ICSID CASE NO. ARB/20/7

IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

CLAIMANT

AND

REPUBLIC OF COLOMBIA

RESPONDENT

RESPONDENT'S REJOINDER ON JURISDICTION AND MERITS

---

4 November 2022

CONTENTS

1. The Republic of Colombia ("**Colombia**" or "**Respondent**") respectfully submits this Rejoinder on Jurisdiction and the Merits ("**Rejoinder**") in accordance with the Revised Annex B to Procedural Order No. 1 of 9 July 2021, and in response to the Reply on Jurisdiction and the Merits ("**Reply**") filed by Security Services LLC, d/b/a Neustar Security Services ("**Neustar**" or "**Claimant**"[1]) on 22 October 2021.

2. Colombia's Rejoinder is accompanied by:

   - Factual Exhibits **R-0088** to **R-0094**; and
   - Legal Exhibits **RL-117** to **RL-191**.

3. After a brief executive summary (**1**), this Rejoinder shows that the claims brought by Claimant do not fall within the Tribunal's jurisdiction (**2**). In any event, Respondent hereby reiterates that Claimant's claims on the merits are unsupported, contradictory, and deprived of any basis in law or facts (**3**). Accordingly, Respondent requests that all claims be dismissed (**4**).

1. EXECUTIVE SUMMARY

4. The present proceedings have no valid *raison d'être*: Claimant has no legitimate claims and is merely putting forward unsubstantiated allegations of 'corruption' and 'sovereign intervention', while blatantly disregarding the clear contractual language of the 2009 Contract. Yet, Claimant's Reply further evidences that in addition to being outside the Tribunal's jurisdiction, its unusual claims are totally bereft of any evidentiary or legal support. Remarkably, Claimant has failed to submit any conclusive documentary evidence to support its unfounded allegations, and has abstained from presenting any fact or expert witnesses.

5. Claimant's allegations of breaches by Colombia of its international obligations under the TPA all essentially rest on the premise that MinTIC had an obligation to renew the 2009 Contract but failed to do so at the end of its term. Yet, Claimant's entire case theory simply ignores the language of Article 4 of the 2009 Contract, which provides that "*the agreed term **may be renewed** in the manner and terms established by the legislation in force at the time of the renewal. […]*".[2] As Respondent explained in the Counter-Memorial, it is clear on the face of this provision (which uses "*podrá*", i.e. "*may be*", and not "*deberá*" or "*shall be*" for instance)[3] that the renewal was only a *possibility* open

---

[1] As per Claimant's letter of 29 July 2022. As per Respondent's email of 12 August 2022, Respondent has reserved all of its rights in relation to the corporate changes referred to in Claimant's letter of 29 July 2022, and the ensuing update to the reference of the present proceedings for administrative purposes. As further set out in Respondent's Application of 5 September 2022, Letter of 28 September 2022, and below at Section 2.1, Respondent does not consent to this change of party midway through the proceedings, which Claimant has failed to properly and timely document.

[2] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]** (emphasis added).

[3] *See, for instance*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (English version), Articles 5, 8 **[RL-117]**; Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Spanish version), Articles 5 , 8 **[RL-118]**: the relevant part of Article 5 (English version) provides that "*[r]ecognition and enforcement of the award **may be refused** […] only if […]*". The Spanish version provides: "*Sólo **se podrá** denegar el reconocimiento y la ejecución de la sentencia […]*". Similarly, Article 8 (English version) provides that "*[t]his Convention **shall be ratified** […]*", with the Spanish version stating: "*[l]a presente Convención **deberá** ser ratificada […]*".

should both parties to the contract (not only MinTIC, but also .CO Internet) agree on it.[4] In fact, Neustar and .CO Internet themselves acknowledged as much in several communications to MinTIC starting in late 2018,[5] stating for instance on 5 March 2019 that "*the renewal of the contract is not automatic […]*."[6]

6. Claimant's Reply only goes to confirm its inability to overcome this fatal flaw to its claims, with Claimant modifying its translation of Article 4 of the 2009 Contract between the Memorial and the Reply. While Claimant had acknowledged in the Memorial that such provision states that the term "*may be renewed*" (original version: "*podrá ser prorrogado*"), Claimant has pivoted in its Reply to alleging that the translation of "*podrá*" is "*will be able to*", in an effort to support a new far-fetched interpretation of Article 4 of the 2009 Contract. However, a simple review of the provision and of the previous translation made by Claimant in the present proceedings confirms that it states "*may be*", making it clear that the renewal was only a possibility and certainly not an obligation.

7. In the face of this unequivocal provision, Claimant's only resort is to put forward unsubstantiated allegations that MinTIC's internal decision-making with respect to the 2009 Contract was somehow improper, and that the 2020 Tender Process was marked by corruption, because MinTIC was allegedly seeking to favour another operator. Such allegations are however not only devoid of any merit, but more importantly they also miss the point. Indeed, Claimant still fails to explain how MinTIC's simple exercise of its contractual prerogatives (in the same manner as any private party) could result in the breach of any international obligations under the TPA.

8. In any event, these assertions are nothing more than speculations that Claimant has failed to properly document, and which are actually disproved by the evidence that Respondent submitted with its Counter-Memorial. With respect to the decision not to renew the 2009 Contract, Respondent has demonstrated that its decision-making process was transparent and based on appropriate insights, and that its ultimate decision (which again was the result of its contractual prerogative) pursued a legitimate public policy objective:

   - More than a year and a half before the 2009 Contract's expiration date, MinTIC launched an internal review of the .co domain situation which culminated in the July 2018 Report.[7] This report identified the need to revise the economic conditions of the 2009 Contract,[8] and highlighted that renewing the 2009 Contract with modifications to its economic conditions

---

4 *See, for instance*, Counter-Memorial, para. 28.

5 *See* Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 7 **[R-0035]**.

6 Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.

7 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]**.

8 *See* Counter-Memorial, para. 82; 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]**.

could entail risks of non-compliance with the Colombian legal framework governing public contracts;[9]

- Following .CO Internet's first communication expressing an interest in renewing the 2009 Contract of 20 September 2018, MinTIC formed an internal team supported by external consultants and recognized international experts from the ITU. The investigations of this team confirmed the preliminary findings of the July 2018 Report and concluded that it was necessary to initiate a new tender process, as memorialized in the minutes of the Advisory Committee's 18 March 2019 session.[10] Additionally, Claimant has failed to mention that during the document production phase, Colombia disclosed several documents confirming the materiality of MinTIC's investigations prior to the recommendation not to renew the 2009 Contract (and which Colombia therefore produces with the present Rejoinder);[11]

- In parallel, MinTIC maintained contact with .CO Internet and acceded to its different requests for meetings (while always indicating clearly that renewal was only a possibility and that it was considering its options), and subsequently informed .CO Internet of its decision not to proceed with a renewal.[12]

9. With respect to the 2020 Tender Process, Respondent has debunked in detail all of Claimant's allegations that Colombia orchestrated some sort of 'grand scheme' to replace it with another registry operator, Afilias. Specifically:

- Claimant's main assertion in support of its corruption allegations is that the 2020 Terms of Reference were "*tailormade*" for Afilias.[13] In its Counter-Memorial, Respondent therefore provided detailed documentary evidence that the specific provisions Claimant complained of were not set arbitrarily by MinTIC but instead based on *public* and *justified* recommendations from the ITU experts (which were available to .CO Internet).[14] In any

---

9 *See* para. 201 *infra*; MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 9 **[C-0027]**: "*It is therefore essential to emphasize the necessity that any renewal 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/FONTIC. It is important to take into account that this modification scenario* ***could imply a long and complex negotiation period****, given that the consideration offered [by the proponents] was one of the determining factors at the time of choosing between the proposals,* ***so the concessionaire would undoubtedly request a series of additional modifications to the contract that could eventually be subject to questions regarding*** *[compliance with]* ***the principle of transparency in the current concession***." (emphasis added).

10 *See* Counter-Memorial, paras. 86-98, 103-108.

11 *See* Viveka Consultores, Lucas Quevedo Barrero, Orlando Garcés (GACOF), *Final Report Valuation of .co Domain*, September 2018 **[R-0088]** (disclosed as HLI01); A. Arcila, *Market analysis to ascertain the opportunity of either initiating a new tender process or renew the current concession contract for the .co domain*, March 2019 **[R-0089]** (disclosed as HLI07); A. Arcila, *Presentation to the Advisory Committee on the .co ccTLD policy*, March 2019 **[R-0090]** (disclosed as HLI08); Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]** (while as explained at para. 202 *infra*., Respondent does not waive privilege it notes that two of the documents "*analyzing legal risks associated with renewing the 2009 Concession*" and "*recommending to initiate a new tender process*" are dated March 2019, that is before MinTIC formalized the decision not to renew the 2009 Contract).

12 Counter-Memorial, paras. 99-102, 109.

13 Memorial, paras. 16, 128.

14 Counter-Memorial, para. 129.

event, these provisions were adapted in the course of the 2020 Tender Process, including in response to comments from .CO Internet itself;[15]

- The 2020 Tender Process in general was characterized by a high level of openness and transparency, as confirmed by Ms. Sylvia Constaín (who spearheaded the process in her capacity as Minister of Telecommunications) and Ms. Luisa Trujillo (who was personally responsible for the process in her capacity as General Secretary of MinTIC).[16] For instance, all of the steps of the process were entirely documented on an online public platform accessible to the public, and all interested parties had several opportunities to be heard and submit comments to the tender documents;[17]

- Decisively, Afilias did not even participate in the 2020 Tender Process. Instead, it was .CO Internet which was awarded the 2020 Contract on 3 April 2020, with Neustar and .CO Internet representatives expressing their satisfaction with the results of the process.[18]

10. Claimant fails entirely to tackle this contrary factual record or to address the inconsistencies that riddle its claims, and has not even sought to present a single witness to support its speculative and groundless contentions. Instead, Claimant attempts to rely on mischaracterizations of the evidence on the record or of Respondent's arguments, exemplifying its incapacity to properly support its claims. Most notably:

- As seen above, Claimant modified its translation of Article 4 of the 2009 Contract from "*may be renewed*" to "*will be able to*" in an effort to support a new far-fetched interpretation of this provision, contrary to the clear language of the contract;

- In its Memorial, Claimant argued that the July 2018 Report actually supported a renewal of the 2009 Contract on its terms. As explained in the Counter-Memorial however, Claimant misrepresented the contents of this report, which instead concluded that MinTIC should initiate a new tender process.[19] Claimant has therefore pivoted in its Reply to asserting that the report was entirely "*pretextual*".[20] As Respondent explains below,[21] this new line of argument fares no better than Claimant's previous position because it also ignores the

---

15 Counter-Memorial, paras. 129-135.

16 First Witness Statement of Sylvia Constaín, para. 23 **[RWS-01]**; First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 16-32 **[RWS-03]**.

17 Through, for instance, the submission of comments to the tender documents which were *all* answered in detail by MinTIC. *See*, Counter-Memorial, Section 2.5; *see also*, Response of MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019 **[R-0048]**; Response from MinTIC to observations on draft 2020 Terms of Reference, 20 December 2019 **[R-0049]**; Attendance list of the public hearing on the 2020 Tender Process of 18 December 2019 **[R-0054]**; Observations of .CO Internet to the final 2020 Terms of Reference of 3 January 2020 **[R-0055]**; Colombian Public Procurement Platform (SECOP II), Information on the 2020 Tender Process, accessible at <https://community.secop.gov.co/Public/Tendering/ContractNoticeManagement/Index?currentLanguage=es-CO&Page=login&Country=CO&SkinName=CCE> (retrieved on 22 February 2022) **[R-0042]**.

18 Resolution 649 of 3 April 2020 **[C-0107]**; Video Recording of Public Tender Hearing of 3 April 2020, No. 2, min. 104 **[R-0067]**.

19 *See* Counter-Memorial, Section 2.4(a).

20 *See* Reply, para. 250.

21 *See* para. 215 *infra*.

contents of the report, which notably contained detailed analyses of the 2009 Contract financial terms and the .co domain prospects;[22]

- Claimant argues for the first time that its first communication expressing its intention to renew the 2009 Contract on 20 September 2018, in which it expressly recognized the necessity to revise the economic terms thereof, was elicited through "*coercion*" by MinTIC, because it was responsive to the July 2018 Report (the report which claimant previously argued supported a renewal).[23] In line with its unorthodox approach, Claimant has failed entirely to explain how exactly this report would have 'coerced' them into making their 20 September 2018 offer. Claimant's 'coercion' allegation may be new, but it is just as unsubstantiated as all the past accusations made in this case;

- Claimant places great emphasis on the fact that presidential elections took place in the second quarter of 2018 and that MinTIC had not taken a decision on the .co domain by then to argue that there was undue "*political favouritism*" in the exercise of MinTIC's public administration over the domain.[24] As Respondent explains at paragraphs 158 and 203-204 *infra*., this contention rests entirely on rank speculation with nothing more than selective quotes and wilful misrepresentations of Respondent's Counter-Memorial and supporting documents.

11. In these unusual circumstances, it appears that Claimant fails entirely to discharge its evidentiary burden (no fact witnesses, experts, or documents), or to even represent truthfully the content and context of the documents on which it seeks to rely.

12. However, the Tribunal need not even fully consider the lack of any factual or legal basis of Claimant's defective claims on the merits in order to dismiss them. Indeed, such claims fail jurisdictionally for a number of reasons. As a reminder, Neustar and .CO Internet formally brandished the threat of international arbitration as early as 13 September 2019, i.e. while the 2009] Contract was still in force (with .CO Internet continuing to receive proceeds) and the 2020 Tender Process had not even yet been put in motion. In line with their litigious strategy, Neustar and .CO Internet also initiated proceedings before the Colombian Council of State in an attempt to thwart the intended tender and have MinTIC be ordered to formalize the renewal of the 2009 Contract instead. Neustar and .CO Internet then rushed to submit a defective RFA to ICSID on 23 December 2019 (registered only on 6 March 2020 following substantial changes), while still continuing the Council of State proceedings. At the same time, in order to put all the odds in its favour, Neustar also opted to fully participate in the ongoing 2020 Tender Process. In fact .CO Internet was awarded the 2020 Contract on 3 April 2020, only for Neustar to announce three days later the sale

---

[22] In order to correct once and for all Claimant's constant mischaracterizations of the contents of this report, Respondent will provide a full translation with its Rejoinder in line with Procedural Order No. 1.

[23] Reply, para. 235.

[24] Reply, paras. 231-232.

of .CO Internet to GoDaddy (which Neustar had been negotiating for at least a year). Were that not enough, Neustar then still elected to press forward with the present proceedings, although it was naturally forced to fundamentally alter its allegations and claims in the Memorial that it filed on 22 October 2021.

13. These circumstances affect the Tribunal's jurisdiction. In particular, Claimant's introduction and continuation of the Council of State proceedings is both (i) constitutive of a definitive forum selection under Annex 10-G of the TPA, and (ii) a breach of its waiver obligation under Article 10.18(2) of the same instrument. Further, Claimant failed to respect the mandatory preliminary requirements prescribed by Article 10.16 of the TPA given that its Notice of Intent was premature and defective and its subsequent RFA was submitted at a time when the dispute had not yet crystallized. Additionally, Claimant lacks standing to bring the present claims due to its sale of its investment, .CO Internet, to GoDaddy, and in any event committed an abuse of process both (i) by submitting the RFA prematurely in an effort to secure standing under the TPA, and (ii) using the present proceedings for purposes other than genuine dispute resolution. Finally, Claimant's Reply confirms the exclusive contractual nature of its claims, which are predicated on its fanciful, but ungrounded, interpretation of the terms of the 2009 Contract.

14. In the face of these many flaws identified by Respondent in the Counter-Memorial, Claimant has here again chosen to elude key evidentiary issues and grey areas surrounding the submission of its claims to arbitration, which are critical for the Tribunal to determine whether it has jurisdiction. Rather than engaging fully with Respondent's objections, Claimant limits itself to alleging that they are "*technical or otherwise irredeemably flawed*".[25] However, Claimant's approach to these objections during the document production phase as well as in its Reply only goes to confirm the jurisdictional defaults of its claims. By way of example:

- Claimant is unable to demonstrate that it had "*incurred*" any actual damages or that the dispute had crystallized by the filing or registration of its RFA;

- Claimant fails to adequately address the detailed record of the Council of State proceedings, which shows that they argued breaches of the TPA before this jurisdiction and sought to have the 2009 Contract renewed through these proceedings (in clear breach of the requirement under Article 10.18(3) that an interim action be brought for the "*sole purpose of preserving the claimant's […] rights and interests*");

- Claimant denies that it committed any abuse of process, instead arguing that it did not submit to arbitration prematurely and that it still had standing to sue as of both the date of its submission of the RFA on 23 December 2019 and (more crucially) its registration by ICSID on 6 March 2020. During the document production phase Claimant was ordered to

[25] Reply, para. 17.

disclose documents relating to the timing of the filing of the RFA and the timing of the concurrent sale of its investment to GoDaddy.[26] However, Claimant did not disclose any relevant documents on these two issues, further shedding doubt on its standing to sue and whether Neustar's premature submission of the RFA was abusive;

- Claimant denies that its claims are entirely contractual, relying primarily on its speculative allegations of corruption on Colombia's part. As explained in the Counter-Memorial already, these are no more than a red herring, and Claimant's Reply instead further confirms the contractual essence of its claims, with Claimant undertaking an extremely detailed (and fanciful) interpretation of the terms of the 2009 Contract in support of its claims on the merits.[27] Claimant however still fails to identify any sovereign act by Colombia with respect to the non-renewal of the 2009 Contract, with MinTIC having acted just as any other private party (*iure gestionis*).

15. In short, the complete silence of the testimonial or documentary evidence put forth by Claimant is deafening in this case and must be dealt with by this Tribunal.

16. Finally, on 29 July 2022, Claimant disclosed yet another corporate restructuring which it completed in late 2021, as a consequence of which it intends to have Neustar, Inc. replaced by another entity (Security Services LLC) as claimant in the present proceedings. However, Claimant failed to inform Respondent (let alone to seek its consent), further warranting a dismissal of its claims on jurisdictional grounds.

17. In these circumstances, Respondent strongly objects to the Tribunal's jurisdiction over Claimant's claims, which are in any event bound to fail on the merits since Respondent acted at all times in accordance with its obligations under the TPA. Claimant's abusive and opportunistic attempt to gain access to ICSID jurisdiction in an effort to overcome the clear language of the 2009 Contract, second-guess MinTIC's reasoned and transparent decisions, and extract undue compensation from Respondent should therefore be rejected.

2. NEUSTAR FAILS TO ESTABLISH THAT ITS CLAIMS ARE WITHIN THE JURISDICTION OF THE TRIBUNAL

18. As Respondent demonstrated in its Counter-Memorial, Claimant's claims are afflicted with a number of flaws and discrepancies that prove fatal to establishing the Tribunal's jurisdiction. Not only did Claimant make a definitive forum selection under Annex 10-G of the TPA by seeking to force MinTIC to renew the 2009 Contract through the Council of State proceedings (**2.2**), but it also continued these proceedings after the submission of its RFA on 23 December 2019 in breach of

---

[26] Procedural Order No. 2 of 6 May 2022, Annex B, Request No. 16, pp. 59-62 *("16. Internal Neustar/.CO Internet Documents (including but not limited to, minutes of meetings or authorizations of the board of directors, minutes of meetings of shareholders, Communications from/to/ccing Nicolai Bezsonoff and/or Eduardo Santoyo, internal notes, presentations, memoranda and minutes of meetings) concerning the timing for filing the RFA. Date range: September 2019 – 23 December 2019.*").

[27] *See* Reply, para. 300.

the waiver requirement under Article 10.18(2) of the TPA (**2.3**). In any event, Claimant has failed to engage Respondent's consent due to its failure to respect the mandatory preliminary requirements to submission to arbitration under Article 10.16 (**2.4**) and lacks standing to bring any claims before this Tribunal as a result of Neustar's sale of .CO Internet to GoDaddy and the lack of crystallization of the dispute as at the date of its Notice of Intent and RFA (**2.5**). Claimant's attempt to introduce the present proceedings prematurely to secure standing in the wake of its sale of .CO Internet to GoDaddy, and to use these proceedings for purposes other than genuine dispute resolution, is further constitutive of an abuse of process (**2.6**). If that were not enough, Claimant is seeking to use the present proceedings to have purely contractual claims heard before this Tribunal (**2.7**).

19. Additionally, as explained *supra*, Claimant has transferred its 'MinTIC Claim' to another entity, Security Services LLC, which Claimant intends to have replace Neustar, Inc. as claimant in the present proceedings. This change, of which Respondent was not timely informed and to which it did not consent, further calls into question the adequacy of Claimant's claims and whether the Tribunal has or should exercise jurisdiction. Respondent addresses it at Section **2.1** immediately below.

2.1 Claimant fails to prove that it is entitled to bring claims after its improperly documented purported transfer of the 'ICSID Claim' midway the proceedings

20. On 29 July 2022, concurrently with the filing of its Reply, Claimant notified the ICSID Secretariat of a corporate and procedural change which it misleadingly presented as a change of "*[t]he name of the Claimant.*"[28] As explained in Respondent's Application of 5 September 2022, this modification is however far more substantial than a simple change of name. In reality, Claimant is attempting to replace the original claimant in the proceedings, Neustar Inc., with a third party, Security Services LLC. Claimant has however failed to adequately disclose and properly document this intended replacement or to meet its "*burden of proof to show that it remains entitled to present and recover in respect of [its] claims*" as identified by the Tribunal in Procedural Order No. 3 (**a**),[29] nor to obtain Respondent's consent to this change of claimant at a well advanced stage of the proceedings (**b**), further warranting a dismissal of its claims on jurisdictional grounds.

(a) Claimant has failed to properly document the purported transfer of its claims and to carry its burden to show that it remains entitled to present such claims

21. In its 29 July 2022 letter, Claimant noted "*that the name of the Claimant in this arbitration had changed to 'Security Services, doing business as Neustar Security Services'*". More specifically, it explained that on 1 December 2021 the shareholders of Security Services LLC (and former shareholders of Neustar Inc.) sold Neustar, Inc. to TransUnion and that prior to that transaction, they had completed a "*spin-out*" of Neustar, Inc.'s legacy cloud-oriented security services to operate

---

[28] Letter from Claimant to ICSID Secretariat of 29 July 2022.

