and Article 2 of Law 1065 of 2006 provide discretionary statements, which to not amount to a specific commitment.[457]

296. Respondent makes these points briefly, perhaps in an attempt to "get in and out" of the details. Throughout its Counter-Memorial, however, Respondent makes repeated erroneous arguments that Article 4 of the 2009 Concession imposed no obligations

[453] Claimant's Memorial, paras. 231-235.

[454] Claimant's Memorial, paras. 230-231.

[455] Respondent's Counter-Memorial, para. 387.

[456] Respondent's Counter-Memorial, para. 387.

[457] Respondent's Counter-Memorial, para. 387.

(continued)

whatsoever on it.[458] Even though, to be clear, Neustar is not claiming for a breach of contract by MinTIC, Neustar has to examine Article 4 of the 2009 Concession here to show that such a right did exist, and gave rise to legitimate expectations.

297. Respondent's submission is facially absurd. Article 4 of the 2009 Concession does not contain conditions, representations, warranties, or recitals. Rather, it contains a covenant. Respondent therefore must be heard to say that it agreed to a covenant that it now asserts does not apply. Needless to say, that is not how covenants work.

298. Respondent correctly states that Article 4 provides the relevant extension provision in the 2009 Concession. In Respondent's translation, Article 4 states that (with emphasis in original):

> VALIDITY AND TERM. The present concession contract will have a term of ten (10) years which will run from the date of the authorization given by ICANN to THE CONCESSIONAIRE for the carrying out of the activities of the domain, provided that by such time, the University of 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.
>
> Paragraph: 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 [...].[459]

299. Both parties to the 2009 Concession (MinTIC and .CO Internet) covenant in the provision that they will perform the following obligation for a specific period of time. In fact, there is no plausible reading that the lead-in paragraph of Article 4 does not memorialize an obligation on the part of both parties. This far, Neustar and Respondent agree.

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[458] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 66-69, 315.

[459] Concession dated 3 September 2009, Article 4, **C-0017**.

300. Once it is agreed that the lead-in paragraph of Article 4 memorializes an obligation, it is a compelled conclusion that the other paragraph of Article 4 memorializes an obligation for the following reasons:

a. First, the Article 4 lead-in paragraph and second Article 4 paragraph both do not use the imperative mood. When interpreting a contract, the interpretation must look at the actual words of the contract. Neither the Article 4 lead-in paragraph or the second paragraph use the imperative mood. The Spanish language in fact has an imperative mood. But the Concession, drafted by Respondent, does not include this mood. Rather, both parties translate the Spanish of the Article 4 lead-in paragraph of the 2009 Concession as "will have a term of ten years" (that is, future indicative). Respondent does not translate the lead-in paragraph to state that the 2009 Concession "shall have a term of ten years." The principal provision of Article 4 therefore expresses a covenant without using an imperative. It uses a simple future construction. This is the same verb mood and tense used in the second paragraph of Article 4.

b. Second, the second Article 4 paragraph does not use an optative mood. Spanish further has two verb moods available to it that could communicate a mere possibility, if that it what was intended. The first such mood is the optative subjunctive mood. This mood indicates a wish or hope. The second such mood is the potential mood indicating that an option might possibly occur. In Latin grammar underlying Romance languages, both moods are expressed with the present subjunctive. But these moods conveying a mere possibility are not used.

c. Third, the next step would be to view the text in the context in which it is used. Both provisions (the Article 4 lead-in paragraph and the second paragraph) are part of the same provision. Thus, the most immediate context of the Article 4

lead-in paragraph is that of a covenant. Both parties agree with this. This covenant binds both parties to a term or duration of time. The contentious provision of the second paragraph of Article 4 covers the same subject as the lead-in paragraph of Article 4 (term of the contract), creating a contextual understanding the second paragraph with respect to the renewal does the same. More precisely, the future indicative in the first paragraph of Article 4 is "will have" in the Spanish original. The future indicative in the second paragraph of Article 4 is "will be able to" (podrá). Both of these verbs indicate an obligation – just an obligation that manifests differently.

The obligation in the second paragraph of Article 4 manifests differently in that denotes an ability or power and does not denote a current possession like the lead in paragraph. The distinction means that a further action is needed (exercise of that power). "Podrá" does not itself limit the exercise of the power. The immediate context of the provision again confirms the same reading. The only limitation on the power is that can be exercised only "in the manner and terms established in the legislation in force at the time of its implementation." A restriction of the manner and terms of exercise of a power does not limit the power itself, so long as the power is implemented and the circumscriptions are taken into account, such as the requirement that the term not be inferior to the original term.

As written, the "will be able to" in the second paragraph relates to the ability of the concessionaire to renew the concession. The purpose of the "will be able to" renewal provision was designed (and did, in fact) cause the original concessionaire to develop and market the .co domain to the valuable resource that it became. In other words, this was not an obligation without benefit to

Respondent. Had this provision not been included, Neustar would not have made the investments it did to promote and develop the .co domain. To be sure, Neustar would still have worked to develop the domain. But Neustar would not have made the investments it did if it had not expected a renewal of another 10-year period on similar terms.

Respondent's reading of the provision thus creates an unfairness, as well as being incorrect. It promises something reasonably concrete (a one-time term extension). It implies a means to get it. And it then reneges when such a renewal is sought.

d. Fourth, the second paragraph of Article 4 literally indicates an ability not a possibility. Respondent's reading of the second paragraph of Article 4 is further absurd not just in light of what Article 4 says but also in light of what it does not say. Respondent submits that Article 4 paragraph merely states a fact about Colombian legislation. There are obviously many other provisions in Colombian legislation that would be applicable to the 2009 Concession. Many of these other provisions of Colombian legislation are not recited in Article 4 or elsewhere in the 2009 Concession.

   The inclusion of a specific, limited possibility existing as a matter of the applicable legal framework communicates something. It holds out that possibility as particularly salient, should the concessionaire choose to invoke it. It is not just some possibility. It is a very important possibility that is meaningful to parties in .CO Internet's position.

e. Finally, the second paragraph of Article 4 does not recite other potentially applicable rules of Colombian law but rather only includes the ability of renewal.