[29] Procedural Order No. 3 of 25 October 2022, para. 4(a).

as an standalone company, Security Services LLC. Under the terms of this spin-out, Security Services LLC would have "*retained […] the rights to this arbitration*" as a "*successor of Neustar with regard to the assets it retained to operate the Security Business.*"[30]

22. In connection with this alleged change of name, Claimant disclosed a heavily redacted Unit Purchase Agreement between Neustar, Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (the "**UPA**"),[31] together with a press release,[32] Neustar Security Services' homepage,[33] and a certificate of formation of Security Services LLC.[34] These exhibits provided, for the first time in these proceedings, a glimpse of the extent of the corporate reorganisation and the ensuing procedural changes that the parties to the UPA had sought to implement:

- Pursuant to Section 2.2 of this agreement, Neustar, Inc. agreed to sell its shares in Security Services LLC to Aerial Security Intermediate LLC,[35] a company which Claimant alleges is owned by the same ownership group that Neustar, Inc. was owned by prior to the sale of Neustar Inc. to TransUnion;[36]

- Under Sections 2.1 and 2.3 of the UPA, the Parties to this agreement acknowledged that prior to the closing of the Transaction a "*reorganization*" of the business had been completed, pursuant to which Neustar caused any "*Transferred Security Assets*" and "*Security Liabilities*" to be assumed by "*a member of the Company Group*".[37] Specifically, Section 2.1 provides that:

  > *Prior to the consummation of the Transaction, Neustar has caused […] the Transferred Security Assets to be transferred and assigned to a member of the Company Group, […] and, (iv) the Security Liabilities to be assumed by a member of the Company Group, in each case, in all material respects and substantially in accordance with Exhibit A (the foregoing clauses (i) to (iv) are collectively referred to as the 'Reorganization').*[38]

---

30 Letter to ICSID of 29 July 2022, pp. 1-2.

31 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 **[C-0136]**.

32 Neustar Press Release, 'Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth', 1 December 2021, accessible at: //www.home.neustar/about-us/news-room/press-releases/2021/neustar-security-services-spins-out-with-focused-investment-to-foster-accelerated-growth **[C-0135]** (also produced as **[C-138]**).

33 Neustar Security Services Homepage, accessible at: https://neustarsecurityservices.com **[C-0134]**.

34 Certificate of Formation of Security Services, LLC of 12 April 2017 **[C-0137]**. Following Respondent's Application of 5 September 2022 and Procedural Order No. 3 of 25 October 2022, Claimant also disclosed an unredacted version of the UPA to Respondent's internal and external counsel team. However, as anticipated in Respondent's Application of 5 September 2022, this unredacted version of the UPA does not shed light on the mechanisms whereby the purported transfer of the 'MinTIC Claim' would have occurred prior to the execution of the UPA on 1 December 2021.

35 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Section 2.2; Recitals **[C-0136]**.

36 Letter from Claimant to the ICSID Secretariat of 29 July 2022.

37 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Recitals, Section 1.1 **[C-0136]**.

38 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Section 2.1 **[C-0136]**.

Claimant explains that the goal of this "*reorganization*" was to "*exclude* […] *Neustar's legacy cloud-oriented security services business*" from the sale of Neustar, Inc. to TransUnion, as the shareholders of Security Services LLC (and former shareholders of Neustar, Inc.) wished to retain this business.[39]

- Under Section 5.10, the claims in the present proceedings (termed "**MinTIC Claim**") are characterised as being a "Transferred *Security Asset and a Security Liability*".[40] This is partially confirmed by Annex I to the UPA, which lists the "*International Centre for Settlement of Investment Disputes claim by Neustar, Inc. and .CO Internet S.A.AS. against the Colombian Ministry of Information Technology and Communications (MINTIC)*" as a "*Transferred Security Asset.*"[41]

23. It can therefore be inferred from the UPA that prior to 1 December 2021, Neustar, Inc. completed a "*reorganization*" which apparently entailed the transfer/assignation of the MinTIC Claim from Neustar to another unknown entity, purportedly a "*member of [Security Services LLC's] company group*".[42] As a consequence of this overall "*reorganization*", and specifically this purported transfer/assignation of the MinTIC Claim prior to the UPA, Claimant's letter of 29 July 2022 goes far beyond a simple administrative notification that the Claimant's name had changed. In reality, it relates to a change of party to the proceedings, with Neustar, Inc. being replaced by Security Services LLC as Claimant. Yet, the underlying mechanisms of this change remain highly unclear.

24. *First*, Claimant has provided no details regarding the terms of the transfer/assignation of the MinTIC Claim, and it is not clear either to which "*member of the Company Group*" the MinTIC Claim was allegedly transferred/assigned. The "*Reorganization*" mentioned at Article 2 of the UPA (and in particular the transfer of the MINTIC Claim contemplated as part of this reorganization) necessarily involved the execution of other agreements between Neustar, Inc. and "*a member of the Company Group*" (i.e. potentially Security Services LLC or one of its subsidiaries): yet, Claimant has failed to disclose any of these arrangements.

25. *Second*, Claimant alleges that Security Services, LLC "*retained […] the rights to this arbitration*" and that this entity is the "*successor of Neustar with regard to the assets it retained to operate the Security Busines*".[43] However, nothing in the record confirms these statements.

---

[39] Letter from Claimant to the ICSID Secretariat of 29 July 2022; *see also*, Neustar Press Release, 'Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth', 1 December 2021, accessible at: //www.home.neustar/about-us/news-room/press-releases/2021/neustar-security-services-spins-out-with-focused-investment-to-foster-accelerated-growth **[C-0135]** (also produced as **[C-138]**).

[40] Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Recitals, Section 5.10 **[C-0136]**.

[41] Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Annex I **[C-0136]**.

[42] Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021, Section 2.1. **[C-0136]**.

[43] Letter from Claimant to the ICSID Secretariat of 29 July 2022.

26. Security Services LLC existed since April 2017[44], long in advance of the purported spin out, and Neustar, Inc. similarly continued to exist – albeit under a different ownership – after the completion of the transaction. Additionally, the only document produced in support of this allegation is an extract of Neustar Security Services' website which mentions its "*over 20 years of experience*"[45]. Other than promoting the reliability of its services, this extract does not demonstrate to any extent that Security Services, LLC is a successor of Neustar, Inc. regarding the assets to operate the Security Business, let alone, the MinTIC Claim.

27. *Third*, it bears noting did that Claimant not disclose the transfer of the MinTIC Claim or to request that the record of the proceedings be updated shortly after the completion and public announcement of the spin-out transaction in early December 2021. Instead, as outlined in Respondent's Application of 5 September 2022, Claimant waited until its Reply to disclose this change (after the document production phase had concluded), casting additional doubts over its approach to the present proceedings. Claimant has therefore failed to meet its burden to show that it "*remains entitled to present and recover in respect of [its] claims*",[46] which should result in the outright dismissal of these.

(b) Claimant's failure to inform, let alone obtain Respondent's consent to this 'change of claimant' affects the Tribunal's jurisdiction *ratione voluntatis*

28. In any event, Claimant's purported transfer of the MinTIC Claim after the commencement of these proceedings deprives the Tribunal of jurisdiction in light of Claimant's failure to inform Respondent, let alone obtain Respondent's consent to this attempted change of claimant.[47]

29. Claimant points to the fact that "*the Claimant remains under the same ownership as Neustar prior to the Spin Out*",[48] appearing to imply that it would have a right to change the 'claimant' party in the proceedings provided than the 'new' party is under the same ownership than the 'previous' party. Leaving aside that this allegation is not properly supported,[49] this circumstance does nothing to

---

44 Certificate of Formation of Security Services, LLC of 12 April 2017 **[C-0137]**.

45 Neustar Security Services Homepage, accessible at: https://neustarsecurityservices.com **[C-0134]**.

46 Procedural Order No. 3 of 25 October 2022, para. 4(a).

47 As a preliminary point, it is highly questionable whether the *transfer* itself of the claims was permissible. As recognized by the *Mihaly* tribunal, international claims such as claims under the TPA are subjective rights incapable of contractual assignment (*see Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, para. 24 **[RL-119]** (*"A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit.*"). This is notably because the structure of investor's treaty protection may be considered to have a form of *intuitu personae*, as observed by the late Prof. Crawford: "*Although it is said that that assignment does not affect the claim if the principle of continuity is observed, great care is required:* ***BIT claims are essentially claims intuitu personae under international law, and this imposes limits to their assignability***." *See* J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed. (2012), p. 704 **[RL-120]** (emphasis added).

48 Letter from Claimant to the ICSID Secretariat of 29 July 2022.

49 The single press release produced in support of this allegation does not provide any details about the ownership structure of Neustar, Inc. and Security Services LLC prior and after the UPA: *see*, Neustar Press Release, 'Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth', 1 December 2021, accessible at: //www.home.neustar/about-us/news-room/press-releases/2021/neustar-security-services-spins-out-with-focused-investment-to-foster-accelerated-growth **[C-0135]** (also produced as **[C-0138]**).

cure the fact that Respondent has not consented to this change (or to the fact that Claimant failed even to properly and timely inform the Tribunal, ICSID and Respondent).

30. Indeed, Claimant overlooks that the consent of the Parties to the present proceedings derives from the arbitration agreement which was formed following Neustar's acceptance of Respondent's offer to arbitrate under Article 10.17 of the TPA (although, as explained below, Claimant also failed to engage Respondent's consent for a number of reasons).[50] As such, absent both parties' consent to modify this agreement to arbitrate, the Tribunal only has jurisdiction *ratione voluntatis* within the limits of the initial agreement.

31. Both the TPA and the ICSID Convention confirm that the respondent State's consent is limited to a *specific* Claimant identified at the outset of the proceedings, not just *any* claimant that would appear midway the proceedings. This not only guarantees that the respondent State is informed fully of the identity of the claimant (and that this identity remains constant), but also ensures that the *specific* claimant has respected the conditions to the consent of the respondent State set out in Chapter 10, Section A of the TPA and the ICSID Convention. For instance:

- Article 36.2 of the ICSID Convention provides that the Request for Arbitration must contain the "***identity of the parties and their consent to arbitration***";
- Article 10.16.2 of the TPA specifies that the notice of intent must include the name and address of the claimant;
- Article 10.18 of the TPA requires that the RFA has to be 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 waiver being necessarily filed by a *specific* claimant.

32. These provisions therefore confirm that under the ICSID Convention and the TPA, an investor (or its owners) cannot simply replace the original claimant midway through the proceedings (let alone at an advanced stage of the proceedings as in the instant case).

33. In *Wintershall*, the tribunal was faced with a similar situation, with the claimant investor seeking to have two other companies (which appeared to be under the same ownership as the original claimant), to which it had transferred all rights and interests in the ICSID arbitration, join or replace it as claimant in the proceedings at issue. In line with previous decisions,[51] the *Wintershall* tribunal

---

[50] Pursuant to this Article, "*Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.*" As Respondent further explains below, it is therefore clear that for the respondent State's consent to be crystallized, the claimant investor must respect the conditions set out in the TPA (and more precisely Chapter 10, Section B).

[51] *See Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 123 **[RL-121]** ("***There can be no doubt that such an ex post joinder or consolidation of proceedings is subject to a specific consent of the Parties***. *One might refer to the Wintershall*

observed that a change of claimant in the proceedings would require the respondent State's consent and went beyond a mere procedural issue, and concluded that:

> *In the present case,* ***an objection to the substitution*** *of the Claimant by a new entity during the course of ICSID arbitration proceedings* ***may be well-taken – for lack of empowerment of a Tribunal to do so, absent consent****.*[52]

34. In the instant case, no consent to modify the arbitration agreement, nor to accept the replacement of Neustar, Inc. by Security Services LLC as Claimant in the present proceedings has been accorded by Respondent,[53] depriving the Tribunal of jurisdiction *ratione voluntatis* to continue with these proceedings.

35. In conclusion, Claimant has not carried its burden to show that it remains entitled to present its claims in the present proceedings in light of its failure to properly document its purported transfer of its MinTIC Claim. In any event, Claimant's failure to seek, let alone obtain Respondent's consent to its attempted 'change of claimant' further affects the Tribunal's jurisdiction over its claims.

2.2 Claimant fails to disprove that the introduction of the Council of State proceedings triggered the definitive forum selection clause at Annex 10-G of the TPA

36. Before seeking to submit to arbitration by filing their RFA on 23 December 2019 (which, as a reminder, was only registered by ICSID on 6 March 2020), both Neustar and .CO Internet turned to Colombia's top administrative court, the Council of State, requesting that this jurisdiction order MinTIC to formalize the renewal of the 2009 Contract. Respondent has demonstrated in its Counter-Memorial that this action far exceeded the scope of the exception under Article 10.18(3), which requires that any interim action be "*brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.*" In fact, Claimant's introduction of the Council of State proceedings constituted a definitive forum selection under Annex 10-G of the TPA.[54]

37. To escape the consequences of this strategic choice, Claimant argues in its Reply that the Council of State proceedings fall within the purview of Article 10.18(3) of the TPA (**a**), and that in any event

---

case in this regard which related to the ex post addition (viz. substitution) of a claimant (i.e. the Wintershall Holding AG) to the proceedings, which indeed required the Respondent's consent." (emphasis added)); *Sumrain et al v. Kuwait*, ICSID Case No. ARB/19/20, Decision on the Joinder Application, 5 October 2020, para. 21 **[RL-122]** ("***Once an arbitration agreement comes into existence and the parties to that agreement have been defined, the arbitral tribunal cannot modify that agreement without the consent of all the parties to that agreement****. That is a fundamental principle: a tribunal can interpret and apply an arbitration agreement, but it cannot rewrite or amend it. The joinder of a third party to the arbitration agreement (as a claimant) would undoubtedly constitute a modification to it.*" (emphasis added)).

52 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 59 **[RL-123]** (emphasis added).

53 C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary (Second Edition)* (2009), 'Article 25 – Jurisdiction', p. 185, para. 362 **[RL-044]** ("*If the Host State is unaware of an assignment or has resisted succession, it is less likely that a tribunal will decide that party status under the Convention has been transferred*.").

54 Counter-Memorial, Sections 2.8(b), 3.1.

the fork-in-the-road clause at Annex 10-G of the TPA was not triggered by these proceedings (**b**). Both contentions are however disproved by the facts.

(a) **The Council of State proceedings go well beyond "*the sole purpose of preserving the claimant's […] rights*" as required under Article 10.18(3)**

38. As explained in the Counter-Memorial, Article 10.18(3) of the TPA sets out a limited exception to the waiver requirement under Article 10.18(2) of the same instrument, according to which the claimant shall waive its right to initiate or continue any proceeding with respect to "*any measure alleged to constitute a breach referred to in Article 10.16.*"[55] Article 10.18(3) states, in its relevant part:

> *Notwithstanding paragraph 2(b), the claimant […] and the claimant or the enterprise […] 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****.*[56]

39. While Neustar acknowledges the conditions set out in Article 10.18(3) in its Reply,[57] it then goes on to argue that the Council of State proceedings met these conditions because (i) Neustar and .CO Internet only presented a request for urgent provisional measures under Colombian law,[58] and (ii) the Council of State only carried out a *prima facie* inquiry into Neustar's allegations of breaches under the TPA.[59]

40. Neustar's arguments (which Respondent addresses in more detail at Section 2.2(b) below) nevertheless miss the point: Respondent's position, as set out in the Counter-Memorial, is that the Council of State proceedings do not fall under Article 10.18(3) because they do not meet the requirement that they be brought "*for the sole purpose*" of preserving Neustar's rights during the pendency of the arbitration.[60]

41. Under Article 31.1 of the VCLT,[61] this provision should be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.*"[62] Turning to the ordinary meaning of Article 10.18(3), it stems from the use of the words "*for the sole purpose*" that in order for an action brought by a claimant investor to qualify under Article 10.18(3), such action must have no other objectives than the preservation of the claimant's rights while the international

---

55 Counter-Memorial, paras.187, 236-237.

56 Emphasis added.

57 Reply, para. 22.

58 Reply, paras. 24-27.

59 Reply, paras. 33-36.

60 *See inter alia* Counter-Memorial, paras. 240-248.

61 Article 31 of the Vienna Convention on the Law of Treaties is recognized by the International Court of Justice as embodying customary international law on the interpretation of treaties. *See Kasikili/Sedudu Island (Botswana/Namibia),* Judgement, 13 December 1999, I.C.J. Reports 1999, p. 1045, para. 18 **[RL-124]**; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, 2 February 2017, I.C.J. Reports 2017, p. 3, para. 63 **[RL-125]**.

62 Vienna Convention on the Law of Treaties, Article 31.1 **[RL-010].**

dispute under the TPA is being adjudicated. While the parties to the treaty could have employed another less restrictive term (such as 'main' purpose), they specified that it was necessary that this interim action:

- Be limited to the "*sole purpose*" of preserving the rights at issue in the international dispute; and,
- That it only seek "*interim injunctive relief*" to the exclusion of any "*monetary damages*".[63]

42. The object and purpose of Article 10.18 read in the context of Section B of Chapter 10 of the TPA confirm the limited scope of the exception to the waiver requirement provided by Article 10.18(3). The general object and purpose of a waiver provision such as the one enshrined at Article 10.18 is to shield the State from the risk of multiple proceedings,[64] prevent double recovery, and conflicting outcomes,[65] as recognized by numerous tribunals ruling under treaties containing similar or identical provisions (such as CAFTA). This is confirmed by the United States themselves in their Non-Disputing Party Submission in the present case:

> *This construction of the phrase is consistent with the purpose of this waiver provision: 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).*"[66]

43. This is why the waiver requirement at Article 10.18(2) is drafted in very wide terms, covering "***any proceeding*** *with respect to* ***any measure*** *alleged to constitute a breach referred to in Article 10.16*",[67] including for instance claims seeking performance. In the words of the *RDC v. Guatemala* tribunal:

> *The waivers under Article 18.10.2 are not restricted to damages claims.* ***They should also cover claims seeking performance****. A reading of Article 10.18.3 confirms this understanding. This paragraph excepts from the waivers actions seeking interim injunctive relief which do not involve the payment of monetary damages and brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.* ***This***

---

63 These limitations are confirmed by the leading commentary on the 2004 US Model BIT, which contains an identical provision. *See* 2004 US Model BIT, Article 26.3 **[RL-030]**; L. Caplan, J. Sharpe, 'Chapter 18: United States', in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), pp. 828-830 **[RL-022]** ("*Two limitations are imposed on such an action: it may not involve the payment of monetary damages before the respondent's local courts or tribunals, and it must be brought 'for the sole purpose of preserving the claimant's or the enterprise's rights and interests' during the arbitration.*").

64 *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 84 **[RL-021]**.

65 *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 27 **[RL- 024]**; *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, para. 27 **[RL-025]**; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, paras. 805-808 **[RL-026]**; *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 111 **[RL-027]**.

66 Non-Disputing Party Submission of the United States of America, 13 May 2022, para. 8.

67 Emphasis added.

> ***exception would have been unnecessary if Article 10.18.2 waivers were limited to damage claims.***[68]

44. As Article 10.18(3) provides an exception to this wide-ranging waiver requirement, it should therefore be interpreted in a restrictive manner, in particular regarding the requirement that the interim injunctive relief request be brought for the "*sole purpose*" of preserving the Claimant's rights. In the words, once again, of the United States in their Non-Disputing Party submission in the present case:

> *This narrow carve-out from the broad waiver requirement in Article 10.18.2 is* ***intended solely to preserve the status quo ante*** *until the investment dispute before a Chapter 10 tribunal can be fully adjudicated. For example, 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. Such relief is preventive in character and often viewed as an extraordinary remedy.* ***Moreover, as the carve-out indicates, the interim injunctive relief sought must not*** *involve the payment of monetary damages or* ***go beyond that which is necessary to preserve the status quo ante during the pendency of the arbitral proceedings****.*[69]

45. This is notably because the definition and boundaries of "*interim injunctive relief*" may prove delicate: as one author observes, a "*domestic interim order in its form equivalent to a decision on the merits in substance*, [could] *possibly be considered as a 'fork in the road' choice*."[70]

46. In the present case, it is uncontested that Neustar requested that the Council of State order Colombia to renew the 2009 Contract. Specifically, Neustar requested that the Council of State:

> *i. Order the MINTIC - Republic of Colombia,* ***to suspend the Roadmap for the selection process of the .CO Domain*** *and the suspension of the decisions and actions to initiate an administrative process of objective selection for the hiring of a new administrator of the .CO Domain as of the year 2020.*
>
> *[…].*
>
> *iii. Order the MINTIC - Republic of Colombia, to* ***suspend all contracts, acts and measures issued, which have the purpose of advising, studying, analysing or structuring, the objective selection process for the hiring of a 'new administrator' of the .CO Domain*** *as of the year 2020, or a similar.*
>
> *[…]*

---

68 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 53 **[RL-028]**.

69 Non-Disputing Party Submission of the United States of America, 13 May 2022, para. 12.

70 R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration', *Journal of International Arbitration* 26(6) (2006), pp. 773-821, p. 786 **[RL-031]**.