301. Therefore, Respondent's reading would turn a covenant into an illusory promise. According to Respondent, the second paragraph of Article 4 creates only an illusory or otherwise meaningless promise.[460] Respondent's interpretation insists that Respondent has essentially no obligation to do anything despite the language of the paragraph. Respondent implies that it does not even have an obligation to consider the extension or to negotiate in good faith. Such a provision would serve no purpose if it did not impose any sort of obligation.

302. Respondent's reading of this provision (and its own law) is not done in good faith, as is required by the TPA. Article 4 must have meant something. To say that this incentive is meaningless cannot be the case. It would render a provision in the 2009 Concession a complete nullity. And it would do so when the most immediate grammatical and semantic context shows an obligation.

303. Notably, even if Respondent is correct (which it is not) that it has no obligation to renew the Concession, good faith requires that Respondent negotiate in good faith with respect to a possible extension. Respondent's Counter Memorial also makes clear that the determination to recommend a new tender rather than negotiation for an extension with .CO Internet and Neustar was made before .CO Internet or Neustar had a chance to present their case. Not only that, .CO Internet and Neustar repeatedly offered to negotiate with Respondent (Respondent's coercive conduct gave Neustar little choice), but never a chance to discuss a renewal because Respondent never would have engaged

[460] *See* Respondent's Counter-Memorial, para. 68.

in the process. Respondent's conduct cannot be reconciled with good faith. Instead, Respondent simply failed to meaningfully engage with .CO Internet or Neustar, even after Neustar submitted its Notice of Intent and laid out the wrongdoing by Respondent.

(2) Neustar Reasonably Relied on Colombia's Conduct and Representations, and Incurred Damage when Colombia Repudiated

304. Respondent argues that "Neustar has provided no evidence that it relied on the possibility of renewing the 2009 Contract when it decided to enter the contract – its legitimate expectations claim can thus be dismissed on this sole basis."[461] Respondent then claims that, in any event, it would not have been "reasonable for Neustar, a sophisticated foreign investor" to expect at the time it made its investment that the Concession would have been renewed or that MinTIC would have even entered into negotiations.[462]

305. But Respondent's assertions fail on its evidence and arguments, which demonstrate that – at the time Neustar made its investment – Neustar relied on Colombia's representations that the 2009 Concession would be renewed or at the very least negotiated in good faith.

306. In particular, Respondent throughout these proceedings has been obsessed with Neustar's purchase of the totality of .CO Internet from Arcelandia.[463] Respondent speculates that "it appears that Neustar agreed to make a multimillion contingent payment to Arcelandia in 2020 should the 2009 Contract be renewed, showing that Neustar understood the renewal of the contract was only a possibility and not a

[461] Respondent's Counter-Memorial, para. 390.

[462] Respondent's Counter-Memorial, para. 394.

[463] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 7, 10, 58, 73-75, 289; Respondent's Request for Production of Documents, Requests 1-3.

(continued)

certainty." [464] Respondent misunderstands this provision, which actually proves Neustar's submission rather than proving Respondent's, demonstrated as follows.

307. By Respondent's account, this purchase required the approval of the Colombian government.[465] Respondent further confirms that Respondent gave its consent to this sale.[466] Finally, Respondent confirmed both the substance, as well as crucially, its contemporaneous knowledge of the price of this transaction.

308. Respondent's approval of the transaction between Neustar and Arcelandia makes Respondent's current legal argument dubious. The original September 2009 Concession issued by the Colombian government contract had a term of ten years.[467] Arcelandia and Neustar consummated their purchase agreement for the shares in .CO on 14 April 2014, as Respondent notes.[468] At this time, the initial term of the Concession Agreement was near its halfway point. During the first half of the Concession Agreement, as Respondent also notes, total revenue for the .CO domain was US$87.9 MM.[469]

309. The purchase price paid by Neustar for Arcelandia's shares in .CO was US$113.7 MM as Respondent admits and as Respondent was aware at the time.[470] Assuming that

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[464] Respondent's Counter-Memorial, para. 10.

[465] Respondent's Counter-Memorial, para. 73.

[466] Respondent's Counter-Memorial, para. 73.

[467] Respondent's Counter-Memorial, para. 70; Concession No. 19 of 3 September 2009, Art. 4, **C-0017**.

[468] Respondent's Counter-Memorial, para. 74.

[469] MinTIC, General data on the .co domain as at 31 March 2021, accessible at: <https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html>, **C-0120** (estimate calculated on the basis of the amount received by MinTIC between 2010 and 2014, USD 6.618.671, representing 7% of the total revenue generated by .co domain. The exchange rate used is the Market Representative Rate (Tasa Representativa del Mercado) set by the Colombian Central Bank as at 31 December of each year). *See also* Respondent's Counter-Memorial, para. 72.

[470] Respondent's Counter-Memorial, para. 74. *See also* Neustar, Annual Report for the fiscal year ended December 31, 2014, 2015, p. 58, **R-0004**.

Respondent's theory of the case is correct, meaning that Neustar did not consider that it would be able to renew the Concession, Neustar would have had to expect a profit of at least US$113.7 MM in the final five years of the concession. The performance of the Concession up until the point of the sale in no way supports such a figure. In fact, Neustar paid more than the entire revenue generated (much less profit) in the first five years of the concession period. This pricing is simply not consistent with the economics of the Concession had the extension not been expected. The economics of the sale, which was known to Respondent contemporaneously, made it clear that Neustar expected a ten-year renewal of the Concession.

310. Respondent further makes much of the existence of a contingent US$6 MM payment in the Neustar-Arcelandia agreement.[471] Respondent submits that "the transaction with Arcelandia appears to have factored in the potential renewal of the 2009 Contract."[472] Respondent thus appears to assume that this an admission of some sort that the original pricing in the purchase agreement was only ever anticipated to cover the five years of the original concession term.

311. Respondent misunderstands this provision, which actually proves Neustar's submission rather than proving Respondent's. Respondent must assume that Neustar valued the remaining five years of profit under the concession at $113.7 MM in order to advance its argument. This would mean that should the concession have been renewed for ten years, the value lost by Arcelandia would have been approximately double that, US$227.4 MM. (Again, this is according to the logic of Respondent's reasoning.) A payment of US$ 6 MM, as is contemplated under the sale agreement, is somewhere around 2.6% of that value. It is nonsensical that Arcelandia would have valued the ten-

[471] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 74-75.

[472] Respondent's Counter-Memorial, para. 75.

year renewed Concession at such a low figure. Notably, no risk to Neustar of non-renewal exists, as the amount would be payable, on Respondent's theory, only upon renewal. Contemporaneously, therefore, Neustar and Arcelandia proceeded on the basis of a 15-year concession term, not a five-year term. And Respondent expressly sanctioned the transaction on those specific terms.[473]

312. In light of the approval granted by Respondent, it is thus clear that Respondent violated its obligations under the TPA by approving a transaction that it knew included an understanding of a right to renew. Respondent caused Neustar to make significant capital investments by building up the .co domain brand and its reputation. Respondent further caused .CO Internet to believe that the Concession would be renewed for at least a period of ten years. Then, Respondent failed to negotiate in good faith (or really at all) with Neustar regarding the renewal. Instead, Respondent announced a new tender within days of receiving some initial research on international pricing terms in ccTLD contracts in 2019.[474]

313. There is no doubt, and Respondent does not seriously contest, that Neustar made substantial investments to develop the .co domain.[475] These investments occurred, of course, after Neustar acquired .CO Internet. Respondent, therefore, has obtained the benefit of these investments, which Neustar made on the legitimate expectation and

[473] Respondent's Counter-Memorial, para. 73.

[474] *See* Victor Munoz (@Vicmunro), Tweet on the President's Announcement (17 March 2019), **C-0040**; 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 NEUVO SIGLO, **C-0041**.

[475] *See*, *e.g.*, Claimant's Memorial, paras. 51-64.

(continued)

correct understanding that Respondent would renew the Concession. Respondent has, in essence, received a windfall through its actions.

314. Respondent agrees with Neustar that the .co domain has grown greatly in value during .CO Internet's marketing and operation of the domain.[476] The appreciation in the .co domain is attributable exclusively to Neustar and Neustar's efforts (through its investment vehicle, .CO Internet): (1) the value of the domain name was not in the marketing to just Colombian residents but instead was in the ability to attract Colombians and non-Colombians to the domain; (2) MinTIC lacked any expertise to assess the domain name industry or to create such an expansion; (3) Neustar in fact achieved a significant expansion of the domain globally.

315. Respondent argues that Neustar somehow received a windfall because of the revenue it received under the Concession through .CO Internet.[477] But this is not the case. Respondent has received the windfall by coercing a new tender and new terms that do not account for the investments made by Neustar and the understanding and operation of the renewal. Neustar seeks only to have that remedied.

B. Respondent Has Acted in a Discriminatory Manner in Violation of Articles 10.3 and 10.4 of the TPA

316. Neustar maintains and incorporates by reference its claims that Respondent has violated its national treatment and most-favored nation treatment obligations under the TPA.[478]

[476] *See*, *e.g.*, Respondent's Counter-Memorial, para. 71 ("Due [to] … .CO Internet's efforts to market the .co domain as an alternative to .com, 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. . . . [T]he number of domains would reach nearly 2.3 million by the end of the term of the 2009 Contract, making the .co domain one of the 20 largest TLDs worldwide.").

[477] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 26, 29, 72.

[478] Claimant's Memorial, Section IV.B.

To recall, Article 10.3 of the TPA extends national treatment protection while Article 10.4 of the TPA extends MFN protection, as follows:

> **Article 10.3**
>
> 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.
>
> 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.
>
> **Article 10.4**
>
> 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.

317. Neustar and Respondent agree that the standard for national treatment and MFN treatment is the same,[479] the difference being that one applies to a distinction between the investments of nationals and the other to a distinction between investments made

[479] Respondent's Counter-Memorial, para. 402.

(continued)

by investors from third states.[480] However, Respondent maintains that Neustar's allegations do not fall within the scope of Articles 10.3 or 10.4 of the TPA, and asserts that – in any event – Neustar's claims fail on the facts of this case. As demonstrated in the remainder of this part, Respondent's position is unsupported.

1. Respondent's Allegation that Neustar Has Not Raised a Claim of Discriminatory "Treatment" Is Self-Defeating

318. Respondent asserts that Neustar's claims fall outside the scope of the MFN or national treatment clauses of the TPA, because "Colombia's individual decision not to renew the 2009 Contract and to launch a new tender process" does not constitute "treatment" actionable under a discrimination claim.[481] Respondent's position is unsupported by the law and by the facts in this dispute.

319. As excerpted above, neither Article 10.3 nor 10.4 limits the "treatment" for purposes of non-discrimination, providing broadly for treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[482] The same provision (and argument of a respondent State) was considered by the tribunal in *Merrill & Ring v. Canada*, 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

[480] Respondent's Counter-Memorial, para. 398.

[481] Respondent's Counter-Memorial, paras. 411-412.

[482] TPA, Article 10.3.4 and Article 10.4.1, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**.

> 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 Columbia. The Tribunal is thus satisfied that the treatment complained of has been adequately identified by the Investor.[483]

320. The tribunal in *Bayindir v. Pakistan* likewise confirmed that the scope of "treatment" under national treatment and MFN clauses are broad, stating:

> 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."[484]

321. As Neustar demonstrated in its Memorial, it was subject to "treatment" by Colombia by virtue of Respondent's actions and conduct relating to, *inter alia*, the management, conduct, operation, and sale of its investment. In particular, and among other actions, Colombia: ignored Neustar's attempts to engage under the regulatory framework on the management and operation of its investment;[485] abruptly announced a public tendering process with respect to the management, conduct and operation of the .co domain, the subject of Neustar's investment;[486] and ignored Neustar's offer to formalize the

[483] *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award (31 March 2010), para. 79, **CL-033**.

[484] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 388, **CL-104**.

[485] *See*, *e.g.*, Claimant's Memorial, paras. 65-73.

[486] *See*, *e.g.*, Claimant's Memorial, paras. 74-87.