> *v. Order the MINTIC - Republic of Colombia* ***to formalize the extension of Concession 019 of 2009 until 2030, approve the guarantees and sign the corresponding document with .CO Internet*** *[…].*[71]

47. If the Council of State had granted Neustar's request, the formalization of the renewal would have gone far beyond the sole preservation of the claimant's rights during the pendency of the arbitration as required under Article 10.18(3): as Respondent demonstrated in its Counter-Memorial, from a practical perspective it would have been extremely difficult (if not impossible) to unwind this situation if this Tribunal had later decided against Neustar in the context of the ICSID proceedings.[72]

48. In this regard, it should be noted that Article 10.26(1) of the TPA does not provide a Tribunal established under Section B of Chapter 10 of the TPA with the power to order specific performance, instead providing that:

> *Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination,* ***only****:*
>
> *monetary damages and any applicable interest; and*
>
> *restitution of property, in which case the award shall provide that the respondent* ***may pay monetary damages and any applicable interest in lieu of restitution****.*[73]

49. Had Neustar prevailed in the Council of State proceedings, there would therefore have existed a clear risk of conflict between the decision of the Council of State ordering specific performance (which would have been virtually impossible to unwind, as Respondent further shows at paragraph 91 below), and the decision of the ICSID tribunal dismissing Claimant's claims or (*quod non*) awarding monetary damages to Claimant.[74]

50. Accordingly, far from being brought for the sole purpose of "*preserv[ing] the status quo while the arbitration proceeded, as well as to protect any ultimate arbitration award issued by a tribunal*",[75] the Council of State proceedings exceeded the scope of the exception set out at Article 10.18(3) of the TPA.

(b) Neustar made a definitive forum selection under Annex 10-G of the TPA by introducing the Council of State proceedings

51. As seen above, the Council of State proceedings cannot be considered to fall within the purview of the exception for "*interim injunctive relief*" actions aimed solely at "*preserving the claimant's […]*

---

71 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. 1 **[R-0080]**.

72 *See* Counter-Memorial, para. 244.

73 Emphasis added.

74 Although Respondent strongly denies that its actions could be constitutive of breaches under the TPA and/or that Claimant incurred in any damages

75 Reply, para. 31.

rights" during the arbitration as permitted under Article 10.18(3). As a consequence, such proceedings fall under Annex 10-G of the TPA.

52. It is uncontested that Annex 10-G of the TPA constitutes a 'fork in the road' or *via electa* clause.[76] It is similarly uncontested that the main purpose of such clauses is to avoid duplication of procedures and conflicting decisions, in the same vein as the waiver obligation analyzed immediately above.[77]

53. In its Reply, Claimant argues that on the facts, the Council of State proceedings cannot constitute a valid definitive forum selection because they did not concern the same legal and factual issues, and did not take place between the same parties (the "*triple identity*" test).[78]

54. Claimant however entirely omits to mention that the first step in order to ascertain the conditions for the definitive forum selection to be triggered under Annex 10-G should be to examine the provision itself.[79] In the present case, as a reminder, Annex 10-G provides 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 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.***

---

[76] Counter-Memorial, paras. 183-184; Reply, paras. 43-44; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, University Press, 2nd ed. (2012), pp. 232-312, p. 267 **[RL-001]**.

[77] *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),* paras. 64-67 **[RL-002]**; *Supervision y Control c. Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 294 **[RL-070]** ("*In order to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions, Investment Treaties use two methods for limiting the selection of a dispute resolution mechanism by the investor. The first method consists of obligating the investor to select a dispute resolution mechanism ab initio through an irrevocable option clause, usually called "fork in the road", which implies that once one of the routes is selected, the possibility of choosing the other is excluded."*).

[78] Reply, paras. 43-44.

[79] *See, for instance, Nissan Motor Co. Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, paras. 208-213 **[RL-126]**, where the Tribunal dismissed the Parties' arguments in favour of the application of the triple-identity or fundamental basis tests respectively, holding that the applicable instrument clearly set out the conditions for the FITR clause ("*In the Tribunal's view, the Parties have expended significant energy in a doctrinal debate about fork-in-the-road clauses generally, which is interesting and important academically but ultimately unnecessary to address for purposes of this particular case. That is because the plain text of Article 96(6) of the CEPA is unusually clear, leaving very little to be decided regarding the applicable test.*"); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.77 **[RL-127]** ("*The triple identity test was developed to address questions of res judicata and to identify specific issues that have already been determined by a competent tribunal. It has also been applied to similar questions arising in the broadly comparable context of lis pendens. It is not clear that the triple identity test should be applied here in order to determine if it is the same 'dispute' that is being submitted to national courts and to the arbitration tribunal. It is, however, not necessary for the Tribunal to decide this question, because there is a more fundamental point arising from the wording of the BIT itself.*").

> *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.*[80]

55. If, consistent with Article 31 of the VCLT, we turn to the ordinary meaning of the precise terms used in Annex 10-G, it appears that the parties to the Treaty conditioned the "*definitive*" election on three cumulative conditions:

- *First*, this clause covers both the "*investor* ***or the enterprise***", meaning that allegations of a breach of Section A in local proceedings by either one of the investor or the enterprise precludes the submission of the same allegations of a breach before the international tribunal by the other. As such, the TPA on its face does not require a strict identity of parties, contrary to Claimant's submission;

- *Second*, the forum election is triggered if the investor or the enterprise has "***alleged that breach***" of an obligation under Section A before local courts. Here again, Annex 10-G on its face does not require that there be an exact identity of cause of action, but only that the same "*breach*" have been "*alleged*" before local courts;

- *Third and finally*, the breach must have been alleged in the context of "*proceedings before a court or administrative tribunal of [the respondent State]*" for the forum selection to be effective.

56. In line with the ICJ's position regarding interpretative inquiries under Article 31 of the VCLT, "*[i]f the relevant words in their natural and ordinary meaning make sense in their context*", no further inquiry is necessary, and the parties' use of unambiguous terms should clearly be construed as expressing their intent.[81] This is precisely the case here, as the wording of Annex 10-G of the TPA is clear and unambiguous.

57. Annex 10-G of the TPA therefore does not require the application of the 'triple-identity' test which has been identified by other tribunals on the basis of the specific wording of the treaties at issue in these cases, and instead sets out specific conditions to be met for the definitive forum election under Annex 10-G to be triggered. Incidentally, it should also be noted that the triple-identity test has been severely criticized by a number of tribunals, precisely due to its very restrictive conditions which effectively render fork-in-the-road clauses devoid of any effect.[82] In the words of one author:

---

80 Emphasis added.

81 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, I.C.J. Reports 1991 p. 63, para. 48 **[RL-053]**.

82 *H&H Enterprises v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367 **[RL-128]**; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, paras. 4.76-4.77 **[RL-127]** ("*A strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect […] It is not clear that the triple identity test should be applied here in order to determine if it is the same 'dispute' that is being submitted to national courts and to the arbitration tribunal.*").

> *[T]he triple-identity test is not a convincing interpretive approach. Like its counterpart, it does not actually attempt to interpret the language of the relevant FITR clauses. Rather, as has been shown, it borrows an existing legal principle (lis pendens) and the applicable legal threshold and applies it to the FITR problem. And while such an approach may be justified in light of the functional similarity of the lis pendens rule and FITR provisions found in investment treaties, it nevertheless fully disregards the specific language employed in FITR clauses*.[83]

58. Similarly, the tribunal in *H&H v. Egypt* considered that, faced with the interpretation of a fork-in-the-road clause, it should base its decision on the interpretation of the "*specific language of the US/Egypt BIT [applicable in this case] and/or its interpretation*" rather than directly applying the triple identity test based on a "*reading of arbitral jurisprudence*".[84] The tribunal went on to discard the application of the triple identity test, in the following words:

> ***[T]the triple identity test is not the relevant test as it would defeat the purpose of Article VII of the US-Egypt BIT****, which is to ensure that the same dispute is not litigated before different fora. It would also deprive Article VII from any practical meaning. The Tribunal notes that the triple identity test originates from the doctrine of res judicata. However, investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties.* ***More importantly, the language of Article VII does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures;*** *what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same. Finally, and in any event, it would defeat the purpose of the Treaty and allow form to prevail over substance if the respondents were required to be strictly the same because in practice, local court proceedings are often brought against state instrumentalities having a separate legal personality and not the state itself.*[85]

---

83 M. A. Petsche (2019), 'The fork in the road revisited: an attempt to overcome the clash between formalistic and pragmatic approaches', *Washington University Global Studies Law Review*, 18(2), p. 421 **[RL-129]**; *see also* C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles,* Oxford University Press, 2nd ed. (2017), Chapter 4: 'Parallel Proceedings', para. 4.106 **[RL-130]** ("*It is, of course, possible to take the view that treaty claims exist only on the plane of international law, and thus that no claim brought before a municipal court could ever invoke such a clause. To some extent, the reasoning applied in those cases that have considered the breach of treaty/breach of contract distinction would support such an analysis. The problem in the present context is that it would give no effective scope of operation to the fork in the road clause in the context of the rights that are the principal subject of investment treaties.*").

84 *H&H Enterprises v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 364 **[RL-128]**.

85 *H&H Enterprises v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367 **[RL-128]** (emphasis added). *See also*, *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 61-64 **[RL-131]** ("*It is common ground that the relevant test is the one expressed by America-Venezuela Mixed Commission in the Woodruff case (1903): whether or not 'the fundamental basis of the claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere. This test was revitalized by the ICSID Vivendi annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora. The Claimant refers to many precedents but has not distilled significant principles from them. It is reduced to the mere assertion that claims based on Treaty provisions are inherently different from those it pursued as a contractor. This is argument by labelling – not by analysis* [...] *The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source. But even this abstract statement may hardly be said to trace a bright line that would permit rapid decision. The frontiers between claimed entitlements are not always distinct* [...] *The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract. Otherwise the Claimant must live with the consequences of having elected to take its grievance to the national courts*."); *Supervision y Control c. Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 315 **[RL-070]** ("*The*

59. In the instant case, an examination of the record in the Council of State proceedings reveals that these proceedings meet the three conditions set out by Annex 10-G of the TPA.

60. *First*, it is uncontested that the parties to the proceedings are the same in the Council of State proceedings and the present proceedings:

- With respect to the Council of State proceedings, as explained in the Counter-Memorial:[86]
  - On 18 September 2019 both .CO Internet and Neustar submitted identically-worded requests for provisional measures before the Council of State;[87] and,
  - When the Council of State denied these initial requests for procedural reasons (respectively on 9 October 2019 for .CO Internet, and 30 October 2019 for Neustar),[88] it would seem that .CO Internet did not appeal this decision. Conversely, Neustar did so on 14 November 2019 (that is even before it purported to submit to arbitration by filing its RFA on 23 December 2019),[89] resulting in the 12 March 2020 decision by the Council of State dismissing Neustar's requests (in case No. 64832).[90]
- With respect to the present ICSID proceedings, as also explained in the Counter-Memorial:[91]

Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same."); J. Sicard-Mirabal and Y. Derains*, Introduction to Investor-State Arbitration*, Kluwer Law International, 1st ed. (2018), p. 73 **[RL-132]** ("*Due to the multiplicity of types and sources of claims available in relation to the same investment, there is an increased risk of parallel proceedings in ISDS. Strict application of the triple identity test, which conditions the applicability of the traditional doctrines of res judicata and lis pendens aimed at preventing multiple litigations of the same issues, leads to the multiplication of simultaneous proceedings. States have attempted to limit this by inserting fork-in-the-road and waiver clauses in protection treaties. However, the practical effect of such provisions is yet again restricted by the triple identity test. To give a meaning to these clauses, some arbitral tribunals have interpreted the triple identity test in a less stringent manner, to take into account the factual circumstances that form the basis of the claim, and not the precise identity between the causes of action and the parties.* ***The goal should be to reduce or eliminate parallel proceedings to avoid wasteful spending of time and resources, in addition to removing the uncertainty of conflicting outcomes***." (emphasis added)).

86 Counter-Memorial, paras. 170-172.

87 Council of State, Decision on .CO Internet's request for interim measures of 9 October 2019 (case No. 64831), para. 6 **[R-0008]**; Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6 **[R-0009]**.

88 Council of State, Decision on .CO Internet's request for interim measures of 9 October 2019 (case No. 64831), para. 39 **[R-0008]**; Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), p. 13 **[R-0009]**: the Council of State held that Neustar and .CO Internet could not submit a request referencing Article 10.18(3) of the TPA prior to having initiated arbitration proceedings under Section B of Chapter 10 of the TPA.

89 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. 5-9 **[R-0080]**.

90 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. 32-41 **[R-0080]**. It should be noted that in parallel, on 13 February 2020, .CO Internet and Neustar also filed a new request for interim measures (case No. 64831), which was also decided by the Council of State on 12 March 2020. *See* Council of State, Decision on Neustar and .CO's joint request for interim measures of 12 March 2020 (case No. 64831), para. 12 **[C-0115]**.

91 Counter-Memorial, para. 204.

- On 23 December 2019, Claimant filed its RFA both on its own behalf and on behalf of .CO Internet (although it later dropped claims on behalf of .CO Internet);[92] and,

- In its RFA, Neustar also sought to have .CO Internet included as a Claimant in these proceedings,[93] although it was forced to drop this request in order for the ICSID Secretariat to proceed to register its RFA on 6 March 2020.[94]

61. Against this backdrop, Claimant's contention that Annex 10-G of the TPA is not triggered, because only .CO Internet could "*effectively challenge the refusal to renew the Concession*",[95] falls flat: both Neustar (the investor) and .CO Internet (the investment) were afforded the opportunity to present their allegations of breaches of the TPA before the Council of State and requested that MinTIC be ordered to 'formalize' the renewal of the 2009 Contract. This jurisdiction decided on the merits of their requests for interim relief on 12 March 2020.[96] In parallel, Neustar included the exact same entities as parties to the ICSID proceedings in its RFA, confirming the duplication of the requests before both *fora*.

62. <u>*Second*</u>, as seen above, it is sufficient for the definitive forum election under Annex 10-G to be triggered that the investor have *alleged* the same breaches ("*that breach*") before the national forum it chose. In the present case, Claimant is effectively unable to dispute that it did allege the same breaches of the TPA before the Council of State as it now alleges before this Tribunal.[97] Specifically:

- Before the Council of State, Neustar argued that *"the concession guarantees the right to extension, which is also based on the rights enshrined in the TPA in favor of the investor to guarantee its legitimate expectations, to act in good faith, not to expropriate its rights and not to discriminate against it*",[98] and put forward detailed allegations of breaches by Colombia of its obligations under Articles 10.3 (National Treatment), 10.4 (Most-Favoured-Nation Treatment), 10.5(1) (Minimum Standard of Treatment), 10.7(1) and 10.7(2) (Expropriation and Compensation) of the TPA.[99] Neustar notably contended that "*international law must be applied to guarantee the investor's rights under the FTA, including non-expropriation, since States are prohibited from invoking domestic law to omit*

---

92 *See* RFA, paras. 99-100. *See also*, Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 84 **[C-0004]**.

93 RFA, para. 111: to this effect, Neustar sought to rely on the Most-Favoured Nation clause at Article 10.4 of the TPA to invoke Article 1(2)(b) of the Swiss-Colombia bilateral investment treaty, despite the very clear wording of the TPA to the contrary.

94 Counter-Memorial, paras. 175, 204.

95 Reply, para. 47.

96 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) **[R-0080]**.

97 Counter-Memorial, paras. 241-246.

98 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]**.

99 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]** ("*It considers that the rights granted to investors in Chapter 10 of the FTA (Articles 10.3, 10.4, 10.5:1, 10.7:1 and 10.7:2) have been violated*.").

or refuse to comply with obligations of international […] *origin*",[100] and that, as a protected investor, it was entitled "*to the protection according [to the TPA] against expropriation and the guarantee of a minimum, fair and equitable treatment*";[101]

- In order to reach its decision to dismiss Neustar's request for interim relief, the Colombian administrative judge examined *inter alia* whether .CO Internet was being treated unfairly or inequitably in disregard of Article 10.5.1 of the TPA,[102] and whether .CO Internet was being discriminated against in disregard of Articles 10.3 or 10.4 of the TPA;[103]

- Similarly, in its RFA, Neustar claimed that "*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*."[104]

63. Neustar tries to resist the implications of the duplicated allegations by arguing that its requests before the Colombian judge were allegedly only for interim relief as permitted under Article 10.18(3),[105] and that the judge only conducted a *prima facie* examination of Neustar's allegations of breaches of the TPA.[106]

64. As a preliminary matter, it is indeed uncontested that Neustar's request was characterized as a request for interim relief under Colombian law.[107] However, Claimant fails to point out that this Tribunal is in no way bound by Neustar's attempted framing of the measure under municipal law, but may conduct its own analysis of the measures at issue.[108] Further, as seen at paragraphs 38-50 *supra*, Neustar's request for interim relief did not meet the requirements of Article 10.18(3) as it was not for the "*sole purpose*" of preserving claimant's rights during the pendency of the international arbitration.

---

100 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. 3.18 **[R-0080]**.

101 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. 33 **[R-0080]**.

102 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. 40.2 **[R-0080]**.

103 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. 40.3 and 40.4 **[R-0080]**.

104 RFA, para. 124.

105 Reply, paras. 24-27.

106 Reply, paras. 33-36.

107 *See* Counter-Memorial, para. 243.

108 *Emmis International Holding et al v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 176 **[RL-071]** ("*The tribunal retains its independent power to judge the probative value of evidence placed before it, including evidence of municipal law.*"); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.6. **[CL-078]** ("*It is common ground that in an international arbitration, national laws are to be considered as facts.*").

65. Rather, Neustar specifically requested that the Council of State order Colombia to *inter alia* "*formalize the extension of Concession 019 of 2009 until 2030, approve the guarantees and sign the corresponding document with .CO Internet […]*."[109] As explained in the Counter-Memorial,[110] while this request was allegedly framed as a request for *interim relief* under Colombian administrative law, its practical effects (of which Neustar was clearly aware) would have gone far beyond that of simple interim relief aimed at preserving Neustar's rights. In particular, had the Council of State ordered the "*formalization*" of the extension of the 2009 Contract only for this Tribunal to dismiss Neustar's claims at a later stage, the result would have been final and not interim, with no ability to later be unwound. As such, Neustar's request for interim relief far exceeds the requirement under Article 10.18(3) that it be brought for the sole purpose of preserving the claimant's rights, and would have had a practical effect equivalent to a final decision on the merits.[111]

66. Similarly, Neustar's argument that the Council of State proceedings cannot constitute a valid forum election because the Colombian judge only conducted a *prima facie* examination of the merits of its claims is entirely self-serving. While Neustar now argues that it only wished to conduct a *preliminary* discussion of the potential breaches of the TPA before the Council of State, an examination of the contemporaneous record of these proceedings instead reveals that Neustar extensively briefed the Council of State on the alleged breaches,[112] and that the Council of State examined in detail the merits of each of Neustar's allegations of breach of the TPA. As already set out in the Counter-Memorial,[113] the administrative judge examined:

- Whether Law 1065 of 2006 or the 2009 Contract provided for an option or an obligation to renew;[114]

- Whether Colombia specifically represented to .CO Internet or Neustar that the 2009 Contract would be renewed;[115]

---

109 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. 1 **[R-0080]**.

110 Counter-Memorial, paras. 242-244.

111 *See* R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration', *Journal of International Arbitration* 26(6) (2006), p. 786 **[RL-031]**.

112 *See* 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. 3.18; 3.19, 5.3, 32, 33 (v) **[R-0080]** ("*3.19.v) The concession guarantees the right to extension, which is also based on the rights enshrined in the TPA in favor of the investor to guarantee its legitimate expectations, to act in good faith, not to expropriate its rights and not to discriminate against it.* [Neustar] *considers that the rights granted to investors in Chapter 100 of the TPA have been violated (articles 10.3, 10.4, 10.5:1, 10.7:1 y 10.7:2* […] *5.3.-The dispute is mainly about the treaty: breach of Section A obligations, unlawful acts against the rights derived from the applicant's covered investment, the need for investment protection and thus the renewal and the guarantee of negotiated improvements for the State.*").

113 Counter-Memorial, para. 189.

114 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. 19-26 **[R-0080]**.

115 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. 27-28 **[R-0080]**.

- Whether .CO Internet was being treated unfairly or inequitably in disregard of Article 10.5.1 of the TPA;

- Whether .CO Internet was being discriminated against in disregard of Articles 10.3 or 10.4 of the TPA.[116]

67. The Council of State then issued a detailed decision as to each of these claims:

- As to the renewal issue, the Council of State rejected Neustar's allegations and explained that "*[A] simple textual analysis of what was agreed in the Contract does not allow inferring that the State entity had contracted the obligation to renew the contract and the Concessionaire had acquired the right to obtain such renewal […] In the stipulations, both of the contract and of the law, it is textually stated that the agreed term <<may>> be renewed, which implies considering that the Government had the possibility of renewing or seeking another alternative to continue with the provision of the service at the expiration of the term of the concession*."[117]

- With respect to the potential breach of article 10.5.1. of the TPA, the Council of State held that no "*legitimate expectations*" were being affected as "*no evidence was provided in the proceedings to prove that the Government has promised or guaranteed a renewal*." Furthermore, it concluded that it had not been demonstrated that the fair and equitable treatment was violated as "*.CO Internet S.A.S. submitted an offer in the bidding process and is participating to date on equal terms with the other competitors*."[118]

- Similarly, with respect to the alleged breach of articles 10.3 (National Treatment) and 10.4 (Most-Favored Nation Treatment) of the TPA, the Council of State concluded that "*the decision to open a bidding process in which .CO Internet S.A.S. participated, is an indication that it was given an equal treatment than the one granted to national investors*" and to "*investors coming from elsewhere*."[119]

68. *Third and finally*, the Council of State proceedings are "*proceedings before a court or administrative tribunal of [the respondent State]*", as required by Annex 10-G of the TPA, since the Council of State is undoubtedly an "*administrative tribunal*" of Colombia. Neustar has not sought to dispute this in its Reply.

---

116 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. 40.3 and 40.4 **[R-0080]**.

117 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. 24 **[R-0080]**.

118 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. 40.1 and 40.2 **[R-0080]**.

119 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. 40.3 and 40.4 **[R-0080]**.