(continued)

extension and as a basis to negotiate the extension of the Concession, and therefore affecting the operation of Neustar's investment.[487]

322. Consequently, Respondent's attempt to portray its conduct as an "individual decision" not constituting "treatment" under Articles 10.3 and 10.4 of the TPA is clearly misleading, and should be rejected.

2. Respondent's Argument that .CO Internet Did Not Find Itself in Like Circumstances to Its Comparators is Absurd

323. The Parties essentially agree on the legal standard regarding the question of whether two companies are in "like circumstances", as Respondent expressly concedes that "Neustar correctly lists the criteria to be taken into account towards an assessment of 'like circumstances.'"[488] For the tribunal's convenience, the factors to be taken into account, as laid out fully in Neustar's Memorial, are as follows:

- Tribunals have considered whether the comparators: (1) operate in the same business or economic sector; (2) produce competing goods or services; or (3) are subject to a comparable legal regime or requirement.[489]

[487] *See*, *e.g.*, Claimant's Memorial, paras. 106-125.

[488] Respondent's Counter-Memorial, para. 417.

[489] Claimant's Memorial, para. 246, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), para. 78, **CL-021** ("the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector"); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 199, **CL-071** (In analyzing like circumstances "tribunals convened under Chapter Eleven have focused mainly on the competitive relationship between investors in the marketplace."); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), para. 167, **CL-073** ("the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like….").

(continued)

- The factors are assessed in the facts as a whole, with no one factor being dispositive. And the presence of one factor alone may be sufficient to establish the presence of like circumstances.[490]

- The first factor (same economic sector) focuses on the type of commercial operations rather than their scale, looking to the economics of services offered, the logistics and internal control on those operations, and the customer base.[491]

- The second factor (competing services) looks to the level of competition between two services, looking in particular to whether one company can take away business from another.[492]

- The third factor (subject to the same legal regime) receives significant weight in NAFTA disputes, which arise from the same legal regime as the TPA.[493] Being subject to the same remedies is one way to establish whether the same legal regime applies. Being subject to the "same regulatory measures" is another way of measuring the third factor.

324. As demonstrated in its Memorial, Neustar's comparators fall into all three categories. Neustar operates with other businesses in the telecommunications sector. Neustar provides a service similar to other services in Colombia. And Neustar's investment operates under the same legal regime as other investors. In fact, with respect to the last

[490] Claimant's Memorial, para. 246.

[491] Claimant's Memorial, para. 247.

[492] Claimant's Memorial, para. 248.

[493] Claimant's Memorial, para. 249.

(continued)

category, many of the concessions that were negotiated and extended include the same or similar language regarding extensions.[494]

325. Respondent asserts, however, that: (1) "Neustar's alleged comparators do not operate in the same 'economic sector' as .CO Internet";[495] (2) "there is no competitive relationship between the comparators cited by Neustar and .CO Internet";[496] and (3) "the regulatory framework of the .co domain in which .CO Internet operates is substantially different from that of the alleged comparators."[497]

326. Before considering Respondent's arguments seriatim, it is astounding to note that Respondent would at all raise an issue with regard to the comparator issue. As a reminder, Respondent's defense in its Counter-Memorial is that its actions affirmatively to put the .co domain out for tender was taken "in line with the established jurisprudence of the Colombian Constitutional Court, according to which the inclusion of automatic renewal clauses in public contracts is contrary to, *inter alia*, the fundamental principle of free competition enshrined in the Colombian Constitution."[498] Respondent thus uses as an affirmative defense that the jurisprudence of the Colombian Constitutional Court would not be distinguishable in the case of an internet domain concession dispute. If Respondent is heard to submit that the present category of contracts is not distinguishable from the public contracts to which the Colombian Constitutional Court referred, it cannot now be heard to deny that this is the correct class of comparators. Having made an unequivocal choice in the Counter-Memorial in this respect, it would lie ill in the mouth of Respondent to contradict it within the very

[494] Claimant's Memorial, para. 250.

[495] Respondent's Counter-Memorial, para. 418.

[496] Respondent's Counter-Memorial, para. 419.

[497] Respondent's Counter-Memorial, para. 420.

[498] Respondent's Counter-Memorial, para. 44.

same document. The question of comparators therefore is open and shut. Given this self-contradiction in Respondent's briefing, it is not surprising that the specific arguments Respondent advances regarding Neustar's comparators cannot be credited.

327. First, in its Memorial Neustar submitted that it operates with other businesses in the telecommunications sector (factor one – same economic sector), and thus relied upon comparator concessions from the telecommunications sector.[499] Respondent argues that these comparators "do not operate in the same 'economic sector' as .CO Internet",[500] and then sets forth a convoluted attempt to try and differentiate different "business sectors" within the telecommunications sector itself.[501] These efforts are unavailing, and Respondent is unable to point to any legal authority in support of its proposed "slice and dice" approach to identifying an economic sector.

328. Moreover, Respondent's position is entirely undermined by its broader approach in regulating the .co domain as part of the telecommunications sector. For example, and as Respondent explains in its Counter-Memorial, MinTIC issued Resolution 600 of 5 May 2002, "whereby the .co domain was recognized as a 'public asset in the telecommunication sector, the administration, maintenance and development of which shall be planned, regulated and controlled by the State.'"[502] The administration of the .co domain therefore fell under the purview of the Minister of Telecommunications, Ms. Constaín – Respondent's witness in this arbitration,[503] who was "directly in charge

[499] Claimant's Memorial, paras. 206, 235.

[500] Respondent's Counter-Memorial, para. 418.

[501] Respondent's Counter-Memorial, para. 418.

[502] Respondent's Counter-Memorial, para. 40, citing Resolution 600 of 7 May 2002 (original version), Article 1, **R-0020**.

[503] *See*, *e.g.*, Respondent's Counter-Memorial, para. 3; First Witness Statement of Sylvia Constaín (23 February 2022), **RWS-01**.

(continued)

of the definition and/or implementation of Colombia's telecommunications policy at the time of the dispute.[504] Moreover, Respondent notes in its Counter-Memorial, that on 3 December 2018, MinTIC issued Resolution 3278 of 2018 which clarified the composition of the Advisory Committee on the .co domain. As recalled by Respondent, the Advisory Committee included, along with the Vice Minister of Digital Economy, the Director of Telecommunications Industry Development, as well as MinTIC officials. [505] That Director of Telecommunications Industry Development was Mr. Castaño, another of Respondent's witnesses in these proceedings.[506] Mr. Castaño also expressly refers to the .co domain as forming part of the telecommunications sector in his witness statement, [507] and further confirms that MinTIC "contracted the Telecommunications Union ("**ITU**"), on the basis that this established international institution could provide experts in domain names".[508]

329. Thus, on the basis of Respondent's own submissions and own laws, the .co domain clearly forms part of the telecommunications sector, *the same economic sector identified by Neustar* in its Memorial.[509] Respondent's attempts to escape this reality are unconvincing, and should be rejected.

[504] Respondent's Counter-Memorial, para. 3.

[505] Respondent's Counter-Memorial, para. 93, citing Resolution 3278 of 3 December 2018 (original version), Art. 1, para. 1, **R-0034** (emphasis added).

[506] Respondent's Counter-Memorial, para. 93; First Witness Statement of Iván Darío Castaño Pérez (24 February 2022), **RWS-02**.

[507] First Witness Statement of Iván Darío Castaño Pérez (24 February 2022), para. 8, **RWS-02**.

[508] First Witness Statement of Iván Darío Castaño Pérez (24 February 2022), para. 16, **RWS-02** (emphasis added).

[509] Claimant's Memorial, paras. 88-97, 206.

(continued)

330. Second, in the Memorial Neustar explained that it provides a service similar to other telecommunications services in Colombia (factor two – competing services).[510] Respondent submits, without much analysis, that there is no competition between .CO Internet and other telecommunications services, because "the services they provide cannot be mutually replaced".[511] This test, which appears to be of Respondent's own making, is incorrect. As the tribunal in *Occidental v. Ecuador* noted, the phrase "in like situations" should not be interpreted narrowly. Instead, the tribunal noted, the purpose of discrimination provisions in investment treaties (compared with, for example, trade treaties) is to ensure that investors are not placed at a disadvantage in foreign markets. In eschewing the World Trade Organization ("WTO") standard of "directly competitive or substitutable products", the tribunal found that an exporter in the oil sector was "in like situation" to exporters exporting flowers or seafood for purposes of the applicability of VAT reimbursements.[512] Similarly, the tribunal in *Methanex v. United States* rejected the notion that WTO provisions should be transported to investment provisions to require complete substitutability.[513]

331. Thus, whether the internet can be "mutually replaced" with other telecommunications services is inapposite. Internet services, like those in issue here, are competing services with businesses in the telecommunications sector. For example, successful domain name administration creates the market place in which online services compete with

[510] Claimant's Memorial, para. 248, citing *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), paras. 120, 130, **CL-074**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 251, **CL-032**.

[511] Respondent's Counter-Memorial, para. 419.

[512] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004), paras. 173-176, **CL-067**.

[513] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part IV, Chapter B, paras. 29-37, **CL-050**.

(continued)

traditional media. That is, the better the ".co" brand, the more likely it is to attract competitors to other telecommunications services. Equally, the better the ".co" brand, the more likely it is to take business away from other telecommunications competitors.[514] To assert that there is no competitive relationship between concessions renewed for companies in the telecommunications sector and the Concession in this dispute is entirely disingenuous.

332. Third, and as explained by Neustar in its Memorial, the contractual or regulatory regime governing an investment may be relevant in determining whether the investors being compared are in like circumstances (factor three – subject to the same legal regime).[515] Once again, Respondent rejects this argument and – somewhat confusingly – argues that the "regulatory framework of the .co domain … is substantially different from that of the alleged comparators."[516]

333. Respondent's argument is, once again, completely undermined by the position it has taken throughout its Counter-Memorial. To recall, one of Respondent's central defenses is that renewal of the Concession would "create 'an unnecessary risk regarding compliance with the legal framework for the administrative function and contractual activity of the State."[517] This broad position of Respondent places the "legal framework" applicable to the .co domain within the wider legal framework of Colombia, the same framework governing the comparators cited by Neustar. In this

[514] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 251, **CL-032**.

[515] Claimant's Memorial, para. 249, citing *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), para. 166, **CL-073**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 89, **CL-033**.

[516] Respondent's Counter-Memorial, para. 420.

[517] Respondent's Counter-Memorial, para. 106.

(continued)

context, Respondent's attempts to atomize the telecommunications industry by submitting that part of .CO Internet's operations were subject to specific regulatory regimes cannot be sustained.[518] In any event, and as outlined above, it is clear that the telecommunications sector was subject to an umbrella regulatory and legal framework under the purview of the Minister of Telecommunications and MinTIC.[519]

334. In sum, and no matter which test applies, Neustar was clearly in "like circumstances" with the comparators it identified in its Memorial: concessionaires in the telecommunications sector.[520]

3. Respondent's Argument that Neustar Was Treated as Favorably as the Comparators Is Untenable

335. In its Memorial, and again in this Reply, Neustar has demonstrated that it was subject to less favorable treatment as compared to others in the telecommunications sector. Respondent objects to this position on two grounds: (1) that Neustar is required to demonstrate that Respondent treated it less favorably on the basis of "nationality"; and (2) Neustar failed to prove it was treated less favorably as a matter of fact. But the law and facts submitted by Respondent serve only to confirm that Neustar was treated less favorably in violated of Articles 10.3 and 10.4 of the TPA.

336. First, Neustar submitted, consistent with the approach in the *Archer Daniels v. Mexico* decision, that protected investors "and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like

[518] Respondent's Counter-Memorial, para. 420.

[519] *See* para. 323 *supra*.

[520] Claimant's Memorial, paras. 88-97, 206.

(continued)

circumstances." [521] When such treatment is different on its face from relevant comparators, it is *de jure* discriminatory under the treaty. Measures that are facially neutral but result in differential treatment are *de facto* discriminatory in violation of the treaty. *De jure* or *de facto* discriminatory treatment establishes nationality-based discrimination without the need to show animus or even intent.