69. Accordingly, the Council of State proceedings, which do not fall within the exception set out at Article 10.18(3) of the TPA, meet the three conditions set out by Annex 10-G of the TPA. As such, Neustar's introduction of these proceedings constituted a definitive forum selection predating the submission by Neustar of its RFA (and/or its registration by ICSID following numerous edits on 6 March 2020), depriving this tribunal of jurisdiction over all of Neustar's claims that Colombia breached its obligations under the TPA.[120]

2.3 Claimant breached both the formal and substantial waiver requirements enshrined in Article 10.18(2) of the TPA

70. In its Counter-Memorial, Respondent has demonstrated that compliance with the waiver requirements at Article 10.18(2) of the TPA, from both a formal and material point of view, is a necessary precondition to the consent of Colombia to arbitration,[121] and that Claimant breached both of these formal and material requirements by (i) failing to waive its right to initiate or continue proceedings before US courts,[122] (ii) trying to carve-out the Council of State proceedings from the scope of its waiver,[123] and (iii) continuing the Council of State proceedings in violation of the material waiver requirement.[124]

71. Notwithstanding the shortcomings of its waiver, which are apparent on the face of the document dated 18 December 2019 that Neustar filed in support of its RFA,[125] Claimant continues to argue in its Reply that such waiver contained no defects, or alternatively that these defects do not affect the Tribunal's jurisdiction. In line with its position regarding Respondent's objection under Annex 10-G, Claimant also continues to allege that the Council of State proceedings did not breach the material waiver requirement because they were permitted under Article 10.18(3) – as shown above, this is however incorrect.

72. Claimant's arguments overlook the mandatory nature of the waiver requirement (**a**), and its Reply in fact confirms that it breached both the formal and substantial waiver requirements of Article 10.18(2) of the TPA, thereby depriving this Tribunal of jurisdiction (**b**).

(a) Claimant overlooks the mandatory and jurisdictional nature of the waiver requirement under the TPA

73. Throughout its Reply, Claimant attempts to insinuate that Respondent's arguments regarding the waiver requirements are overly formalistic, and contends that any defects in the waiver requirements "*are not sufficient to render Neustar's claims outside the jurisdiction of this*

---

120 Claimant's argument at paragraph 39 of its Reply that Respondent's objection under Annex 10-G "*should not be heard*" because Respondent also argues that Neustar's RFA was premature due to the lack of crystallization of the dispute is entirely unavailing: as explained above, it is Neustar's introduction of the Council of State proceedings which triggered the definitive forum election under Annex 10-G.

121 Counter-Memorial, paras. 223-226.

122 Counter-Memorial, para. 232.

123 Counter-Memorial, para. 233.

124 Counter-Memorial, paras. 238-248.

125 Neustar's Waiver of 18 December 2019, p. 1 **[C-0007]**.

Tribunal",[126] citing to several decisions which allegedly support its position.[127] Claimant also alleges that in the present case there is no risk of conflicting outcomes, legal uncertainty, or double redress (which waiver requirements indisputably seek to prevent[128]) since the Council of State dismissed its request that MinTIC be ordered to renew the 2009 Contract.[129] Claimant appears to conclude on this basis that this Tribunal should adopt a lenient interpretation of the waiver requirements in order to consider Neustar's 18 December 2019 waiver as valid.[130]

74. Claimant's entire analysis is however based on a wrong premise. Claimant overlooks entirely the clear wording of Article 10.18(2) of the TPA, which states in its relevant part:

> *No claim may be submitted to arbitration under this Section unless: […]*
>
> *(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****, […]*
>
> *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.*

75. *First*, as explained in the Counter-Memorial, the repetitive use of the word "*any*" regarding the rights that must be waived confirms that the investor must respect each and every one of these conditions, failing which the consent of the respondent State to arbitrate is not crystallized: there is no textual basis for a distinction on the basis of the perceived *severity* of the defects at issue, or their influence on the conduct of the proceedings.[131] In the words of the *Amorrortu* tribunal, which very recently ruled on the scope of a waiver provision in the Peru-United States Trade Promotion Agreement identical to Article 10.18(2) of the TPA,[132] "*[t]he intent of the Contracting Parties to be comprehensive in respect of the scope of the waiver could not be any clearer.*"[133]

76. *Second*, Claimant overlooks the inherently jurisdictional nature of the waiver requirement under the TPA: as can be seen from the title of Article 10.18 ("*Conditions and Limitations on Consent of Each Party*"), the *consent* of the respondent State to arbitrate is conditioned on the submission of and

---

126 Reply, para. 65.

127 *Such as*: *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, paras. 117-118 **[CL-059]**.

128 *See* Counter-Memorial, para. 224.

129 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) **[R-0080]** (In this decision the Council of State confirmed its previous decision rejecting the requests made by Neustar).

130 *See* Reply, para. 68 ("*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.*"), 73 ("*[n]o 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.*").

131 Counter-Memorial, para. 230.

132 *See* Peru-United States Trade Promotion Agreement, Chapter 10 (Investment), Art. 10.18(2) **[RL-029]**.

133 *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, para. 226 **[RL-133]**.

compliance with a valid waiver. This was confirmed by Tribunals ruling under treaties containing identically-worded provisions,[134] including in *Amorrortu*:

> *The Tribunal by majority finds, similarly to the Renco I tribunal, that the submission of a compliant waiver is not a condition for the admissibility of claims, but a* ***precondition for the very existence of the State's consent to arbitrate, and, by way of necessary implication, to this Tribunal's jurisdiction****. This is also confirmed by the United States' position in this arbitration*.[135]

77. The corollary is that if the waiver is held defective in regard of either its formal or material requirements, the tribunal has no power to remedy it and should decline jurisdiction for want of consent to arbitrate. This position is explicitly supported by the United States themselves in the present case:

> *If all formal and material requirements under Article 10.18(2) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the Tribunal's jurisdiction ab initio under the Agreement. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18(2). However,* ***a tribunal itself has no authority to remedy an ineffective waiver****.*[136]

78. Claimant seeks to rely on *Thunderbird* to argue that the waiver provision is not mandatory and could be disregarded by this Tribunal. Claimant however disregards the clear differences between the waiver provision of NAFTA and the waiver provision of the TPA. While the title of the waiver provision in NAFTA is "*Conditions Precedent to Submission of a Claim to Arbitration*",[137] this wording was amended in subsequent US treaties such as the TPA (as well as the 2004 Model BIT and the Peru-United States Trade Promotion Agreement, amongst other agreements) to include the word "*consent*" ("*Conditions and Limitations on Consent of Each Party*"). As aptly put by the *Renco (I)* tribunal:

> *The Tribunal is constrained to conclude, therefore, that the submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) is a precondition to the State's "consent" to arbitrate and to the Tribunal's jurisdiction. Accordingly,* ***the Tribunal concludes that the Ethyl and Thunderbird decisions cannot***

---

134 *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 115 **[RL-027]**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 61 **[RL-028]**; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 142 **[RL-021]**; *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 191 **[RL-095]**.

135 *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, para. 233 **[RL-133]** (emphasis added).

136 Non-Disputing Party Submission of the United States of America, 13 May 2022, para. 10.

137 North American Free Trade Agreement (NAFTA), Chapter 11, Art. 1121 **[RL-023]**.

> ***assist Renco in the present case because of the differences between the text of Article 10.18 of the Treaty and Article 1121 of NAFTA***.[138]

79. In addition, it should be noted that in *Thunderbird*, the tribunal's opinion that it should not take construe the NAFTA waiver provision in an "*excessively technical manner*" was reached not only on the basis of the more lenient wording of the waiver provision, but also on the specific facts of that case, which are entirely different to the present dispute. In *Thunderbird*, the claimant had simply inadvertently failed to file certain waivers on behalf of its subsidiary with its notice of arbitration, a defect that it remedied immediately with its Statement of Claim (well before Mexico raised any objection).[139] In contrast, as explained in the Counter-Memorial, Neustar not only failed to include the US courts in its waiver, but also voluntarily sought to exclude the Council of State proceedings (which it continued after filing the RFA on 23 December 2019), despite the fact that these proceedings clearly exceeded the scope of the Article 10.18(3) exception.[140]

80. *Third and finally*, it is undisputed that tribunals interpreting similar provisions have held that this requirement serves *inter alia* to avoid multiplicity of proceedings, prevent conflicting outcomes and double redress.[141] Further, an additional benefit conferred by the waiver in respect of certainty for the respondent State is, as explained by the United States themselves in their Non-Disputing Party Submission:

> *[T]he waiver requirement seeks to* ***give the respondent certainty, from the very start of arbitration*** *under the Agreement,* ***that the claimant is not pursuing and will not pursue proceedings*** *in another forum with respect to the measures challenged in the arbitration.*[142]

81. Accordingly, the waiver requirement also serves to ensure that the respondent State is provided with certainty that it will not have to litigate claims arising from the same measures before several fora, from the moment an investor seeks to initiate the arbitration. Claimant cannot therefore self-servingly rely on the fact that the Council of State ultimately (rightly) dismissed its request that

---

138 *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 142 **[RL-021]**. *See also*, *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, para. 233 **[RL-133]** ("*The Tribunal by majority notes that Article 10.18 of the USPTPA, of which Article 10.18.2(b) is a part, is entitled "Conditions and Limitations on Consent of Each Party." As the Respondent points out, the choice of wording is not accidental. Indeed, the titles of the waiver provisions in the USPTPA, the DR-CAFTA and the US Model BIT were amended to include the word "consent" – a significant point of difference from NAFTA's Article 1121.*").

139 *International Thunderbird Gaming Corporation v. The United Mexican States,* UNCITRAL, Award, 26 January 2006, para. 116 **[CL-059]**.

140 *See* Counter-Memorial, Section 3.3.

141 Counter-Memorial, para. 224; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 84 **[RL-021]**; *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 27 **[RL-024]**; *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, para. 27 **[RL-025]**; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, paras. 805-808 **[RL-026]**; *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 111 **[RL-027]**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 54 **[RL-028]**. *See also*, L. M. Caplan and J. K. Sharpe, 'United States' in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013), p. 829 **[RL-022]**.

142 Non-Disputing Party Submission of the United States of America, 13 May 2022, para. 5.

MinTIC be ordered to renew the 2009 Contract (after a careful examination of Claimant's allegations of breaches of the TPA) and that there are currently no concurrent proceedings in order to argue that this Tribunal should disregard its manifold failures to comply with the waiver requirements.

(b) Claimant's Reply confirms that it breached both the formal and substantive requirements of Article 10.18(2)

82. As explained in the Counter-Memorial, Claimant not only breached the formal requirements of the waiver by failing to mention the US courts and failing to waive the right to "*continue*" proceedings before Colombian courts, but also acted in breach of its waiver obligation by continuing the Council of State proceedings.[143] Neustar's Reply does nothing to disprove these breaches, instead confirming their materiality.

83. *First*, with respect to the formal requirements of the waiver, the document filed by Neustar provides in its relevant part that Neustar waives:

> *[A]ny 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 including the interim injunctive relief filed before the Consejo de Estado**) […].*[144]

84. In its Reply, Neustar does not even contest that it failed to formally waive its right to continue proceedings before Colombian courts, such as the Council of State proceedings that it specifically sought to carve-out from the waiver under the pretext that these were solely for "*interim injunctive relief*". Instead, Neustar argues that "*there were simply no claims for Neustar to waive its right to 'continue' in this dispute as Neustar had no claims against Respondent under the protection of the TPA.*"[145] However, Article 10.18(2) requires that a claimant waive its right to continue proceedings "*with respect to **any measure alleged to constitute a breach** referred to in Article 10.16*", not in respect of TPA claims.[146] In the present case, it is abundantly clear from the Council of State's 12 March 2020 decision that these proceedings concerned the same "*measures*" that Neustar alleges constitute a breach of the TPA, including chiefly Colombia's decision not to renew the 2009 Contract.[147] In any instance, as seen above, these proceedings went far beyond the boundaries

---

143 Counter-Memorial, paras. 228-249.

144 Neustar's Waiver of 18 December 2019, p. 1 **[C-007]** (emphasis added).

145 Reply, para. 64.

146 Emphasis added.

147 Measures are defined at Article 1.3 of the TPA as "*includ[ing] any law, regulation, procedure, requirement or practice*". In the case at hand, as can be seen from the Council of State decision, this jurisdiction clearly examined whether Neustar had no contractual, legal or treaty right to have the 2009 Concession Contract renewed (and ruled this possibility out): "*Thus, although the request and the appeal refer to the right of the Concessionaire to have the contract renewed, that it had preference right for the renewal and a right to have the Government negotiate the offer it made, it does not appear that this right has any legal, contractual or conventional basis. The extension of the contract was an option, for which the Government did not opt*" (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. 29 **[R-0080]**). In this context, it is clear that the Council of State addressed the same "*measures*" than this Tribunal, i.e. Colombia's failure to observe the alleged legal requirement or 'practice' of renewing concession contracts.

of the limited exception set out at Article 10.18(3),[148] entailing that Neustar breached the formal requirements of the waiver by seeking to add a reservation regarding these unauthorized proceedings.

85. Instead, Neustar focuses on its failure to mention the US courts in its waiver, arguing that this does not amount to a formal defect of the waiver because its waiver mentioned "*other dispute settlement procedures*", which would allegedly include any US proceedings.[149] In doing so, Neustar however overlooks the precise terms of Article 10.18(2), which draws a distinction between proceedings before "*any administrative tribunal or court under the law of any Party*" on the one hand, and "*other dispute settlement procedures*" (including presumably alternative dispute resolution procedures, such as arbitration under Article 19 of the 2009 Contract in the present case[150]).[151]

86. Neustar then turns to Annex 10-G for support, explaining that since this provision is limited to "*investors 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.*"[152] To try and persuade the tribunal to admit its defective waiver, Neustar contends that should it try to introduce proceedings in the US,

---

148 *See* paras. 38-50 *supra*.

149 Reply, para. 57.

150 Neustar's argument that it is dubious any proceedings were available to it before US Courts is not only unsubstantiated and imprecise (other than by a general reference to the US Sovereign Immunities Act), but is also beside the point: as explained above, the objective of the waive requirement is to give certainty to the respondent State.

151 Neustar also turns to Annex 10-G to try and salvage its defective waiver, arguing that since this provision is limited to "*investors 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*" (Reply, paras. 62-63). Neustar however entirely fails to explain what this 'ambiguity' consists of: while the fork-in-the-road provision clearly provides that it applies in case an investor has alleged a "***a breach of an obligation under Section A*** *in proceedings before a court or administrative tribunal of that Party*" (emphasis added), the waiver provision covers proceedings "*with respect to any* ***measure alleged to constitute a breach***", which is a wider requirement. As such, while it is uncontested that both provisions operate complementarily, they do not have the exact same scope. *See, for instance*, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 294 **[RL-070]** ("*The first method consists of obligating the investor to select a dispute resolution mechanism ab initio through an irrevocable option clause, usually called "fork in the road", which implies that once one of the routes is selected, the possibility of choosing the other is excluded. Under the second method, based on the concept of waiver, once the investor chooses international arbitration under the corresponding treaty, it must waive the exercise of any claim before another dispute resolution mechanism, including those already initiated and those it could initiate.*"); G. Kaufmann-Kohler and M. Potestà, *European Yearbook of International Economic Law – Special Issue: Investor-State Dispute Settlement and National Courts* (2020), Chapter 3: 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework', para. 79 **[RL-002]** ("*A different type of approach to the coordination of multiple proceedings before domestic and international fora is to include "waiver" or "no-U-turn" clauses. Unlike fork-in-the-road clauses (which make the choice of forum by the investor final), waiver or no-U-turn provisions permit investors to opt for international arbitration after commencing domestic court proceedings in relation to the same measure. However, if the investor decides to submit a claim to international arbitration under the dispute settlement provision in the IIA, it is required to discontinue domestic court proceedings or waive its right to start new such proceedings.*"). Besides, it is widely accepted that waiver provisions like the one in the instant case are interpreted broadly. *See* B. Sabahi, N. Rubins and D. Wallace, *Investor-State Arbitration*, 'XIV. Election of Forum: Treaty Arbitration, National Courts or Contract Arbitration', Oxford University Press, 2nd ed (2019), p. 474 **[RL-134]** ("*[A] number of treaties that adopt the waiver approach, most notably NAFTA and its descendants, incorporate more specific language describing the type of court action that triggers the waiver requirement. As previously noted, NAFTA allows arbitral jurisdiction only where the claimant has irrevocably waived the right to pursue court relief 'with respect to the measure of the disputing Party that is alleged to be a breach'. A tribunal interpreting such a provision does not need to apply the so-called triple identity test; it need only inquire whether the same measure underlies both international and domestic law claims. Once that is established, arbitral jurisdiction exists only if the investor has waived its right to local remedies. The investor must waive its right to commence or continue local proceedings even if its claims concerning the measure are based on breaches of different laws (i.e. breaches of local law as opposed to breaches of international law.*").

152 Reply, para. 63.

Respondent would seek to rely on the waiver to resist the introduction of such proceedings,[153] and that in any event there "*were (or are) no prospect of such claims*":[154] Neustar's allegations are however nothing more than self-serving speculations.

87. Similarly, Neustar's allegation that should this Tribunal consider the waiver invalid, this would "*effectively deny Neustar access to ICSID arbitration and of its only means of obtaining compensation for Respondent's wrongful conduct under the TPA*" is unfounded: in previous cases under treaties containing identically-worded or similar provisions where the tribunal had dismissed claimant's claim due to a defective waiver, the investor was able to resubmit to arbitration *with a valid waiver*.[155]

88. Neustar's opportunistic interpretations are therefore nothing more than an eleventh-hour attempt to cure its waiver, and should be disregarded by this Tribunal.

89. *Second*, with respect to the material requirements of the waiver, it is uncontested that Neustar continued the Council of State proceedings *after* the filing of its RFA and accompanying waiver with ICSID on 23 December 2019 (and the registration of the RFA by ICSID on 6 March 2020), resulting in the Council of State's 12 March 2020 decision. In keeping with its arguments regarding Respondent's objection under Annex 10-G, Claimant however argues that the Council of State proceedings did not breach Neustar's waiver because they were permitted under Article 10.18(3) of the TPA.

90. However, as seen above, these proceedings went far beyond the "*sole purpose*" of preserving Neustar's rights during the pendency of the arbitration, and therefore exceeded the permitted scope of the exception to the waiver requirement. For the sake of efficiency, Respondent incorporates the arguments at Section 2.2(a) here by reference. If the Tribunal was to hold that the Council of State proceedings overstepped the boundaries of Article 10.18(3), Claimant does not seriously contest that this would entail that these proceedings breached its material waiver obligation under Article 10.18(2).

91. It is however necessary to address Neustar's argument that its rights could allegedly not be effectively preserved had MinTIC been able to pursue the 2020 Tender Process and award the 2020 Contract to another entity during the pendency of the arbitration.[156] In keeping with its general approach throughout the Reply, Claimant simply omits that it did not only request the suspension of the 2020 Tender Process, but also that MinTIC be ordered to formalize the renewal of the 2009

---

153 Reply, para. 60.

154 Reply, para. 62

155 *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal concerning Mexico's Preliminary Objection Concerning the Previous Proceedings, 26 June 2002, para, 37 **[RL-024]**; *Renco Group v. Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, para. 246 **[RL-135]**.

156 Reply, para. 77.

Contract.[157] This request went far beyond the sole objective of preserving its rights, and contrary to Neustar's contention it could not have been "*revisited in light of the final award.*"[158] As explained at paragraph 47 *supra*, in practice it would have been impossible for Colombia to unwind the renewed 2009 Contract if it had prevailed in the present proceedings after an adverse decision by the Council of State.

92. It also bears reminding that Neustar's request for the renewal of the 2009 Contract before the Colombian judge went well beyond the powers of this tribunal under the TPA: pursuant to Article 10.26 of the TPA, a tribunal may only award "*monetary damages*" or "*restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.*"[159] Accordingly, had the Council of State granted Neustar's request, Colombia would have been placed in a situation where Neustar would have effectively benefited from a renewed 2009 Contract during the pendency of the present proceedings, while at the same time being allowed to pursue its international claim. This would undoubtedly have been contrary to the object and purpose of Article 10.18, which is to prevent the risk of conflicting outcomes and double recovery.

93. Accordingly, this Tribunal should decline jurisdiction over Neustar's claims in light of Neustar's failure to abide by the formal and material waiver requirements at Article 10.18 of the TPA.

2.4 Claimant's failure to observe the preliminary requirements prescribed by the TPA is fatal to its claims

94. Claimant not only made a definitive forum selection (and later breached its waiver obligation) by introducing and pursuing the Council of State proceedings, but also failed to observe the preliminary requirements prescribed by Article 10.16 TPA prior to submitting its RFA on 23 December 2019, further depriving this Tribunal of jurisdiction.[160] This is because Claimant submitted its Notice of Intent and RFA before the international dispute had crystallized (**a**), and in any event submitted a defective Notice of Intent in spite of the mandatory nature of this preliminary step (**b**). As Respondent demonstrates below, Claimant's attempts to salvage its claims are entirely unavailing.

---

157 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. 1.v **[R-0080]** ("*Order MinTIC-Republic of Colombia to formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .CO Internet.*").

158 Reply, para. 77.

159 Article 10.26(1) of the TPA.

160 Counter-Memorial, Section 3.2.

(a) **The alleged "*investment dispute*" had not crystallized by the time Claimant submitted its Notice of Intent or RFA**

95. It is uncontested that both the TPA and the ICSID Convention require that an investment dispute be in existence in order for the submission of a claim to be valid, and for the tribunal constituted under these auspices to have jurisdiction:[161]

- Article 10.16(1) of the TPA provides that an investor may submit to arbitration under Section B of Chapter 10 of the TPA in case it considers that an "***investment dispute** cannot be settled by consultation and negotiation*";[162]

- Article 25 of the ICSID Convention provides that the jurisdiction of the Centre extends to "*legal dispute[s]*" that the disputing parties "*consent in writing to submit to the centre*". Article 36(1), in turn, provides that the request for arbitration shall "*contain information concerning the **issues in dispute** […].*"[163]

96. It is further uncontested that the definition of dispute was first set out by the PCIJ in *Mavrommatis*, as a "*disagreement on a point of law or fact, a conflict of legal views or interests between two persons,*"[164] and that ICSID tribunals have generally referred to this definition.[165] On this basis, Claimant contends that ICSID tribunals will find that a legal dispute is in existence on the basis of two limited conditions: that the investor have claimed violations by the host State of procedural or substantive treaty protections, and sought legal remedies.[166] Claimant then proceeds to argue that these two conditions were met prior to the submission of the RFA, or at the very least at the time of the registration of the RFA by ICSID.[167] Claimant's defence however falls flat for several reasons.