337. Respondent appears to disagree with this submission, arguing that not only must Neustar prove that there was *de jure* or *de facto* discriminatory treatment between .CO Internet and its comparators, but it must also prove the mental state with which Colombia acted when discriminated against .CO Internet and Neustar. [522] This submission is a specious reading of the both the text of the TPA and of the jurisprudence on which it relies. It is also directly contradictory to the United States non-disputing party submission in this proceeding, which unequivocally states that "[a] claimant is not required to establish discriminatory intent."[523]

338. Articles 10.3 and 10.4 are formulated in broadly similar ways, as discussed above. The relevant treaty protection requires Respondent to "accord investors of another Party treatment no less favorable than that it accords in like circumstances, to" its own investors/ investments or to investors/ investments from third states. The causal connection introduced by Respondent ("because of nationality")[524] is nowhere found in the text of the TPA. The mental reason for the disparate treatment is expressly not an element in the treaty language, and Respondent's attempt to assert otherwise flies in the

[521] Claimant's Memorial, para. 251, citing *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 193, **CL-071**.

[522] Respondent's Counter-Memorial, paras. 425-436.

[523] Non-Disputing Party Submission of the United States of America under Article 10.20.2 of the TPA (13 May 2022), para. 15.

[524] Respondent's Counter-Memorial, paras. 424-436.

(continued)

face of its own avowed textualism and the mandate to interpret the words in the treaty as they appear and in good faith.[525]

339. In addition, tribunals considering national and MFN treatment claims have consistently found that there is no requirement for a claimant to show subjective intent to discriminate.[526] As the tribunal in *Cargill v. Poland* stated (quoting the reasoning in *Feldman v. Mexico*):

> [R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant as that information may only be available to the government. [...]. If Article 1102 violations are limited to those where there is explicit (presumably de jure) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic. investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors.[527]

340. The tribunal in *Bayindir v. Pakistan* also confirmed this position, stating:

> If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e. whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is

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[525] Moreover, there is a good reason that the words in question (that Respondent seeks to impute) are not included in the TPA. International law does, when possible, presume that violations of international law are not done in bad faith. The treaty provision as redrafted by Respondent would in fact mean that every finding of a violation of MFN and national treatment would constitute animus between those two state parties, as the wrongdoing would always be the host state where the investment was made.

[526] *See*, *e.g.*, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004), para. 177, **CL-067**; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018), para. 1206, **CL-131**; *Cargill, Incorporated v. Republic of Poland II*, UNCITRAL, Award (29 February 2008), para. 344, **CL-132**; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 183, **CL-070**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 390, **CL-104**.

[527] *Cargill, Incorporated v. Republic of Poland II*, UNCITRAL, Award (5 March 2008), para. 344, **CL-132**, citing *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 183, **CL-070**.

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> the correct one. This arises from the wording of Article II(2) quoted above. It is also in line with the rationale of the protection as was emphasized in *Feldman v. Mexico*.[528]

341. Unsurprisingly, Respondent's position is also contrary to the jurisprudence upon which it relies, namely *Champion Trading v. Egypt*,[529] *Feldman v. Mexico*,[530] and *Total v. Argentina*.[531]

- In *Champion Trading v. Egypt*, the tribunal set down two elements of a claim for a violation as follows (1) "there shall be no treatment less favourable – *i.e.*, no discrimination – between foreign and national investments when they are in like situations"; and (2) to compare the treatment being received by the foreign investment with the treatment received by local investors to determine whether there was a violation of the provision."[532] Notably, the *Champion* tribunal did not mention animus or the mental state of a respondent in discussing these requirements.

- In *Feldman v. Mexico*, the tribunal expressly rejected the argument advanced by Respondent in this arbitration. The *Feldman* tribunal held that "it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality."[533] Furthermore, and as noted above, the *Feldman* tribunal considered that "[i]t would be virtually

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[528] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 390, **CL-104**.

[529] Respondent's Counter-Memorial, n. 667.

[530] Respondent's Counter-Memorial, n. 667.

[531] Respondent's Counter-Memorial, nn. 671-673.

[532] *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award (27 October 2006), para. 128, **RL-102**.

[533] *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 181, **CL-070**

(continued)

impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason". If discriminatory intent were required, the tribunal explained, "it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors."[534]

- In *Total SA v. Argentina*, the tribunal neatly outlines three – and only three – elements to establish national treatment: (1) a claimant "has to identify the local subject for comparison"; (2) a claimant "has to prove that the claimant investor is in like circumstances with the identified preferred national comparator(s)"; and (3) a claimant "must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor of the specific class of national comparators."[535] Again, the *Total* tribunal did not impose the obligation of a mental state or specific animus that Respondent seeks to incorporate.

342. Thus, Respondent's legal position is fundamentally flawed, and unsupported by its own authorities.

343. The second limb of Respondent's argument – that there was no "detrimental difference in treatment" between Neustar and the relevant comparators fares no better.

344. Neustar in its Memorial submitted that .CO Internet was treated very differently from all of its comparators.[536] .CO Internet and Neustar were not even allowed to negotiate

[534] *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 183, **CL-070**

[535] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 November 2010), para. 212, **RL-111**.

[536] Claimant's Memorial, para. 253.

(continued)

for the extension of the 2009 Concession in earnest. .CO Internet and Neustar certainly were not accorded the extension as required by Article 4 of the 2009 Concession. Other companies in .CO Internet's and Neustar's position with the same underlying contract language routinely received such better treatment.[537]

345. Respondent then seeks to justify its disparate treatment, which fails for several reasons.

346. The first argument Respondent advances is that it simply treated other concessionaires more favorably because in the comparator cases, "[w]hile financial terms were slightly modified, most provisions of the original concessions remained in force and the structure and rationale of the concessions were left untouched."[538] This of course is precisely Neustar's point. These comparator concessions did not face the procedure to remain a concessionaire as .CO Internet did. Given that .CO Internet and these concessionaires were in like circumstances, this observation demonstrates the violation by Respondent.

347. It is further no excuse, as Respondent seeks to assert, that the concessions "included different contractual terms regarding the possibility of renewal."[539] Respondent premised the non-renewal of the 2009 Concession on its pretextual assertion (raised in this arbitration) that such an extension would be impermissible as a matter of administrative law. Respondent never argues that such an extension would be contrary to the specific language of Article 4 of the 2009 Concession. The attempted distinction drawn by Respondent, with respect, therefore does not in fact comport with its own contemporaneous decisions.