97. *First*, Claimant fails to address the authorities submitted by Respondent highlighting that in the context of ICSID proceedings, a dispute only arises when all of its constituent elements (both factual and legal) come into existence. In the words of the late Prof. Gaillard in *Eurogas*:

> *[A] dispute arises at the moment a disagreement is formed between the parties over points of law or fact. In turn, a disagreement is formed once the claims or positions of one of the parties over those points of law or fact are contested or ultimately ignored by the other. A dispute, therefore, **presupposes the***

---

161 Counter-Memorial, paras. 193-196; Reply, para. 85.

162 Emphasis added.

163 Emphasis added.

164 *Mavrommatis Palestine Concessions*, Judgment No. 2, 30 August 1924, P.C.I.J., Series A, No. 2, p. 5 **[RL-003]**; *See* Counter-Memorial, para. 197; Reply, para. 86.

165 *See Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras. 96-97 **[RL-007]**, *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]**; *Burlington 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, para. 110 **[RL-043]**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, para. 447 **[RL-087]**.

166 Reply, para. 87.

167 Reply, paras. 90-93.

> ***existence of the factual and legal framework on which the disagreement is based and cannot arise until the entirety of such constituent elements has come into existence**.*[168]

98. In that case, the investor had submitted to arbitration a claim regarding the expropriation of a mining license by the Slovak authorities: this act had been carried out in 2005, but there had subsequently been proceedings before Slovak courts, resulting in a decision urging the State to reinstate the mining rights to the investor. Instead, the State decided to reassign the mining rights to another entity in 2012.[169] The tribunal was tasked with assessing whether the dispute arose less or more than three years before the entry into force of the TPA, as the applicable treaty applied only to disputes that had arisen "*not more than three years prior to its entry into force.*"[170] Prof. Gaillard, referring the definition of the ICJ in *Mavrommatis*, explains that as a matter of principle, in determining the existence of a dispute, the following factors should be considered:

> *The Tribunal therefore has two tasks when ruling on its jurisdiction ratione temporis: (1) determining the subject and scope of the disagreement submitted to it by the parties, and (2) determining when this disagreement arose.*
>
> *In the context of determining the subject and scope of the dispute, the Mavrommatis definition calls for an assessment that encompasses all relevant facts and elements constituting the parties' disagreement, as conveyed in their submissions. It is therefore not sufficient to carry out an analysis that is limited to searching for the "real causes" of the dispute, particularly when this results in overlooking key and distinctive features of the dispute.*[171]

99. In applying the principle set out above to the case, Prof. Gaillard found that the dispute submitted by the investor had only arisen in 2012, as one of its main 'constituent elements' was undoubtedly the Slovak State's decision to reassign the mining rights to another company in spite of the local courts' decisions mandating the reinstatement of the mining rights to the investor:

> *As stated above, a dispute cannot arise until all of its constituent elements have fully come into existence. In this case, the DMO's 2012 act of reassignment of the mining rights is the **final and essential constituent element of the dispute**, as it is the act that created the legal situation of the mining rights contested before the Tribunal. **Without this final act, the dispute before the Tribunal would not exist. As a result, the dispute before the Tribunal necessarily arose after this act.***[172]

---

168 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017, para. 6 **[RL-009]**.

169 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017, paras. 18-25 **[RL-009]**.

170 *Eurogas Inc, and Belmont Resources Inc. v. Slovak* Republic, ICSID Case No. ARB/14/14, Award, 18 August 2017, para. 284 **[RL-136]**.

171 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017, paras. 7-8 **[RL-009]**.

172 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017, para. 26 **[RL-009]**.

100. As explained in the Counter-Memorial,[173] a similar situation arises in the present case: while Claimant sought to send a trigger letter on 7 June 2019, a Notice of Intent on 13 September 2019, and then submitted its RFA on 23 December 2019 (which was eventually registered by ICSID on 6 March 2020), at these times the 2009 Contract was still in force and the 2020 Tender Process had not yet been adjudicated.[174] It is only on 3 April 2020 that the 2020 Tender Process concluded with the award of the 2020 Contract to .CO Internet, formally Neustar's subsidiary at the time (although, as Respondent explains at paragraph 134 *infra*, the little evidence that Claimant has disclosed on this issue suggests that .CO Internet's sale to GoDaddy was well-advanced, if not concluded by that time).[175] It is this act that would allegedly have determined the extent of Claimant's reclamations against Respondent, and which would therefore have constituted a determinative act for the dispute to crystallize.

101. *Second*, Claimant seeks to rely on the alleged possibility for a claimant to develop its pleadings and modify its claims in the course of the arbitral proceedings to explain that the numerous changes in its factual allegations and claims are irrelevant to determining whether a dispute existed.[176] Claimant however misses the point and misrepresents Respondent's position. As explained in the Counter-Memorial, which lists in detail the constant changes and contradictions in Claimant's pleadings between the Notice of Intent, RFA and Memorial,[177] these changes ***evidence*** Claimant's difficulty to frame its claims precisely before the Memorial, due precisely to the fact that all of the constituent elements of the dispute had not come into existence.

102. *Third and finally*, Claimant also omits the requirement at Article 10.16(1)(ii) of the TPA that for an investor to submit an "*investment dispute*" to an international tribunal, this claimant must have "***incurred loss or damage** by reason of, or arising out of, that breach.*"[178] Claimant contends that "*the crystallization of a dispute does not depend on the existence of a full quantum analysis*".[179] Claimant's denials however miss the point: it is uncontested that Article 10.16(1)(ii) does not require such a 'full quantum analysis'. Nevertheless, the use of the verb "*incurred*" in the past tense

---

173 *See* Counter-Memorial, paras. 201-202.

174 *See* Counter-Memorial, paras. 126-146; the 2020 Tender Process was formally launched on 13 December 2019 with the publication of the final 2020 Terms of Reference (**[R-0051])** through Resolution 3316 of 2019 (**[R-0052]**). This process only concluded on **3 April 2020** with the award of the 2020 Contract to .CO Internet through Resolution 649 of 3 April 2020 (**[C-0107]**).

175 Resolution 649 of 3 April 2020 **[C-0107]**.

176 Reply, paras. 98-100.

177 Counter-Memorial, paras. 204, 257. For instance, and as recapped at para. 115 *infra*:

- In the Notice of Intent and RFA, Neustar indicated that it intended to present claims "on behalf" of .CO Internet, only to later drop these claims in the Memorial;
- In order to have its RFA registered by ICSID, Neustar had to drop its initial attempt to have .CO Internet added as a Claimant in reliance on the Most-Favoured Nation Clause in the TPA;
- In its Notice of Intent and RFA, Neustar mentioned a potential expropriation claim, but did not present it with the Memorial;
- Despite failing to mention this potential claim in its Notice of Intent, Neustar submitted claims under an "*investment agreement*" in its RFA, only to drop these in its Memorial;
- Neustar also introduced new claims for the first time in its Memorial based on the Swiss-Colombia BIT and on Article 10.14 of the TPA,

178 Emphasis added.

179 Reply, para. 101.

confirms that the investor must have suffered harm due to the alleged breach, not pure *speculation* regarding *hypothetical* loss. As confirmed by the United States themselves in the *AmecFoster* case (under the TPA) regarding this provision:

> *As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party "has breached" a relevant obligation, and also "has incurred loss or damage by reason of, or arising out of" (i.e. caused by) that breach. (Emphasis added). This,* ***there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach****. The breach and loss must have already occurred prior to the submission of a claim to arbitration.* ***No claim based solely on speculation as to future breaches or future loss may be submitted****.*
>
> *[…] Article 10.16.1 does not embrace* ***hypothetical claims*** *– e.g., that a* ***loss may be incurred in the future if circumstances ripen into an actual breach*** *of an obligation under the Agreement.*[180]

103. As explained in the Counter-Memorial, at the time Neustar submitted its RFA to ICSID on 23 December 2019, the 2009 Contract was still in force (with .CO Internet still receiving its 93% share of proceedings from the operation of the .co domain under this contract) and the 2020 Contract had not yet been awarded.[181] It should also be noted that as early as 20 September 2018, that is several months before MinTIC announced its decision not to renew the 2009 Contract and to launch a new tender process, Neustar had readily offered to renegotiate the financial conditions of the 2009 Contract in the following terms:

> *We are conscious of the dynamism of the industry and that a renewal of the contract would entail working on a restructuration of the compensation package, where in addition to revising the formula and calculation value of the same, it would also be possible to discuss other mechanisms that, taken together, would improve the contribution of the .co ccTLD to the digital transformation efforts in Colombia*.[182]

104. In these circumstances, it was unclear prior to the award of the 2020 Contract on 3 April 2020 that the divergence of views between MinTIC and Neustar regarding the renewal of the 2009 Contract would result in any damage for Neustar. Neustar's alleged "*losses*" were therefore entirely speculative and hypothetical when Neustar filed its RFA (or when this RFA was registered by ICSID).

105. To try and escape this reality, Neustar appears to contend that by 20 September 2018, Colombia had already expressed its intention not to renew the 2009 Contract through the July 2018 Report.[183] This baseless contention however does not hold up to an examination of the record. Indeed, the

---

180 *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022, paras. 3-4 **[RL-137]** (emphasis added).

181 *See* Counter-Memorial, paras. 173-175.

182 Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.

183 *See* Reply, para. 235.

July 2018 report was an internal report aimed at providing the new administration with an overview of the .co domain situation and the upcoming steps with respect to the 2009 Contract,[184] and Claimant fails to establish that it had knowledge of this report prior to 20 September 2018.[185] Even assuming (*quod non*) that Neustar and .CO Internet were aware of the report, it is unclear how this would have 'coerced' them into making their 20 September 2018 offer. Neustar's allegation is therefore entirely unsupported; to the contrary, this offer evidences the hypothetical nature of Neustar's alleged losses at the time of the submission of the Notice of Intent and RFA, in light of Neustar's clear admission of the need to "*restructur[e]*" the "*compensation package*" under the 2009 Contract.[186]

106. In light of the above, it is further clear that Claimant's Notice of Intent and RFA were not sufficient to meet the requirements for Respondent's consent to arbitration to be formalized,[187] and this Tribunal therefore lacks jurisdiction over Claimant's claims.

(b) **Claimant's defective Notice of Intent did not engage Respondent's consent**

107. As Respondent established in its Counter-Memorial, the Tribunal also lacks jurisdiction over Claimant's claims in light of the defects affecting Claimant's 13 September 2019 Notice of Intent, which is a mandatory pre-condition to arbitration pursuant to Article 10.16(2) of the TPA.[188] At the very least, the Tribunal lacks jurisdiction over Claimant's claims under the Swiss-Colombia BIT and Article 10.14 of the TPA, which were impermissibly excluded from the Notice.

108. Claimant does not appear to dispute the mandatory nature of Article 10.16(2) of the TPA, which has been recognized as a necessary step in order for the respondent State's consent to arbitration under the TPA to be formalized.[189] Claimant however contends that its Notice was not defective,

---

184 *See* Counter-Memorial, para. 79; First Witness Statement of Sylvia Constaín, paras. 5-7 **[RWS-01].**

185 It bears noting that this document is clearly marked as 'confidential' on all of its pages. *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]**.

186 And in any event as well as at the time of the registration of the RFA by ICSID on 6 March 2020.

187 As explained by the United States in *AmecFoster*, the requirement that a loss have been incurred by the investor at the time of submitting the claim to arbitration is a precondition to consent. This is because, *inter alia*, under Article 10.17 of the TPA the contracting parties consented "*to the submission of a claim to arbitration* ***under this Section in accordance with this Agreement***." (emphasis added).

188 Counter-Memorial, Section 3.2(b).

189 *See* Counter-Memorial, paras. 207-213. *See also*, *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]** ("*The Tribunal agrees that the State's consent to arbitration under DR-CAFTA presupposes the compliance with the requirement for the submission of a claim, including but not limited to those under article 10.16(2), which establish the need to include in the notice of intent not only a factual description for each claim, but also the 'legal basis' thereof. It is a right of the Respondent to have a clear framework of the claims from the outset.*"); *Pac Rim v. The 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. 93 **[RL-012]** ("*It would therefore be impermissible for a claimant to evade pleading the factual basis for each of its claims in the notice of intent: a mere conclusion could not specify a factual basis. Accordingly, liability, causation and damages must be pleaded under CAFTA Article 10.16.1 and Article 10.16.2(b), (c) and (d) as regards the notice of intent.*"); *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022, para. 10 **[RL-137]** ("*The procedural requirement sin Article 10.16.2 are explicit and mandatory, as reflected in the way the requirements are phrased (i.e., "shall deliver;" "shall specify"). These requirements serve important functions, including to provide a Party to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense. […] For all of*

arguing that it contained enough details regarding its claims and damages since it spanned nearly 40 pages (**i**),[190] and that it did not improperly exclude claims from the Notice (**ii**).[191] Claimant's arguments are, here again, unavailing.

(i) *Claimant failed to adequately mention the legal and factual basis as well as to plead damages in its Notice of Intent*

109. As a reminder under Article 10.16(2) the Notice of Intent shall contain the following information:

> *[T]he 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;*
>
> *[F]or each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*
>
> *[T]he legal and factual basis for each claim; and*
>
> *[T]he relief sought and approximate amount of damages claimed.*

110. As explained in the Counter-Memorial, the purpose of this mandatory provision is to provide the respondent State with a framework of the claims and an opportunity to consider negotiations, and/or to prepare its defence.[192] While it is uncontested that a Notice of Intent will not require the same level of detail than a full pleading such as a memorial,[193] it remains that under the plain wording of Article 10.16(2) such notice shall contain the "*legal and factual basis*" of the claims as well as the "*relief sought and approximate amount of damages claimed*." In the words of the *Pac Rim* tribunal, ruling under DR-CAFTA (which contains an identical provision), "*liability, causation and damages must be pleaded […] as regards the notice of intent.*"[194]

111. Irrespective of the length of the notice, which appears to be Claimant's main defence, a careful examination of the document submitted by Neustar on 13 September 2019 reveals that it fails to adequately state the legal and factual bases for each claim, and that it does not properly plead liability, causation and damages:

---

the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the requirements of Article 10.16.2. Rather, satisfaction of the requirements of Article 10.16.2 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by at least 90 days to engage respondent's consent to arbitrate.").

190 Reply, paras. 105-113.

191 Reply, paras. 114-123.

192 Counter-Memorial, para. 211; *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 346 **[RL-011]**; *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022, para. 10 **[RL-137]**.

193 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 346 **[RL-011]**; *Pac Rim v. The 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, paras. 96-97 **[RL-012]**.

194 *Pac Rim v. The 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. 93 **[RL-012]**.

- With respect to the factual and legal bases of its claims, Neustar alleged that Colombia was intending to "*terminate in advance*" the 2009 Contract due to "*alleged breaches*" and insisted particularly on the alleged expropriation of the 2009 Contract that Colombia was supposedly conducting, explaining that "*the refusal to extend the Contract means it will not be possible to continue operating.*"[195] This was entirely speculative and was disproved by subsequent events, with .CO Internet winning the 2020 Tender Process and continuing to operate in Colombia. Claimant therefore quietly dropped its allegations of expropriation in its Memorial, not in order to "*limit the issues in dispute*" as Claimant now alleges but simply because the "*factual basis*" for this claim had proven entirely speculative.[196]

- With respect to the damages, liability and quantum Claimant only requested that Colombia pay an amount of at least USD 350 million without any further explanation, thereby failing to adequately plead liability, damages and causation. While Respondent certainly does not argue that a "*full case on quantum*" shall be pleaded in the Notice of Intent, contrary to Claimant's suggestion,[197] Claimant's Notice of Intent entirely fails to evidence the link between Colombia's alleged conduct and the alleged damages. Further, as seen immediately above at the time of submitting the Notice of Intent these damages were entirely speculative, given that the 2020 Tender Process had not even yet been put in motion.[198] This failure in Neustar's pleadings was specifically identified by Colombia on 2 December 2019, which noted Neustar's failure to identify "*the causation of a certain damage that affects its investment and [would require] compensation.*"[199]

112. It follows that Neustar's Notice of Intent of 13 September 2019 did not meet the mandatory requirements of Article 10.16(2) of the TPA, thereby failing to engage Respondent's consent under Article 10.17 of the same.

(ii) *At the very least, Claimant's claims under the Swiss-Colombia BIT and Article 10.14 of the TPA should be disregarded*

113. Claimant attempts to rely on a convoluted interpretation of Articles 10.16(2) and 10.16(4) combined to argue that the claims it had not articulated in its Notice of Intent (i.e. its claims that Colombia breached Article 10.14 of the TPA, and that Colombia breached Article 4(1) of the Swiss-Colombia BIT) should fall within this Tribunal's jurisdiction. However, in doing so Claimant disregards the plain wording of Article 10.16(2), which explicitly requires that before submitting "*any claim*" to arbitration, the notice "*shall*" specify "***for each claim**, the provision of this Agreement, investment*

---

195 Notice of Intent of Neustar and .CO Internet of 13 September 2019, paras. 54.iv, 81-84 **[C-0004]** (For instance, Neustar alleged that "*On 27 June 2019, the MinCIT […] signed a service Contract with the Durán y Osorio law firm to help justify the termination of the Contract to the investor, and for the legal development of the selection process to identify the third party that will be responsible of the […] .CO Domain, which makes clear the State's intention […] to proceed with the expropriation of the Contract from 2020.*").

196 Reply, para. 110.

197 Reply, para. 113.

198 *See also*, Counter-Memorial, para. 201.

199 Letter from ANDJE to Neustar of 2 December 2019, p. 2 **[R-0081]**.

authorization, or investment agreement alleged to have been breached and any other relevant provisions."[200]

114. It also bears noting that prior tribunals, interpreting both treaties with similar language (such as DR-CAFTA) or treaties with more lenient language regarding notice of intent requirements, have found that the requirement that the claims be included in the Notice of Intent (or trigger letter) is compulsory, and that claims raised after this trigger letter are outside the tribunal's jurisdiction due to a failure to notify the host state.[201]

115. As explained in the Counter-Memorial, Neustar made constant changes to its claims between the Notice of Intent, RFA, and Memorial.[202] In particular:

- In its Notice of Intent of 13 September 2019, Neustar highlighted MinTIC's alleged intention to "*terminate in advance the Contract with .CO Internet*",[203] and put forward a potential claim under Article 10.7 of the TPA (expropriation), arguing that "*[t]he disregard of Neustar/.CO Internet rights […] in relation to its conduct to make the attempt for the extension of the Contract and to conduct negotiations in good faith can be interpreted as an indirect expropriation.*"[204] Further Neustar listed potential claims under Articles 10.3 (national treatment), 10.4 (most favoured nation treatment) and 10.5 (minimum standard of treatment), which it also linked to Colombia's alleged failure *"to extend the contract for 10 years.*"[205] Neustar also indicated that it intended to present claims "*on behalf*" of .CO Internet under Article 10.16(1)(b) of the TPA;[206]

- In its RFA as submitted on 23 December 2019, while Neustar continued to put forward claims under Articles 10.3 (national treatment), 10.4 (most favoured nation treatment), and 10.5 (minimum standard of treatment) of the TPA, Neustar pivoted to place more emphasis on the 2020 Tender Process, explaining that "*[i]t is apparent […] that the outcome of the new tender process is predetermined*", and that such process fundamentally lacked transparency.[207] As such, Neustar concluded that "*Colombia has manifested a clear intention to* […] *expropriate[e] their investments without regard to the obligations imposed by Article 10.7.*"[208] Neustar also referred to two new claims that had not been included in the Notice of Intent:

---

200 Emphasis added.

201 *Burlington . v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras. 316-318 **[RL-016]**; *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17 (UNCITRAL), Award, 24 March 2016, paras. 385-391 **[CL-020];** *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, paras. 343-346 **[RL-011]**.

202 *See* Counter-Memorial, para. 204.

203 Notice of Intent of Neustar and .CO Internet 13 September 2019, paras. 54-65 **[C-0004]**.

204 Notice of Intent of Neustar and .CO Internet 13 September 2019, para. 81 **[C-0004]**.

205 Notice of Intent of Neustar and .CO Internet 13 September 2019, para. 69 **[C-0004]**.

206 Notice of Intent of Neustar and .CO Internet 13 September 2019, paras. 66, 84 **[C-0004]**.

207 RFA, paras. 80-81.

208 RFA, para. 124.

- An alleged breach of "*the observation of obligations clause, as found in the Swiss-Colombia BIT and which protection the Claimants invoke here through the MF[N] clause of the TPA*";[209]

- A purported claim under the 2009 Contract, pursuant to Articles 10.16(1)(a)(i)(C) and 10.16(1)(b)(i)(C) referring to claims under an "*investment agreement*" as defined in the TPA;[210]

From a procedural standpoint, Neustar not only continued to present claims "*on behalf*" of .CO Internet,[211] but also sought to have .CO Internet included as a Claimant in these proceedings by relying on the MFN clause at Article 10.4 of the TPA to invoke the Swiss-Colombia BIT;[212]

- In its RFA as registered by ICSID on 6 March 2020, following communications from ICSID and Respondent pointing the clear limitations of the TPA and the flaws affecting Claimant's RFA, Neustar decided to drop its request to have .CO Internet included as a Claimant through the invocation of the Swiss-Colombia BIT; finally,

- In its Memorial, Neustar no longer put forward (i) any claims under an investment agreement, (ii) its allegations of breach of the observation of obligations clause in the Swiss-Colombia BIT, and (iii) its speculative expropriation claim. From a procedural standpoint, Neustar also abandoned its claims "*on behalf*" of .CO Internet.