[537] Claimant's Memorial, paras. 235-237.

[538] Respondent's Counter-Memorial, para. 439.

[539] Respondent's Counter-Memorial, para. 439.

348. To be clear, the expectation Neustar had as an investor in .CO Internet and the 2009 Concession was that the same benefits of public contracting would be extended to the 2009 Concession in the context of Article 4. That is, Neustar had the expectation that renewal would be done without having recourse to a new tender process, and was conditioned only on the respect by the concessionaire of its contractual obligations. As outlined above, Neustar acted on this belief when it purchased the shares in .CO Internet for the price point the parties negotiated.[540]

349. Respondent's second factual theory is a textbook example of victim blaming: Neustar and .CO Internet gave into their mistreatment by Respondent's authorities because they: (1) attempted to negotiate with Respondent; and (2) in fact participated in and won the second tender process.[541] As described at the outset of this Reply on the merits, the application of coercive pressure to modify contractual rights is not excused by achieving its objective. Neustar responded to the threat of losing its investment and reputation to an illegal and illegitimate tender process by negotiating. Neustar then responded to the threat made real by participating in the tender through .CO Internet.[542]

350. Critically, Neustar knew at all points what Respondent now admits: Respondent simply lacked a good faith basis to ask for more compensation in July 2018 when it first raised its request.[543] (It only learned of industry pricing terms in early 2019 and thus lacked any basis for the July 2018 statement.) Neustar stood to lose significant business due to the reputational harm it would have taken had it lost the 2009 Concession as the market would have assumed Neustar had acted inappropriately.[544] As the choice of .CO

[540] *See* paras. 284 to 288, *supra*.

[541] Respondent's Counter-Memorial, paras. 440-442.

[542] *See* paras. 193 to 195 *supra*.

[543] *See* paras. 223 to 228 *supra*.

[544] *See* paras. 194 to 198 *supra*.

Internet and Neustar as concessionaire under the second illicit tender process show, nothing could have been further from the truth. But reputations are harmed by gossip as often as they are hurt by facts.

351. To be clear, .CO Internet never should have been subjected to a material alteration of financial terms as the July 2018 report demanded. That the July 2018 so demanded is outright discriminatory. Everything that followed simply made matters worse.

352. In this case, it should be noted that Respondent was fully aware during the relevant period of time that .CO Internet was U.S. owned. Respondent had signed off on the transfer of shares in .CO Internet to Neustar.[545] And Respondent was also fully aware that Neustar at all relevant times was actively considering TPA proceedings.[546] Respondent's conduct therefore, at the relevant times, was purposefully aimed at a foreign-held company at the relevant point in time. It is therefore on the whole clear that the conduct was not only actually discriminatory, but intentionally so. While, as above, a claimant is not required to show motive, this just serves to further support Respondent's violation of Article 10.3 and Article 10.4 of the TPA.

4. Respondent's Decision-making Cannot Be Saved by Public Policy Rationales

353. Respondent further asserts that "[e]ven if" there had been discriminatory treatment, Neustar's claim nonetheless fails because Colombia's actions were justified by "at least two public policy objectives":[547] (1) to increase MinTIC's share of proceeds while avoiding "significant legal risk" by violating "fundamental Colombian law principles";

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[545] Respondent's Counter-Memorial, para. 73.

[546] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 161-169.

[547] Notably, Respondent does not contest that it bears the burden of proof to rebut that discriminatory treatment can be excused on the basis of a public policy rationale.

(continued)

and (2) to "adapt the conditions of administration and operation of the .co domain to the evolving realities of the domain name industry."[548]

354. However, and as discussed at length in Part II(B)(4) above, Respondent's "public policy objectives" are contradictory to the evidence. In the interests of efficiency, Neustar incorporates those arguments – summarized in brief below – by reference here.

- Respondent's desire "to obtain an increase in MinTIC's share of proceeds resulting from the administration of the .co domain" is belied by its own evidence that it delayed review of the contract for presidential elections, and failed to even consider Neustar and .CO Internet's numerous offers to discuss a modification of the financial terms of the Concession.[549]

- Respondent's *post hoc* declaration that it was trying to ensure that it would not violate principles of "administrative and competition" law is nonsensical. It would be illogical for Colombia to have incorporated the clause on renewal in the 2009 Concession if it were contrary to its own administrative law, and in its July 2018 Respondent barely addressed the importance of competition or the administrative function of public procurement. If Colombian administrative and competition law could be at risk of fundamental breach, as Respondent now claims, surely it would have been front and center of the former government's consideration in 2018.[550]

- Respondent's desire to adapt the conditions of administration and operations of the .co domain to the evolving realities of the domain name industry, in order to align with best practices, and notably obtain an increase in MinTIC's share of proceeds"

[548] Respondent's Counter-Memorial, para. 448.

[549] *See*, *e.g.*, Claimant's Memorial, paras. 66-73, 107-114.

[550] *See* paras.180 to 182 *supra*.

(continued)

is contradicted by its own actions.[551] Had Respondent held such a desire, it would have put in place the structures to receive advice on these factors in 2017 or 2018 at the latest. Respondent refused to do so. Rather, by its own admission, it was only in 2019 that Respondent received initial research on these issues.[552] Respondent then acted within days once it had this preliminary research in hand. Less than two weeks passed between 6 March 2019 correspondence in which the government told Neustar extension of the 2009 Concession might be possible and the 18 March 2019 decision to put it out to tender.[553]

355. In sum, Respondent's accusation that Neustar is acting "in utmost bad faith" by questioning the alleged policy objectives of Colombia's conduct is entirely unsupported.[554] As clearly demonstrated by the above, if any party is acting in bad faith it is Respondent through its attempts to develop *post hoc* rationalizations to justify its wrongful conduct.

5. Notwithstanding Articles 10.3 and 10.4, Respondent Was Obliged to Protect Neustar's Confidential Business Information

356. Finally, Neustar notes that Respondent has failed to address Neustar's claim that it violated the terms of Article 10.14 of the TPA notwithstanding its conduct pursuant to Articles 10.3 and 10.4 of the TPA.[555] While Respondent has raised admissibility

[551] *See* paras. 241 to 243*supra*.