  Conversely, Neustar introduced two new claims for the first time: one based on Colombia's alleged "*unreasonable measures*" under the Swiss-Colombia BIT,[213] and the other on Colombia's alleged failure to protect confidential business information under Article 10.14 of the TPA.[214]

116. In light of the mandatory nature of Article 10.16(2), this Tribunal should therefore at the very least disregard Neustar's claims for breach of Article 10.14 of the TPA and breach of the Swiss-Colombia BIT which Claimant failed to include in its Notice of Intent or RFA, instead raising them for the first time in its Memorial.[215]

---

209 RFA*, ibid.*

210 RFA, paras. 126-128.

211 RFA, paras. 99-100.

212 RFA, para. 111.

213 Memorial, paras. 266 *et seq.*

214 Memorial, paras. 264-265.

215 Claimant's argument on the possibility to add further claims at a later stage of the proceedings is inapposite. In the words of the *Kappes* tribunal, on which Claimant seeks to rely, such an additional claim could be accepted only "*provided that the claim **is related to the existing dispute** and is added early enough in the proceedings that the State will have appropriate opportunity to investigate, discuss and respond*". (*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. 198 **[CL-086]**. *See also*, *Supervision y Control S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 341 **[RL-070]** ("*In the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different and not directly related to*

2.5 **Claimant still fails to establish its standing to bring any claims before the Tribunal**

117. As explained in the Counter-Memorial, Claimant does not have standing to bring claims before this Tribunal because it sold its investment, .CO Internet, to GoDaddy at a time when the dispute had not fully crystallized.[216] Claimant however persists in arguing that its standing was unaffected by the sale to GoDaddy because it submitted its RFA on 23 December 2019 and it was registered by ICSID on 6 March 2020, prior to the formal conclusion of the sale to GoDaddy on 6 April 2020.[217] Claimant however misrepresents Respondent's position, and fails to establish conclusively that it does have standing to bring any claims under the TPA.

118. *First*, as demonstrated at Section 2.4(a) *supra*, the dispute had not crystallized by the time Neustar submitted its RFA or by when this RFA was registered by ICSID on 6 March 2020. While Respondent incorporates the arguments set out above by reference, it bears noting that at these times:

- The 2009 Contract was still in force, with Neustar and .CO Internet perceiving revenues under such contract;
- The 2020 Tender Process was still ongoing, with Neustar and .CO Internet participating fully therein and having submitted a bid for the 2020 Contract;
- In fact, it was still uncertain that the 2009 Contract would not be renewed at all: as explained in the Counter-Memorial, continuity of service was the foremost concern of MinTIC with respect to the operation of the .co domain.[218] As such, if the 2020 Tender Process had proven unsuccessful (with, for instance, no interested parties presenting offers), MinTIC could well have had to conclude a renewal of the 2009 Contract in order to avoid any risk to the continuity of service.

119. It follows that as of the dates of the submission and registration of the RFA, any damages claimed by Neustar were not only uncertain in their quantum, but in fact entirely speculative. This is all the more so considering Neustar's willingness to renegotiate the terms of the 2009 Contract even before MinTIC had announced its intention to carry out a new tender process.[219]

---

those previously presented, all the claims not notified will be inadmissible.")). In the present case, Neustar has not at all elaborated on its claim for breach of Article 10.14 of the TPA (other than two paragraphs in its Memorial – *see* paras. 264-265) and has not explained the basis for its claim. With respect to its claim under the Swiss-Colombia BIT, it had not been included in the Notice of Intent and appears to have been later added by Claimant in order to compensate its withdrawal of claims under the 2009 Contract which it alleged constituted an "*investment agreement*" under Article 10.16(1)(a)(i)(C) and 10.16(1)(b()(i)(C). Accordingly, this Tribunal should disregard these claims. *See also*, Section 3-4 *infra*.

216 Counter-Memorial, Section 3.4.

217 Reply, paras. 128, 132.

218 Counter-Memorial, paras. 52, 82, 96, 105, 113; First Witness Statement of Iván Darío Castaño Pérez, para. 14 **[RWS-02]**.

219 *See* Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.

120. *Second*, an examination of the changes in Claimant's claims and factual allegations in support thereof between the Notice of Intent, RFA and Memorial of 22 October 2021 confirm that when Neustar submitted its RFA (or when such RFA was registered by ICSID), the dispute had not yet crystallized since Neustar was unable to fully present its claims. By way of example:

- From a factual perspective, Neustar appears to have modified its case between the RFA and the memorial on several aspects:
    - In the RFA, Claimant's case was based on mere speculations about the 2020 Tender Process, with Neustar stating that "*it is apparent from this circumstances that outcome of the new tender process is predetermined*"[220]. However, as .CO Internet actually ended up winning the 2020 Tender Process, in its Memorial Neustar had to include these facts and build up a new argument concerning how the transparent selection process carried out by Colombia had affected it.
    - While in its Memorial, Claimant devoted several pages on Colombia's alleged practice of renewing the concession contracts, no mention of this point was made in the RFA.
- As explained at Section 2.4(b) *supra.*, from a procedural perspective Neustar made constant changes to its claims between its Notice of Intent, RFA, and Memorial, also putting forward different facts in support of these claims.

121. The changes made by Neustar in its Memorial are of such a nature that they go far beyond a simple 'modification' of its arguments or "*amend[ment] to some of its pleadings*" as alleged by Claimant in its Reply.[221] In fact, it is only with the submission of the Memorial that Respondent was provided for the first time with a view of Claimant's *actual* claims (including two new claims under Article 10.14 of the TPA and Article 4(1) of the Swiss-Colombia BIT), and Claimant's *actual* factual allegations in support of these claims, confirming that as of the date of the submission of the RFA on 23 December 2019 or its registration by ICSID on 6 March 2020 no dispute had crystallized.

122. However, at the time of submitting its Memorial it is uncontested that Neustar had already sold its investment to GoDaddy:

- Neustar and GoDaddy themselves acknowledged that they had been negotiating the sale since at least April 2019 and that the announcement had been delayed pending the results of the 2020 Tender Process;[222]

---

220 RFA, para. 80.
221 Reply, para. 138.
222 L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May **[R-0075]**.

- As explained in the Counter-Memorial, the evidence Respondent has been able to gather shows that the negotiation for the sale was concluded on 23 December 2019 when Claimant sought to submit its RFA, and even more crucially before ICSID registered this request on 6 March 2020;[223]

- The transaction was officially signed on 3 April 2020 and closed on 20 August 2020,[224] upon the award of the 2020 Contract to .CO Internet.

123. Claimant therefore lacked standing to introduce its claims when it introduced them by the first time with its Memorial, further depriving the Tribunal of jurisdiction.

2.6 **Claimant's introduction of these proceedings is constitutive of an abuse of process**

124. Respondent has established in its Counter-Memorial that Neustar's introduction of the present proceedings is constitutive of an abuse of process for two separate reasons: Neustar tried to artificially secure standing by submitting to arbitration at a time when the dispute had not crystallized in light of its impending sale of .CO Internet to GoDaddy, and Neustar sought to use the present proceedings (as well as the related Council of State proceedings) to exert undue pressure on Colombia not to launch a tender process. Claimant cannot rely on the fact that its attempts to effectively force MinTIC to renew the 2009 Contract (through *inter alia* speculative allegations of TPA breaches) did not succeed: its introduction of the present proceedings for other purposes than dispute resolution remains abusive.

125. While Claimant accepts that the doctrine of abuse of process is firmly established under international law, including in the context of treaty-based investment arbitration,[225] it disputes that any of its behaviour constitutes an abuse of process, arguing that Respondent has not proved its allegations and that in any event these do not reach the threshold required for such a finding.

126. As set forth below, Claimant's defences are nothing more than a smokescreen to distract the Tribunal from the reality surrounding Claimant's filing of its RFA. Further, Claimant's blatant failure to produce relevant documentation with respect to the sale of .CO Internet to GoDaddy and the timing of the filing of its RFA, as mandated by Procedural Order No. 2, confirms that Claimant acted in bad faith and committed an abuse of process when initiating these proceedings, because it did

---

223 *See* para. 100 *infra*. *See also*, Letter from Neustar to the ICSID Secretariat of 6 March 2020 **[R-0071]**; Unit Purchase Agreement between Neustar and GoDaddy of 3 April 2020, Recitals **[C-0126]**, confirming that the transfer of .CO Internet shares from Neustar to Registry Services LLC was an important step for the completion of the transaction, Registry Services LLC being the special vehicle used by the parties to transfer Neustar's registry business to GoDaddy. The transfer of the shares from Neustar to Registry Services LLC was effective as early as 24 January 2020, thereby confirming that as of this date the sale was already completed and for purposes of the present proceedings Neustar had lost standing to bring any claims as a protected investor, long before its RFA was registered by ICSID on 6 March 2020.

224 Email from .CO Internet to MinTIC of 6 April 2020 **[R-0072]**; Email from GoDaddy to Colombia of 6 April 2020 **[R-0073]**; GoDaddy, 'GoDaddy acquires Neustar's registry business', 6 April 2020 **[R-0074]**; A. Allemann, 'GoDaddy goes vertical with Neustar registry integration', *Domain Name Wire*, 6 April 2020 **[R-0076]**; MarketScreener, 'GoDaddy Inc. completed the acquisition of Registry business of Neustar, Inc.', 5 August 2020 **[R-0077]**.

225 Reply, paras. 144-145.

so to both artificially secure standing (**1**) and for purposes other than genuine dispute resolution (**2**).

127. As a preliminary matter, it is however necessary to correct Claimant's allegation that an abuse of process is always considered an admissibility issue.[226] Contrary to Claimant's position, several tribunals have considered the issue of abuse of process to affect a tribunal's jurisdiction.[227] As one author explains, this is because in the context of treaty-based arbitration:

> *[T]he abusive attempt to acquire the right to investment arbitration does not accord such right to a specific claimant investor, and therefore, a tribunal does not have jurisdiction over the investor and its claims. While the general right to investment arbitration does exist under an investment agreement, regardless of the abusive conduct of the claimant, that does not mean that the tribunal has jurisdiction over the claimant. Therefore, a question for the tribunal is whether the claimant abuses the general right to investment arbitration in an attempt to acquire its own right to investment arbitration over its specific claims, and whether, as a consequence, it fails to establish the jurisdiction of an investment arbitral tribunal over its claims.*[228]

128. Should the Tribunal find that Claimant committed an abuse of process, as Respondent will evidence below, then the Tribunal should decline jurisdiction over Claimant's claims.[229]

(a) Claimant's omissions and spurious defences confirm that it sought to initiate these proceedings to artificially secure standing

129. In order to argue that its introduction of the proceedings was legitimate, Claimant mostly attempts to argue that the concept of abuse of process does not apply to situations such as the one at issue in the present case, where a claimant deliberately introduced proceedings prematurely in light of its impending sale of its investment. Claimant's spurious defence, coupled with its continued failure to disclose any relevant documents relating to the negotiation and timing of the GoDaddy transaction, however, points to the contrary.

---

226 Reply, para. 141.

227 *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, and others v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 52 **[CL-092]** ("*In theory, the inquiry by the Tribunal at the present stage of the proceedings would also extend to the question of whether they are not frivolous or abusive*"); *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, para. 423 **[RL-138]** ("*The Tribunal has come to the conclusion that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide ST-AD's claim, then any pre-existing national dispute could be brought to an international arbitration tribunal by an "after the fact" transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would ipso facto constitute a "protected investment" – and the jurisdiction of an international arbitral tribunal under a BIT would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying bilateral investment treaties. The Tribunal has to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration.*").

228 Y. Fukunaga, 'Abuse of Process under International Law and Investment Arbitration', *ICSID Review - Foreign Investment Law Journal 33(1)* (2018), p. 196 **[RL-050]**.

229 At the very least, should it consider that the specific abuse of process committed by Claimant in this case relates to admissibility, it should declare Claimant's claims inadmissible.

130. *First*, while Claimant acknowledges that the doctrine of abuse of rights is applicable in the present case,[230] and that tribunals should discretionarily assess "*all circumstances of the case*" in determining whether an abuse of process occurred,[231] it argues that this doctrine has only been applied in two instances in the context of treaty-based investment arbitration, namely:[232]

- Where a vertically integrated claimant seeks to have several entities in the corporate chain bring the same claims (a scenario which neither party has argued is of relevance to the present case),[233] and
- Where a claimant has engaged in corporate restructuring to gain jurisdiction after a dispute became foreseeable.[234]

131. Claimant then goes to great lengths to argue that the second instance is irrelevant to the issue at hand, because it 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*."[235]

132. Claimant's submissions are however misleading: Respondent never submitted that this case involves a situation where Claimant would have tried to gain jurisdiction through corporate restructuring. Rather, Respondent submits that these cases constitute an informative example of the type of circumstances that tribunals will consider reach the threshold of an abuse of process. Specifically, in these cases the tribunals considered that an investor's schemes to secure jurisdiction when a dispute was "*foreseeable*" were constitutive of an abuse of process,[236] and considered that such a dispute is foreseeable "*when there is a reasonable prospect […] that a measure which may give rise to a treaty claim will materialise*."[237]

133. By analogy, in the case at hand Claimant also "*engaged in conduct to gain access to jurisdiction*" in the wake of its sale of .CO Internet (its investment) to GoDaddy. As shown at Section 2.4(a)

---

230 Reply, para. 144.

231 Reply, para. 148; *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 177 **[RL-058]**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143 **[RL-139]**; *Renée Rose Levy and Gremcitel v. Peru,* ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 186 **[RL-064]**; *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA, Case No. 2012-12 (UNCITRAL), 17 December 2015, para. 550 **[RL-063]**.

232 Reply, para. 145.

233 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 94-95 **[CL-012]**.

234 *Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 540 **[RL-061]**.

235 Reply, para. 148 (emphasis added).

236 C. Ceretelli, 'Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?', *Journal of International Dispute Settlement* 11(1) (2020), p. 54 **[RL-055]**. *See also*, *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 12 June 2012, para. 2.45 **[RL-060]**; *Philip Morris Asia Limited v. Commonwealth of Austra*lia, PCA, Case No. 2012-12 (UNCITRAL), 17 December 2015, para. 539 [**RL-063]**.

237 *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA, Case No. 2012-12 (UNCITRAL), 17 December 2015, para. 554 **[RL-063]**; *Tidewater Investment SRL and Tidewater Caribe C.A v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, para. 147 **[RL-065]**.

supra. (which is incorporated by reference), the dispute had not yet crystallized when Claimant submitted its RFA on 23 December 2019 or when this RFA was registered by ICSID on 6 March 2020, notably because Claimant had not incurred anything more than speculative damages (with the 2009 Contract still in force and the 2020 Tender Process ongoing). Yet, Claimant submitted to arbitration prematurely to artificially preserve its standing, at a time when its sale of .CO Internet to GoDaddy was at the very least foreseeable (if not already agreed in principle, and delayed pending completion of the 2020 Tender Process)

134. *Second*, as already explained in the Counter-Memorial,[238] the evidence that Respondent has been able to uncover, despite Claimant's obstructionist behaviour, confirms that:

- Neustar and GoDaddy started negotiating the sale of the registry business, including .CO Internet, at least one year prior to the announcement of the sale on 6 April 2020. This is confirmed by Neustar and GoDaddy representatives themselves, and has not seriously been denied by Claimant;[239]

- While, as explained below, Claimant has breached its obligation to comply with ordered production refusing to provide any relevant documents relating to the timing of the negotiations, the evidence already on the record confirms the negotiations were closed long before Claimant filed its RFA, or at the very least before it was registered by ICSID on 6 March 2020. In particular, it is uncontested that in early 2020, Neustar transferred its interest in .CO Internet to Registry Services LLC,[240] and subsequently informed MinTIC of this transfer on 24 February 2020. When Respondent questioned this transfer in the context of the ICSID proceedings,[241] Claimant indicated that it was simply an internal restructuring aimed to, *inter alia*, "*satisfy the requirements of the tender*", while stressing that Registry Services remained a fully-owned subsidiary of Neustar.[242] Claimant however failed to provide any proof of its allegation that it remained the owner of Registry Services (and therefore the owner of its investment, .CO Internet) at that time in spite of Respondent's explicit request.[243] Further, to date Claimant has failed to prove how this transfer was intended to "*satisfy the requirements of the tender*", and has submitted no evidence that shows that Registry Services was anything more than a simple transfer vehicle intended to tender the investment to GoDaddy.[244]

---

238 Counter-Memorial, paras. 279-281.

239 L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May **[R-0075]**.

240 *See* Letter from .CO Internet to MinTIC of 24 February 2020, p. 2 of the PDF **[R-0069]**.

241 Letter from Colombia to ICSID Secretariat of 3 March 2020 **[R-0070]**.

242 Letter from Neustar to the ICSID Secretariat of 6 March 2020 **[R-0071]**.

243 Letter from Colombia to ICSID Secretariat of 3 March 2020 **[R-0070]**.

244 In fact, while Claimant declared that Registry Services LLC remained "*wholly owned and controlled by Neustar*" in its letter of 6 March 2020, it did not even provide any documentary proof that Registry Services LLC was still owned by Neustar at that time in spite of Respondent's requests. *See* Letter from Colombia to ICSID Secretariat of 3 March 2020 **[R-0070]**; Letter from Neustar to the ICSID Secretariat of 6 March 2020 **[R-0071]**.

In fact, the Unit Purchase Agreement between Neustar and GoDaddy confirms that such transfer was an important step towards the completion of the sale (as Registry Services LLC was the entity transferred from Neustar to GoDaddy), further highlighting Claimant's bad faith and elusive explanations.[245]

- While the sale of the investment to GoDaddy was already done and finalized, Neustar and GoDaddy simply opted to delay the finalization and announcement of the sale until 6 April 2020. This is, again, expressly recognized by Neustar and GoDaddy representatives, who explain that they did so precisely due to the impending award of the 2020 Contract, which ultimately took place on 3 April 2020.[246] Claimant fails entirely to address these statements in its Reply. Instead, Claimant summarily dismisses Respondent's argument that the delay was related to .CO Internet and the 2020 Tender Process on the basis that "*the transaction encompassed a number of interests, and not just the sale of .CO Internet*."[247] However, not only has Claimant failed to present any witnesses in support of its submissions, but a simple look at the Unit Purchase Agreement between Neustar Inc. and GoDaddy confirms the opposite. The Unit Purchase Agreement was signed on 3 April 2020, which is coincidentally *the same day* as the award of the 2020 Contract.[248] Claimant's contentions are therefore disproved by the record.

135. *Third and finally*, Claimant further attempts to resist Respondent's claim by alleging that "*[t]he reason Neustar did not publicly disclose the sale to GoDaddy at the time identified by Respondent is thus because there was no sale to speak of.*"[249] Claimant's arguments however miss the point: as shown in the Counter-Memorial, the main terms of the sale to GoDaddy were essentially agreed when Neustar submitted its RFA on 23 December 2019, or at least when such RFA was registered by ICSID on 6 March 2020.[250] As explained immediately above, it would simply appear that the finalization of the sale was delayed pending completion of the 2020 Tender Process, as recognized by Neustar itself. It bears noting that in the face of this clear record, Claimant has submitted no contrary evidence at all and therefore failed to support in any way its claim that the sale had not been agreed before 6 April 2020. Claimant could easily have presented a witness or a document to disprove these allegations, and complied with its burden of proof to demonstrate that it owned the investment at relevant times, yet it failed to do so. Claimant's lack of evidence to respond to Respondent's allegations speaks for itself.

---

245 See Unit Purchase Agreement between Neustar and GoDaddy of 3 April 2020, Recitals, Section 2.1. **[C-0126]**.
246 L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.
247 Reply, para. 157.
248 Unit Purchase Agreement between Neustar and GoDaddy of 3 April 2020 **[C-0126]**.
249 Reply, para. 156.
250 Counter-Memorial, para. 279.

136. Notably, during document production Claimant also failed to produce any documentation on this issue, despite the Tribunal ordering that it disclose *inter alia*:[251]

- Any internal Neustar documents "*regarding the negotiation with GoDaddy or any of its affiliates or representatives for the sale of Neustar's registry business, including .CO Internet, to GoDaddy or its affiliates*", including in particular documents "*pertaining to the initiation of the negotiations*" and "*Board authorizations or decisions regarding the negotiations*";[252]

- Any internal Neustar documents "*regarding Neustar's approval of the terms and conditions of the sale of its registry business, including .CO Internet, to GoDaddy or its affiliates*."[253]

137. Instead of fully complying with the Tribunal's order and undertaking reasonable searches for documents as mandated under Procedural Order No. 2,[254] Neustar chose to produce just four heavily redacted documents which contained no relevant information about the negotiations at all. As explained in Respondent's 5 September 2022 Application, it is not credible to suggest that no further responsive documents exist. A transaction of such magnitude as the sale of Neustar's registry business to GoDaddy must have been documented in more than four PowerPoint presentations: other internal Neustar documents, including communications, are virtually certain to exist.[255] This is all the more so given that Neustar's and GoDaddy's representatives publicly acknowledged that the negotiations started at least one year prior to the announcement of the sale on 6 April 2020.[256]

138. In light of Neustar's utmost failure to comply with its disclosure obligations, and in line with Procedural Order No. 1, 2, and 3 as well as the IBA Guidelines (which grant the Tribunal such powers[257]) Respondent respectfully requests that the Tribunal draw adverse inferences and consider that had these documents been duly produced, they would have shown that the main terms of the sale had been agreed prior to the filing of the RFA on 23 December 2019 and/or (even more importantly) prior to its registration by ICSID on 6 March 2020, and that Neustar was delaying formal finalisation and announcement simply to artificially preserve standing in this dispute.

139. Against this background, Claimant's contention that Respondent has not met the high burden required for the demonstration of an abuse of process falls flat. Rather, the evidence on the record

---

251 *Ibid*.
252 Procedural Order No. 2 of 6 May 2022, Annex B, Request 7 (pp. 24-32 of the PDF).
253 Procedural Order No. 2 of 6 May 2022, Annex B, Request 8 (pp. 32-34 of the PDF).
254 Procedural Order No. 2 of 6 May 2022, Annex B, Requests 7 and 8 (pp. 24-34 of the PDF).
255 Respondent's Application of 5 September 2022, pp. 5-6.
256 L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.
257 IBA Rules on the Taking of Evidence in International Arbitration, Article 9.6 **[RL-140]** ("*If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*").

confirms that there are special circumstances in this case,[258] including Claimant's insistence to maintain a shroud of secrecy surrounding the timing of the GoDaddy transaction, and that Claimant committed an abuse of process by deliberately introducing the present proceedings prematurely to preserve standing. This Tribunal should therefore decline jurisdiction on this basis alone.[259]

(b) Claimant improperly sought to coerce Colombia into renewing the 2009 Contract

140. In addition to trying to improperly secure standing under the TPA, Claimant also used the ICSID proceedings for "*purposes other than genuine dispute resolution*",[260] that is mainly to improperly try to coerce Colombia into renewing the 2009 Contract. Claimant's defences to the contrary are, here again, unavailing: its introduction of the present proceedings to try and force MinTIC to conclude a renewal of the 2009 Contract, and its presentation of meritless claims in spite of the clear language of Article 4 of the 2009 Contract confirm Claimant's abusive approach.

141. *First*, Claimant argues that there are no authorities supporting Respondent's argument that an use of the arbitral process for other purposes than genuine dispute resolution can be constitutive of an abuse of process.[261] Claimant however misrepresents the late Prof. Gaillard's commentary on abuse of process, in which he explains that instances of use of arbitration for purposes other than dispute resolution would include "*gaining a benefit which is inconsistent with the purpose of international arbitration*", and "*harass[ing] and exert[ing] pressure on another party.*"[262] In fact, similar arguments were put forward in cases on which Claimant itself seeks to rely.[263] While the tribunals in these cases did not decide on the issue of abuse of process, they certainly did not discard the possibility that an abuse be constituted when a party seeks to use the proceedings for purposes other than genuine dispute resolution.[264]

---

258 Claimant relies on two awards to assert that the threshold for finding an abuse of process is high (*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 **[RL-139]** (not numbered by Claimant at fn. 193 of the Reply) and *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]**). However, these awards are inapposite to the instant case as, in those cases, the tribunals addressed the issue at a *preliminary stage*, in the context of bifurcated objections to jurisdiction. The tribunals' concerns where inherently linked to the "*appreciation of the risk of a mistake*" in the "*context of a prima facie examination*", where a "*false positive*" finding would prevent the tribunal from hearing the dispute. Evidently, this is not the case here.

259 Or, at the very least, declare Claimant's claims inadmissible.

260 E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review - Foreign Investment Law Journal* 32(1) (2017), pp. 10-11 **[RL-056]**.

261 Reply, paras. 160-161.

262 E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review - Foreign Investment Law Journal 32(1)* (2017), pp. 10-11 **[RL-056]**.

263 *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. 85 **[CL-117]**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 135 **[RL-139]**.

264 *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]**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, paras. 146-147 **[RL-139]**.

142. *Second,* Neustar's various attempts to argue that the examples of abusive behaviour set out by Respondent in its Counter-Memorial are "*misplaced and insufficient*" fall flat. Rather, Respondent has shown that Claimant's actions were all aimed at "*harassing and exerting pressure*" on Respondent in general and MinTIC in particular in an effort to obtain undue "*benefit[s]*":[265]

- Claimant is seeking to obtain an undue benefit through the present proceedings by claiming compensation for Respondent's alleged failure to renew the 2009 Contract in utmost disregard of the contractual language of the very same agreement, with Article 4 thereof providing that it "*may*" be renewed. That this approach is abusive has in fact been further evidenced by Claimant's attempts in its Reply to modify its initial translation of this article: while Claimant had acknowledged in the Memorial that such provision states that the term "*may be renewed*" (original version: "*podrá ser prorrogado*"),[266] Claimant now alleges in its Reply that "*the future indicative in the second paragraph of Article 4 is 'will be able to' (podrá)*".[267] What is more, Claimant's approach appears all the more questionable given that Claimant is attempting to obtain compensation for Colombia's alleged failure to renew *even though* it sold its investment .CO Internet to GoDaddy;

- As explained in the Counter-Memorial, Neustar submitted what it termed a 'notice of dispute' (not envisioned under the TPA) as early as June 2019, in the hopes of thwarting Colombia's efforts to put in place the tender process that had been announced at that stage.[268] From this point on, Neustar mentioned threats of action under the TPA in numerous subsequent communications with MinTIC regarding issues unrelated to the renewal, aiming precisely to "*harass and exert pressure*" on Colombia outside of the TPA framework for negotiation.[269] Far from being "*efforts to engage in negotiations*" as Claimant alleges,[270] a close look to these communications confirms that they were intended solely to thwart Colombia's efforts towards carrying out the 2020 Tender Process.. As explained in the Counter-Memorial, continuity of service of the .co domain was the utmost priority of MinTIC, and a critical point for the .co domain's entire sustainability:[271] as such, any derailment of the 2020 Tender Process would have increased the possibilities that MinTIC be forced to conclude a renewal of the 2009 Contract to protect such continuity. In parallel, as also explained in the Counter-Memorial,[272] Neustar continuously refused to fully engage with MinTIC's request for a transition plan, thereby also potentially jeopardizing the

---

265 Reply, para. 162; *see* Counter-Memorial, paras. 286-289.

266 Memorial, para. 47; in fact, Claimant includes this translation again at para. 298 of its Reply, only to distort and misrepresent it at para. 300 of the Reply.

267 Reply, para. 300.

268 Notice of Dispute from .CO Internet to Ministry of Commerce and MinTIC of 7 June 2019 **[R-0006]**; Counter-Memorial, para. 286.

269 Counter-Memorial, paras. 285-289.

270 Reply, para. 163.

271 *See, for instance*, Counter-Memorial, paras. 52, 82, 96, 105, 113; First Witness Statement of Iván Darío Castaño Pérez, para. 14 **[RWS-02]**.

272 Counter-Memorial, paras. 113-115.

continuity of service of the .co domain, in a further effort to force Colombia to renew the 2009 Contract.[273]

- Neustar then submitted its Notice of Intent on 13 September 2019 and RFA on 23 December 2019, at a time when the dispute had not crystallized as shown at Section 2.4(a) *supra*. In response, Neustar alleges that this could not have pressured Respondent, as Colombia had already taken the decision to launch a new tender process. However, this misses the point: what matters is that these communications show Neustar's determination to try and exert pressure on Respondent through any means possible, irrespective of the clear language of Article 4 of the 2009 Contract. This is confirmed by the very wording of the Notice of Intent, through which Neustar requested that Colombia "*revoke all the acts and measures aimed at taking forward the tendering process for the administration of the .CO Domain.*"[274]

- In parallel, Neustar introduced the Council of State proceedings, in which it *inter alia* requested MinTIC be ordered to formalize the renewal of the 2009 Contract and halt the 2020 Tender Process.[275] As seen at Section 2.2(a) above, these proceedings far exceeded the limited scope of Article 10.18(3) of the TPA to which Neustar purported to refer, and were instead aimed at forcing MinTIC to formalize the renewal of the 2009 Contract. As such, had Neustar prevailed there would have been a clear risk of conflict (or double recovery) between the decision of the Council of State ordering the renewal of the contract (which would have been virtually impossible to unwind), and the decision of the ICSID tribunal dismissing Claimant's claims or (*quod non*) awarding monetary damages to Claimant. Such a request before the Council of State was therefore clearly abusive, and the Council of State rightfully dismissed it noting that:

  A simple textual analysis of what was agreed in the Contract does not permit to infer that the State entity Grantor had the obligation to renew the contract and the concessionaire had acquired the right to obtain such renewal.[276]

143. In light of the above, it is therefore clear that Respondent has discharged its burden of proving that Claimant also committed an abuse of process by introducing the present proceedings for other purposes than genuine dispute resolution, thereby further depriving this Tribunal of jurisdiction.[277]

---

273 Counter-Memorial, paras. 113-115; First Witness Statement of Iván Darío Castaño Pérez, para. 29-31 **[RWS-02]**.

274 Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 85(i) **[C-0004]**.

275 Counter-Memorial, paras. 170-172; Council of State, Decision on .CO Internet's request for interim measures of 9 October 2019 (case No. 64831), para. 6 **[R-0008]**; Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 6 **[R-0009]**.

276 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. 24 **[R-0009]** ("*Un análisis simplemente textual de lo pactado en el Contrato, no permite inferir que la entidad estatal Concedente hubiese contraído la obligación de prorrogar el contrato y el concesionario hubiese adquirido el derecho a obtener dicha prórroga;*" (original version)).

277 Or, at the very least, rendering Neustar's claims inadmissible.

2.7 Claimant's Reply confirms that its claim is a contractual one, with Claimant failing to identify any sovereign act by Respondent relating to the decision not to renew the 2009 Contract

144. As Respondent has established in its Counter-Memorial, this Tribunal should respectfully decline jurisdiction over Neustar's claims because these are essentially contract claims stemming from the 2009 Contract, which Neustar has sought to "*dress […] up as a Treaty case*".[278] Indeed, an examination of Neustar's claims reveals that their "*essential basis*"[279] rests on an issue of interpretation of Article 4 of the 2009 Contract (according to which the contract "*may be*" renewed).[280] This is further confirmed by the fact that this issue of contractual interpretation could entirely have been resolved through resorting to the contractually-agreed dispute mechanism, commercial arbitration.[281]

145. Claimant however maintains that its claims are treaty-based, by arguing that they are predicated on actions taken by Colombia "*in its sovereign capacity*".[282] Claimant also suggests that this Tribunal should be in some way bound by the "*formulation and nature of a claimant's claims*",[283] and should therefore disregard the inclusion of a forum selection clause at Article 19 the 2009 Contract, which Claimant terms "*irrelevant*".[284] Claimant's attempts to salvage its claims however fall flat, with the Reply notably confirming that Colombia did not act in any manner different from that of a private party when deciding not to renew the 2009 Contract (as the renewal was only a contractual *possibility* which could be refused by either party) and that Claimant's opportunistic claims are essentially contractual in nature.

146. *First*, with respect to the amount of scrutiny to be exercised over a claimant's claim in the context of a jurisdictional enquiry, Neustar argues that this Tribunal is only required to determine whether its claims are *prima facie* capable on constituting a breach of the TPA.[285] However, an examination of the authorities that Neustar relies on for this proposition reveals that the *prima facie* test has been overwhelmingly applied in the context of *preliminary* jurisdictional objections which had been *bifurcated*, in light of the necessity not to prejudge the merits.[286] In the present instance, the Parties

---

278 *RSM and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.3.7 **[RL-073]**.

279 *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana*, ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 329-337 **[RL-072]**.

280 *See* Counter-Memorial, paras. 296-299.

281 *See* Counter-Memorial, para. 300. Article 19 of the 2009 Contract explicitly covers all "*disputes arising between the Parties relating to the signature, execution, termination, liquidation and interpretation of the contract.*" (emphasis added). Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**.

282 Reply, paras. 178-180.

283 Reply, para. 178.

284 Reply, paras. 190-194.

285 Reply, para. 174.

286 *See, for instance, Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction and Recommendation on Provisional Measures, 14 November 2005, paras. 59, 195-197 **[CL-010]**; *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, paras. 127, 311 **[RL-057]**; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras. 16, 19 **[CL-100]**.

have had the opportunity to present their case in full, and the Tribunal should therefore not be bound to apply the *prima facie* test.

147. In any event, Neustar fails to expand on the requirements of this test, and instead limits itself to submitting that a tribunal should only have regard to the "*formulation and nature of a claimant's claim*".[287] This is however not what the *prima facie* test entails. While it is correct that Judge Higgins first formulated the *prima facie* test in the following words in her separate opinion in the *Oil Platforms* case:

> *The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is* ***to accept pro tern the facts as alleged by Iran to be true*** *and in that light to interpret Articles I, IV and X for jurisdictional purposes — that is to say,* ***to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them****.*[288]

148. Investment tribunals, including in cases relied upon by Claimant, have expanded on the initial standard set by Judge Higgins and considered that even where the *prima facie* test is relevant, such test does not entail that a tribunal should be bound by a claimant's description of its claims. Similarly, these tribunals have confirmed their power to take into account contrary evidence submitted by the respondent State, in particular in cases where the objections to jurisdiction are not bifurcated and/or where the parties have had the opportunity to fully present their evidence.[289] As aptly put by the *Chevron v. Ecuador (I)* tribunal:

> *The Tribunal agrees with the Respondent that Judge Higgins did not have any rebuttal evidence to consider when she devised her test in the Oil Platforms case and that her approach does not prevent the Tribunal from taking into account the large amount of documentation the Parties have already submitted in this jurisdictional phase of the proceedings. If, from this evidence,*

---

287 Reply, para. 178, citing 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]**.

288 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion of Judge Higgins, 12 December 1996, para. 32 **[RL-141]** (emphasis added).

289 Such as where the jurisdictional objections have not been bifurcated and are joined to the merits. *See Highbury International v. Venezuela*, ICSID Case No. ARB/11/1, Award, 26 September 2013, para. 160 **[RL-142]** ("*Por otro lado, la alegada jurisdicción y competencia de este Tribunal se funda precisamente en hechos concretos alegados por las Demandantes y no en supuestos que podrían aceptarse prima facie por el Tribunal si la discusión sobre jurisdicción fuese meramente interpretativa. En circunstancias que se decidió no bifurcar las cuestiones de jurisdicción respecto de las materias de mérito, no resulta apropiado utilizar un estándar de prueba menos riguroso o limitar el análisis a una presunción prima facie, en la medida que las partes han tenido amplia oportunidad de presentar su caso y aportar todas las pruebas necesarias para acreditar los extremos invocados a efectos de determinar la jurisdicción del Tribunal o la falta de ésta.*" (original version); "*On the other hand, the alleged jurisdiction and competence of this Tribunal is based precisely on concrete facts alleged by the Claimants and not on assumptions that could be accepted prima facie by the Tribunal if the discussion on jurisdiction were merely interpretative. In circumstances where it was decided not to bifurcate the jurisdictional issues on the merits, it is not appropriate to use a less rigorous standard of proof or to limit the analysis to a prima facie presumption, inasmuch as the parties have had ample opportunity to present their case and provide all the evidence necessary to prove the points invoked in order to determine the Tribunal's jurisdiction or lack thereof*." (our translation)). In this regard, it should also be noted that in the *Bayindir* case on which Claimant relies for its proposition that the Tribunal should limit its jurisdictional enquiry, the objections had been bifurcated in a preliminary phase. *See Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction and Recommendation on Provisional Measures, 14 November 2005 **[CL-010]**.

> *the Tribunal finds that facts alleged by the Claimants are shown to be false or insufficient to satisfy the prima facie test, jurisdiction would have to be denied.*[290]

149. In a similar vein, the *Libananco* tribunal "*confirm[ed] its view that it is not required to make a pro tem assumption of the truth of a fact if the evidence of that fact has been fully presented*", and considered that in that case "*sufficient evidence exist[ed] for the Tribunal to make an informed and dispositive finding at this stage*."[291] This approach was followed by several other tribunals,[292] including in the context of the jurisdictional enquiry into the nature of claims submitted by an investor.[293]

150. Accordingly, even if this Tribunal was to consider that the *prima facie* test applies to the determination of the present jurisdictional issue, such test does not entail deferring entirely to Claimant's formulation of its claims or statement of facts, and the Tribunal may take into account any rebuttal evidence presented by Respondent. As explained in the Counter-Memorial,[294] and as Respondent further shows immediately below, the evidence on the record confirms that Claimant's claims are exclusively contractual in nature.

151. <u>*Second*</u>, it bears noting that previous tribunals tasked with distinguishing between a treaty and contract claim have sought to determine the "*essential basis*" of the claim in order to assess whether it is contractual or treaty-based, and ultimately whether they have jurisdiction over such claim.[295] This is because, in the words of one author, "*[p]ublic international law considers States concluding such contracts to be acting iure gestionis. Hence, from public international law point of view such investment agreements are commercial contracts concluded between two commercial parties, one*

---

290 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 110 **[RL-139]**. *See also*, *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, para. 53 **[RL-143]**.

291 *Libananco Holdings Co. Limited v. Republic of Turkey,* ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 121 **[RL-144]**.

292 *Phoenix Action Ltd v. Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 60-61 **[CL-012]** ("*In the Tribunal's view, it cannot take all the facts as alleged by the Claimant as granted facts, as it should do according to the Claimant, but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent. If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.*"); *PSEG Global Inc., et al v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, para. 64 **[RL-145]** ("*The Tribunal is aware that the prima facie test has been applied in a number of cases, including ICSID cases such as Maffezini and CMS, and that as a general approach to jurisdictional decisions it is a reasonable one. However, this is a test that is always case-specific. If, as in the present case, the parties have views which are so different about the facts and the meaning of the dispute, it would not be appropriate for the Tribunal to rely only on the assumption that the facts as presented by the Claimants are correct.*"); *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, paras. 2.9-2.10 **[RL-060]**.

293 *Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004, paras. 63, 78 **[CL-006]**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, paras. 80-89 **[CL-067]**.

294 Counter-Memorial, paras. 295-301.

295 *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana*, ICSID Case No. ARB/07/24), Award, 18 June 2010, para. 334 **[RL-072]**.

of which happens to be a State acting as a private party."[296] As such, the simple conclusion of a contract by a State cannot in itself create treaty rights for a given investor:[297] "*[i]t is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the [fair and equitable] standard.*"[298]

152. *Third*, it is similarly uncontested that in order to determine the real essence of the claims in cases where the breach of the treaty invoked by the investor involves an examination of an underlying State contract, tribunals have given particular attention to whether the State has acted in its sovereign capacity (*iure imperii*), as opposed to a purely commercial capacity akin to that of a private party (*iure gestionis*).[299] In the words of the *Tulip v. Turkey* tribunal, on which Claimant relies:

> *The Tribunal agrees with the Parties that the determination of whether a claim arises under a BIT involves an inquiry into the "essential basis" or "normative source" of that particular claim. In order to amount to a treaty claim,* ***the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of puissance publique***.[300]

---

296 A. Siwy, 'Chapter 7: Contract Claims and Treaty Claims, in C. Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International, 2016), p. 210 **[RL-146]**.

297 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 167 **[RL-069]**; *Supervision y Control S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 279 **[RL-070]**; *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 344 **[CL-075]**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 358 **[CL-063]**; A. Siwy, 'Chapter 7: Contract Claims and Treaty Claims, in C. Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International, 2016), pp. 210-212 **[RL-146]**.

298 *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana*, ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 329-337 **[RL-072]**; *RSM and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.3.7 **[RL-073]**. *UAB v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 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.*"); *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, para. 291 **[RL-147]** ("*For the reasons exposed above (see paras. 191-194), a breach of contract does not per se trigger a breach of treaty protection. It will be a breach of treaty only if the legitimate expectation is of such nature as to justify its protection under the relevant treaty and its frustration is of sufficiently serious character to constitute an independent breach of the relevant treaty protection standard*.").

299 Reply, paras. 177-178.

300 *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]** (emphasis added). *See also Impregilo SpA v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260 **[CL-091]** ("*In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.*"); *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 72 **[CL-006]** ("*The Tribunal is mindful that any answer to this question must be case specific as every contract and many treaties are different. However, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved*.").

153. While Claimant has correctly identified this criterion in its Reply and cited cases considered to be seminal authorities on this issue,[301] it has failed to expand on the specific findings of the tribunals in these cases regarding the nature of an *acte de puissance publique*:

- In *Abaclat*, the tribunal held as a matter of principle that "*[a] claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein* ***are unilaterally altered by a sovereign act of the Host State***",[302] and that the "*origin and nature*" of a sovereign act should be "***totally foreign to the contract****.*"[303] The tribunal went on to find that Argentina's acts were of a sovereign nature since Argentina had promulgated an emergency law unilaterally modifying its payment obligations under sovereign bonds subscribed by the investors, and observed that Argentina "*[did] not contend that it had any contractual right of doing so, such as for example, a force majeure provision.*"[304]

- Similarly, in *Deutsche Bank* the tribunal considered that *"[t]he 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.*"[305]

- In *Casinos Austria*, the investor introduced claims stemming from the revocation of an operating license in the gambling industry by an Argentinian State agency. In order to reach the conclusion that the impugned acts were "*imposed in the exercise of public authority, not as a matter of any contractual authorization*", the tribunal examined in great detail the circumstances and legal grounds put forward by the State entity to justify the revocation and held that such revocation "*was not based upon the operation of the contractual termination clause*", but rather on the use of administrative police powers.[306]

- In *Malicorp*, the Tribunal considered that "*[i]n order for a breach of contract to serve as the basis for jurisdiction of a tribunal in an investment arbitration, such breach must at the same time, and for reasons inherent in the investment protection treaty itself, amount to a violation*

---

301 Reply, paras. 177-178.

302 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 318 **[RL-057]**.

303 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 318 **[RL-057]**.

304 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 319-326 **[RL-057]**.

305 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 559 **[CL-009]**.

306 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, paras. 214-222 **[CL-122]**.

of that treaty, one that could not be resolved by using the ordinary procedure [set out in the contract]."[307]

154. The above decisions therefore illustrate that for an action to be considered a sovereign act, tribunals have considered that the State must have taken action "*totally foreign to the contract*" and used its sovereign powers to override the contract at stake.