[552] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), Consultancy services related to the .co domain, May 2019, **C-0067**.

[553] In a letter dated 6 March 2019 (received on March 8), MinTIC asserts that "it is in the process of evaluating the current concession" but that the other possible scenario was a new tender. **C-0033**. In addition, in Minutes No 2 of 18 March 2019, the Committee asserts that "it is necessary to give adequate consideration to all the options indicated" – i.e., an extension or a tender. **C-0039**.

[554] Respondent's Counter-Memorial, para. 447.

[555] Claimant's Memorial, para. 264.

objections with respect to Neustar's position under Article 10.14, these objections are unfounded as demonstrated in paragraphs 114 to 117 above.

357. In its Counter-Memorial, Respondent does not directly respond to Neustar's arguments and thus has acquiesced to Neustar's submission on this issue. To the extent that Respondent intends to ambush Neustar by addressing, for the first time, any argument with respect to these legal standards, this would be procedurally improper under Rule 31(3) of the ICSID Arbitration Rules, which provides that:

> A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law *in the last previous pleading*; a statement of law in answer thereto; and the submissions.[556]

358. As made clear by these emphasized portions, the Counter-Memorial should have addressed statements of law as filed in the Memorial (as the "last previous pleading"). Any attempt on the part of Respondent to address issues in its Rejoinder should be rejected as depriving Neustar of due process.[557]

C. Respondent Failed to Protect Neustar's Investment Against Unreasonable Measures in Violation of Article 4(1) of the Swiss-Colombia BIT

359. In its Memorial, Neustar explained that Article 4(1) of the Swiss-Colombia BIT applied to this dispute by operation of the MFN clause of the TPA. Article 4(1) of that agreement sets out a prohibition of interfering with qualified investments through "unreasonable" measures.[558] As Neustar explained, this provision is broader than that

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[556] Emphasis added.

[557] *See Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum (30 December 2016), para. 380, **CL-083** ("The Tribunal is aware that the provisions relating to written submissions contained in Rule 31 of the ICSID Arbitration Rules are closely related to a party's fundamental procedural right to be heard…").

[558] Claimant's Memorial, para. 266.

(continued)

of "arbitrary measures", and are those that "are irrational in themselves or result from an irrational decision-making process."[559] Neustar demonstrated that Respondent's actions were unreasonable, and the result of such an irrational decision-making process.[560]

360. In its Counter-Memorial, Respondent asserts that Article 10.4 of the TPA cannot be interpreted to apply in this case and, even if it could, there has been no violation of Article 4(1) of the Swiss-Colombia BIT.[561]

361. First, the Tribunal does not need counsel to explain to it that there is a fundamental jurisprudential split on the meaning and scope of MFN clauses. Respondent, with somewhat uncharacteristic (if laudable) brevity, has advanced one side of this argument. The other side of this argument is that tribunals have also routinely applied MFN provisions to accord FET protections of other BITs.[562]

362. Further, Respondent again advocates that the TPA must be interpreted in line with the VCLT "in good faith and in accordance with their ordinary meaning in context".[563] Simultaneously, however, Respondent relies on the unstated intent of the parties as a guide to interpretation to assert that the MFN clause included in Article 10.4 of the TPA

[559] Claimant's Memorial, para. 267, citing *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para 1452, **CL-039**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1. Decision on Liability (3 October 2006) para. 158, **CL-051**.

[560] Claimant's Memorial, paras. 268-269.

[561] Respondent's Counter-Memorial, para. 458.

[562] *See*, *e.g.*, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 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), para. 571, **CL-118**.

[563] Respondent's Counter-Memorial, para. 457.

(continued)

cannot be interpreted as Neustar submits.[564] Not only is this contrary to the terms of the VCLT, but Neustar notes that the United States – one of the parties to the TPA – is silent on this point in its non-disputing party submission. Consequently, Respondent's unilateral interpretation of the TPA for purposes of this arbitration should be given little weight.

363. Second, and with respect to the facts of the claim, Neustar again incorporates its argument from the Memorial by reference here.[565] However, Respondent declares that Article 4(1) of the Swiss-Colombia BIT does not apply because "it has already been proven that Colombia acted entirely rationally".[566] However, it is not sufficient for a respondent State to just declare that it acted rationally. As described in detail throughout this Reply, Respondent's conduct was irrational and unreasonable because, *inter alia*:

- it refused to engage with Neustar and .CO Internet in good faith, despite Respondent's own evidence confirming that Colombia was satisfied with Neustar's performance, and declared the .CO Domain "trustworthy, secure and stable."[567]

- the basis of its decision-making process was a political decision by the Colombian president, involving dubious circumstances with respect to another potential bidder, Afilias.[568]

- its conduct was inconsistent with its practice to routinely extend similar concessions for other investors.[569]

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[564] Respondent's Counter-Memorial, para. 457.

[565] Claimant's Memorial, paras. 268-269.

[566] Respondent's Counter-Memorial, para. 458.

[567] *See*, *e.g.*, Claimant's Memorial, para. 64, citing Minutes of Meeting 2-2017, **C-0025**.

[568] *See*, *e.g.*, Claimant's Memorial, para. 75.

[569] *See*, *e.g.*, Claimant's Memorial, paras. 88-97.

364. Moreover, Respondent's treatment of .CO Internet was not in keeping with the demands of good faith. Good faith demands at a minimum that Respondent would have negotiated in earnest with .CO Internet given the language in Article 4. Respondent acted in bad faith when it failed to do so without any reasonable basis and by communicating pretextual reasons. It would have required the kind of transparency Respondent failed to demonstrate from 2017 onwards. Consequently, Respondent also breached Article 4(1) of the Swiss-Colombia BIT.

IV. RELIEF REQUESTED

365. For the reasons stated, Claimant respectfully requests that the Tribunal render an Award ordering:

a. that Respondent has breached 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

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

Dated: 29 July 2022
Washington, D.C.

Respectfully submitted,

Steptoe & Johnson, LLP
Teddy Baldwin