155. In the present case, as already shown in the Counter-Memorial,[308] a careful examination of Claimant's claims for breach of Articles 10.3, 10.4 and 10.5 of the TPA reveals that these are in fact systematically based on the (wrong) premise that MinTIC had an obligation to renew the 2009 Contract. Neustar's Reply confirms as much:

- In its introductory statement, Claimant explains that it "*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.***"[309] Claimant goes on to submit the following rhetorical question: "*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 it wants to interpret a provision** and then ignore its actions with respect to other investors explains the rash of investment cases against it.*"[310] Claimant's presentation of the situation as if it had been the victim of some 'unilateral' or extraordinary interpretation of Article 4 of the 2009 Contract is however misleading: It could well have submitted a claim for interpretation of the agreement before the contractually-agreed forum, a commercial arbitration tribunal, but carefully refrained from doing so despite submitting legal opinions to MinTIC on the interpretation of the 2009 Contract as early as 27 December 2018.[311] This is certainly because in this very legal opinion, the legal expert put forward by Neustar was forced to acknowledge that under Article 4 of the 2009 Contract and the accompanying legal framework, the renewal was indeed just a possibility open should both parties agree on a renewal;[312]

- With respect to its claim that Colombia breached the minimum standard of treatment, Neustar notably explains that it "*held legitimate expectations*" deriving from "***the terms of the 2009 Concession itself***."[313] In the same vein, with respect to its claim that Colombia acted discriminatorily in breach of Articles 10.3 and 10.4 of the TPA, Claimant admits that

---

307 *Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 103.c **[RL-074]**.
308 Counter-Memorial, paras. 295-296.
309 Reply, para. 5 (emphasis added).
310 Reply, para. 6 (emphasis added).
311 *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**; Counter-Memorial, para. 300.
312 *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 6 **[R-0035]**.
313 Reply, para. 294.

the crux of its discrimination case is the following: "*.CO Internet and Neustar were not even allowed to negotiate 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****.*"[314]

- While Claimant self-servingly asserts on several occasions that its claim is treaty-based in nature, it devotes more than five pages of its Reply to setting out a lengthy and convoluted interpretation of Article 4 of the 2009 Contract in order to claim that this provision entailed an obligation of renewal.[315]

156. Against this backdrop, the litany of alleged examples of public intervention by Colombia in the management of the .co domain listed by Claimant in its Reply is not only irrelevant, but entirely misses the point.[316] It is uncontested that the .co domain is a public asset which has been managed by MinTIC. It is similarly uncontested that Colombia adopted several laws, regulations, and other administrative acts to regulate the .co domain over the years. However, at no point does Neustar show, even *prima facie*, that Colombia interfered with its alleged right to renewal under the 2009 Contract through sovereign acts which would be foreign to the 2009 Contract:

- From the outset of the 2009 Contract until Colombia's decision not to renew it in March 2019, the regulatory framework governing the possibility to renew the contract was not modified, and Claimant does not even allege that Colombia's State organs would have sought to override it;[317]

- From the outset of the 2009 Contract until Colombia's decision not to renew it in March 2019, the terms of the 2009 Contract regarding renewal were not modified, and the possibility to renew the 2009 Contract remained regulated by Article 4 of the agreement,[318] under which:

> *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* […]*.*[319]

---

314 Reply, para. 344.
315 Reply, paras. 296-303.
316 Reply, paras. 180-186.
317 Counter-Memorial, Section 2.2(a).
318 Counter-Memorial, Section 2.2(c).
319 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]** (emphasis added).

157. Claimant therefore fails to identify an act by Colombia that would have been "*totally foreign to the contract*",[320] or that would have had the goal of modifying Colombia's obligations under the 2009 Contract. Neustar therefore fails to show that MinTIC acted in a manner different to that of a private party by deciding not to negotiate a renewal with its counterparty under the 2009 Contract, .CO Internet. Claimant simply cannot escape the clear language of Article 4 of the 2009 Contract, which provided the contract parties with a mere *possibility* to renew the contract should they agree on it. MinTIC's lack of exercise of this possibility did not differ in any way from the potential actions of a private party, and MinTIC (just as any private party) did not have to justify its intention not to pursue this possibility.

158. In any event, should the Tribunal (*quod non*) consider that Neustar's additional allegations of political intervention are relevant to determining the essence of its claims, Respondent has submitted ample evidence disproving these baseless assertions:

- Claimant's main theory, developed abundantly throughout its submissions in spite of scarce and dubious documentary evidence (and no witness evidence),[321] is that Colombia refused to renew the 2009 Contract for the sole purpose of installing Afilias as its new registry operator.[322] Respondent demonstrated at length in its Counter-Memorial that Neustar's entire factual basis for this argument is erroneous, and that all the terms of the 2020 Terms of Reference it alleges were "*tailor-made*" for Afilias were in fact recommended by the ITU experts on objective grounds.[323] The process was entirely documented throughout on a public platform accessible by all interested parties, which also had the opportunity to submit comments and request motivated changes to the tender documents in several occasions.[324] Both Ms. Constaín (then Minister of Telecommunications) and Ms. Trujillo (then Secretary General of MinTIC, directly responsible for the 2020 Tender Process) further confirm that the process was conducted transparently.[325] Claimant has failed to address this evidence entirely in its Reply, instead continuing with its unsubstantiated accusations that Colombia engaged in corrupt acts "*to exclude every company for*

---

320 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 318 **[RL-057]**.

321 As a reminder, Claimant exclusively relies on several articles written during a short time period by a single journalist in order to allege that the 2020 Tender Process was rigged and designed to favour Afilias. *See* Counter-Memorial, fn. 198; K. 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', *The Register*, 15 January 2020 **[C-0096]**; K. McCarthy, 'Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?', *The Register*, 4 February 2020 **[C-0097]**; K. McCarthy, 'Afilias Vanishes from Battle to Run Colombia's Trendy .CO after El Reg Probes Technical Docs, Allegations of a Stitch-Up', *The Register*, 25 February 2020 **[C-0102]**; K. McCarthy, 'Afilias vanishes from battle to run Colombia's trendy .co after El Reg probes technical docs, allegations of a stitch-up', *The Register*, 25 February 2020 **[C-0117];** K. McCarthy, 'Why Colombia is about to Make a Colossal Mistake with .CO', *Circle ID*, 27 November 2019 **[C-0119]**. Claimant's suggestion that the connections between Afilias and Colombia were "*widely recognized by the industry at that time*" (Reply, para. 288) are therefore ludicrous.

322 *See, for instance,* RFA, paras. 79.1-5, 81; Memorial, paras. 15-16; Reply, paras. 260-266.

323 Counter-Memorial, Section 2.5(c), para. 129.

324 *See* Counter-Memorial, paras. 128-135; *see also*, Colombian Public Procurement Platform (SECOP II), Information on the 2020 Tender Process (retrieved on 22 February 2022) **[R-0042]**.

325 First Witness Statement of Sylvia Constaín, para. 23 **[RWS-01]**; First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 29 **[RWS-03].**

Afilias".[326] What is more, Claimant fails to account that .CO Internet ultimately won the 2020 Tender Process, being awarded the 2020 Contract on 3 April 2020;[327]

- Claimant affirms that the announcement by the President that a new tender would take place confirms that the decision "*came from the President of Colombia, although the actual parties to the Concession […] were still in the process of negotiation and discussion.*"[328] Claimant's presentation of the facts is once more disingenuous and simply ignores the evidence submitted by Colombia with its Counter-Memorial, which shows that the decision not to renew the 2009 Contract was clearly recommended by the .co domain Advisory Committee, taken by MinTIC, and *then* announced by the President in light of the significance of the .co domain asset for the Colombian public.[329] This is confirmed *inter alia* by Ms. Constaín, who personally informed the President of MinTIC's decision not to renew the contract.[330]

159. *Third and finally*, Claimant's argument that the inclusion of a dispute resolution clause in the 2009 Contract is irrelevant also misses the point. While some tribunals have considered that the existence of a contractual remedy does not deprive them of jurisdiction over treaty claims, they have also outlined that "*pure contractual claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ -be it a court or an arbitral tribunal- can and must hear the claim in its entirety and decide thereon based on the contract only*."[331]

160. As shown above, the essential basis of Claimant's claim is one of contractual interpretation of Article 4 of the 2009 Contract, and said contract includes an arbitration clause at Article 19 which explicitly covers all "*disputes arising between the parties relating to the signature, execution, development, **termination**, liquidation, **and interpretation of the contract.***"[332] In this context, deference should be accorded to the contractual dispute resolution method agreed by the parties: in the words of the *Malicorp* tribunal, "*[s]o long as a procedure of this type exists for protecting investment, it is not possible to resort to the special methods provided for by treaty if the commercial route, be it arbitration or the local courts, enables all submissions and arguments to be exhausted.*"[333] As explained above, Neustar or .CO Internet had every opportunity to submit their

---

326 *See, for instance*, Reply, paras. 260-263,

327 Counter-Memorial, paras. 142-146; Resolution 649 of 3 April 2020 **[C-0107]**.

328 Reply, para. 180.

329 Counter-Memorial, paras. 108.

330 First Witness Statement of Sylvia Constaín, para. 16 **[RWS-01]**.

331 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 316 **[RL-057]** .

332 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Article 19 **[C-0017]**.

333 *Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 103(c) **[RL-074]**. *See also Hydro et al v. Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, para. 588 **[CL-114]** ("*Where the parties have chosen a forum for their contractual disputes, the Tribunal must respect that choice.*"); *Thomas Gosling and others v. Republic of Mauritius,* ICSID Case No. ARB/16/32, Award, 18 February 2020, para. 277 **[RL-148]** ("*To conclude, the lessee, PJD, had breached the Lease and the Government had the right to cancel the Lease de plein droit as permitted by the terms of the Lease and, therefore, without exercising any other rights than its contractual rights*."); *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA No. 2017-33, Final Award, 3 February 2020, paras. 312-327 **[RL-149]** ("*La Demanderesse soutient à cet égard que le Tribunal aurait une compétence large*

alleged interpretation of Article 4 of the 2009 Contract to commercial arbitration under the contract well prior the expiry of the 2009 Contract on 6 February 2020, as they had even been submitting legal opinions to MinTIC on the interpretation of the 2009 Contract as early as 27 December 2018.[334] Neustar and .CO Internet however refrained from doing so, presumably in light of the acknowledgment in this very legal opinion the renewal was indeed just a possibility.[335]

161. Accordingly, Neustar's alleged treaty claims, which in fact stem from an issue of contractual interpretation of the 2009 Contract, do not stem from any sovereign act from Colombia and fall outside the Tribunal's jurisdiction.

3. NEUSTAR'S CLAIMS HAVE NO BASIS AND SHOULD BE DISMISSED

162. Beyond the fact that Claimant's claims must be dismissed on jurisdictional grounds, the claims also must be rejected on the merits as they do not even come close to constituting breaches of Respondents' international obligations under the TPA.

163. The main issue on the merits before this Tribunal is simple: whether Respondent's conduct regarding the refusal to renew the 2009 Contract after its ten year term amounted to a breach of the TPA. The answer is a resounding no, there has been no breach.

164. On the one hand, as is apparent from the very wording of the 2009 Contract ("*may be renewed*"), the renewal of the 2009 Contract was solely a *contractual possibility* which the Parties may consider at the term of the contract and certainly was not an obligation for MinTIC. It is on the basis of this

---

pour connaître de tous différends, quel que soit les moyens invoqués au soutien des demandes, dès lors qu'ils sont relatifs à l'investissement. En d'autres termes, un différend relatif au contrat objet de l'investissement serait nécessairement relatif à l'investissement lui-même. Le Tribunal ne partage pas cette position. La compétence du Tribunal est en effet fondée sur le Traité. Pour qu'un différend soit relatif à l'investissement au sens du Traité, il faut que les faits allégués soient susceptibles de constituer des violations des obligations prévues par le Traité à la charge de l'Etat relativement à l'investissement. Le Tribunal n'est donc pas compétent pour connaître de tout différend, quel qu'il soit, portant sur l'investissement. Pour que sa compétence soit fondée, il faut que les violations alléguées soient susceptibles d'engager la responsabilité internationale de l'Etat sur le fondement du Traité. Comme on l'a dit, les faits invoqués par la Demanderesse au soutien de la compétence du Tribunal sont autant de violations alléguées des obligations contractuelles d'Algérie Télécom. Le Tribunal estime que ces violations du contrat liant Spec-Com à Algérie Télécom ne peuvent à elles seules, en l'absence d'implication des pouvoirs souverains de la puissance publique, fonder la compétence du Tribunal sur le fondement du Traité. Le Tribunal partage à cet égard la position des nombreux tribunaux arbitraux ayant écarté leur compétence pour connaître de simples violations contractuelles lorsque l'Etat n'a pas agi de iure imperii, mais uniquement de iure gestionis" (original version); ("*The Claimant argues in this regard that the Tribunal would have broad jurisdiction to hear all disputes, regardless of the grounds on which the claims are based, as long as they relate to the investment. In other words, a dispute relating to the contract which is the subject of the investment would necessarily relate to the investment itself. The Tribunal does not share this position. The Tribunal's jurisdiction is in fact based on the Treaty. In order for a dispute to relate to the investment within the scope of the Treaty, the facts alleged must be likely to constitute breaches of the State's obligations under the Treaty in respect of the investment. The Tribunal therefore has no jurisdiction to hear any dispute whatsoever relating to investment. In order for the Tribunal to have jurisdiction, the alleged violations must be capable of engaging the international responsibility of the State under the Treaty. As stated above, the facts invoked by the Claimant in support of the Tribunal's jurisdiction are all alleged breaches of Algérie Télécom's contractual obligations. The Tribunal considers that these breaches of the contract between Spec-Com and Algérie Télécom cannot in themselves, in the absence of involvement of the sovereign powers of the public authority, justify the jurisdiction of the Tribunal on the basis of the Treaty. In this respect, the Tribunal shares the position of the numerous arbitral tribunals that have excluded their jurisdiction to deal with simple contractual breaches when the State did not act iure imperii, but only iure gestionis*.") (our translation)).

334 *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**; Counter-Memorial, para. 300.

335 *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 6 **[R-0035]**.

independent contractual right (of which Neustar was well aware) that MinTIC decided not to renew the 2009 Contract. Contemporaneous evidence actually shows that Neustar perfectly understood that MinTIC was not under an obligation to automatically renew the 2009 Contract.[336]

165. On the other hand, the 2020 Tender Process that MinTIC carried out subsequently was entirely transparent and resulted in the award of the 2020 Contract to .CO Internet, Neustar's former subsidiary. In fact, Neustar itself specifically expressed its satisfaction with the 2020 Tender Process at the close of the adjudication hearing on 3 April 2020.[337] In these circumstances, Claimant cannot reasonably contend that Respondent behaved inappropriately, much less that it breached international obligations under the TPA.

166. Claimants' speculative and unsupported allegations that Colombia's actions were in breach of Article 10.5 of the TPA regarding the minimum standard of treatment (**3.1**), Article 10.3 of the TPA concerning most-favoured-nation treatment and Article 10.4 of the TPA concerning national treatment (**3.2**), as well as Claimant's entirely unsubstantiated claim that Colombia breached its obligation to protect confidential business information (**3.3**), and its attempt to import a standard from another treaty (**3.4**) should therefore all be categorically dismissed.

3.1 Colombia treated Neustar fair and equitably in accordance with the minimum standard of treatment prescribed by Article 10.5 of the TPA

167. In its Reply, Claimant ignores Respondent's Counter-Memorial and continues to attempt to widen the scope of the minimum standard of treatment under Article 10.5 of the TPA (**a**). However, Claimant's Reply does nothing to cure its blatant failure to show any breach by Respondent of its obligations under Article 10.5 of the TPA (**b**): instead, the record shows that Respondent acted fully in accordance with these obligations with respect to both its decision not to renew the 2009 Contract (which was in any event a mere contractual possibility), and its subsequent conduct of the 2020 Tender Process.

(a) Claimant's attempts to expand the minimum standard of treatment under Article 10.5 of the TPA remain baseless

168. As noted in Respondent's Counter-Memorial, on its face the FET standard under Article 10.5 of the TPA is expressly limited to the minimum standard of protection under customary international law and "*does not require "treatment in addition to or beyond that what is required by that standard*."

---

336 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**; Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.

337 Video Recording of Public Tender Hearing of 3 April 2020, No. 2, min. 104 **[R-0067]**.

169. In light of this plain wording, Claimant has confirmed in its Reply that it accepts this limitation. Accordingly, its previous attempts to rely on cases where the FET clauses of the applicable treaties were not linked to the minimum standard should be dismissed expeditiously.[338]

170. Claimant seems however to keep advocating – in a rather contradictory manner – for a broad interpretation of this standard. Indeed, while recognising that the "*formula of the minimum standard*" has not changed and that no "*extra protections have been added*", Claimant argues that "*the substance of the standard changed*" in a way in which the standard now includes a "*myriad of obligations to the State and protections to investor.*"[339]

171. On this basis, Claimant argues that the FET standard under the TPA expands as far as to cover any alleged discrimination, the concept of transparency, an expanded due process standard and its alleged legitimate expectations, and criticises the Respondent for noting that the threshold for a finding of a breach of this standard is high. This position, which is contrary to the very wording of Article 10.5 of the TPA, does not hold water for numerous reasons.

172. *First*, it overlooks the fact that by expressly linking the FET standard in Article 10.5 of the TPA to the minimum standard of treatment, the parties' intent was precisely to avoid overexpansive interpretations of the standard. As noted by the United States: "*This text demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in article 10.5 […] The standard establishes a minimum "floor below which treatment of foreign investors must not fall*"[340]. Had the parties wished to extend the protections under this standard they could have done so, but instead their intention was the exact opposite.

173. *Second*, as already demonstrated in the Counter-Memorial,[341] it is widely established that the threshold for finding a breach of the minimum standard is particularly high, in the sense that only shocking or egregious or grossly unfair acts may constitute a breach of this standard.[342] This high

---

338 In its Reply, Claimant suggests that it has not relied in such cases in the Memorial. This statement is misleading. In various sections of the Memorial, Claimant refers to cases in which the FET clauses being examined by tribunals are not linked to customary international law or minimum standard of treatment. This is the case, for instance, of Sections concerning "*1. The Requirement to Grant Fair and Equitable Treatment Under the Customary International Law Minimum Standard of Treatment*" in which Claimant relies on *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (**[CL-029]**) and section two regarding the alleged violation of Neustar's "*Right to Fair and Equitable Treatment under Article 10.5 of the TPA*" in which it relies on *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan* (**[CL-010]**). In other subsections on its claim under Article 10.5 of the TPA, Claimant keeps relying on awards that examined an independent FET clause such as in the analysis of purported arbitrariness, discrimination, lack of good faith, due process and legitimate expectations such as (*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 **[CL-037]**; *Teinver S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017 **[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 **[CL-039]**; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005 **[CL-045]**; *Deutsche Telekom v. India*, PCA Case No. 2014-10 (UNCITRAL), Interim Award, 13 December 2017 **[CL-068]**; *ADC Affiliate Limited et al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 **[CL-061]**; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 **[CL-062]**).

339 Reply, para. 211.

340 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 25.

341 Counter-Memorial, para. 310.

342 *L.F.H. Neer and Pauile E. Neer v. United States*, Opinion, 15 October 1926, *United Nations Record of International Arbitral Awards*, Vol. IV, pp. 61-62, para. 4 **[RL-081]**: *"[T]he treatment of an alien, in order to constitute an international delinquency should amount to an outrage to bad faith, to wilful neglect of duty, or to an insufficiency of governmental*

threshold has been recognised widely, not only in the *Neer* case, but also in recent decisions exhibited by Claimant itself regarding the minimum standard of protection under Article 1105 of NAFTA (which is similar to Article 10.5 of the TPA though not identical).[343] For example, in *S.D Myers*, the arbitral tribunal held that "*[a] breach of Article 1105 [NAFTA] occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.*"[344] While Claimant criticises Respondent for having brought to the Tribunal's attention this high bar, it does not dispute it, confirming therefore that the Tribunal should be guided by this threshold when assessing the Claimant's allegations under 10.5 of the TPA.

174. *Third*, Claimant blatantly mischaracterises Respondent's submissions on the content of this standard. Claimant asserts that Respondent "*unduly seeks to narrow the legal standard*" by considering that customary international law is "*frozen in time*" and that the world has not changed since 1926, i.e. the year when the fundamentals of the *Neer* case were set out.[345] Respondent has not made such statements. In its Counter-Memorial, Respondent contended that regardless of any evolution of this standard, the threshold for the violation of this standard remains high,[346] in such a way that the *fundamentals* (the foundations, the essentials) of *Neer* are still relevant when assessing a violation of the minimum standard of treatment and should not be completely disregarded.[347]

175. As highlighted in the Counter-Memorial, this was notably the position taken in 2006 by the NAFTA tribunal in *Thunderbird v Mexico* and in 2009 by the tribunal in *Glamis* v*. United States of America* (a case on which Claimant initially relied on) which highlighted that "*the fundamentals* of the *Neer standard thus still apply today*"[348] and that "*the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer*."[349] Numerous other decisions, as noted by the Claimant itself in its first Memorial on Jurisdiction and the Merits, have also relied upon the *Neer* fundamentals and/or applied a high threshold.[350] Further, it is telling that most of the awards to which Claimant refers in its Reply to

---

action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

343 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 616 **[CL-017]***; Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 286 **[CL-018]**.

344 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2002, para. 367 **[CL-084]** ("*Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.*").

345 Reply, Section III.A.1, *see* para. 210.

346 Counter-Memorial, para. 312.

347 Counter-Memorial, para. 312.

348 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22 **[CL-017]**.

349 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22 **[CL-017]**.

350 Memorial, para. 181. In fact, even the tribunal in *EcoOro v. Colombia*, a case repeatedly cited by Claimant in its Reply, noted that "*there is a high threshold for finding a violations of the MST*." *See*, *Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41*, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 753 **[CL-023]**.

support the idea that the minimum standard is "*broader than the defined in the Neer case*"[351], actually accepted a narrow perspective of the minimum standard of treatment. For instance, the *Bilcon* tribunal accepted that a high threshold applies for finding a breach of Article 1105 of the NAFTA[352]. Similarly, in *Eco Oro*, the tribunal held that the minimum standard of treatment obligation could not be interpreted expansively,[353] and that a conduct that violates the minimum standard of treatment "*must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards.*"[354] In the recent *Mondev* award, the tribunal clearly acknowledged that the founding decisions which set out the contents of the customary international law minimum standard of treatment, such as primarily *Neer*, remained relevant.[355] In *Mobil*, the tribunal resolved that "*what the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behaviour*".[356] Accordingly, it seems undisputed between the Parties that the threshold for finding a violation of the minimum standard of treatment is high, notwithstanding any evolution of such standard.

176. *Fourth*, as already noted in the Counter-Memorial, Claimant has the burden to prove the extent to which the standard could potentially have evolved. This has been recognized by several tribunals, such as the tribunal in *Cargill v. Mexico*,[357] and Claimant does not appear to dispute this. The Parties seem to be in agreement that the minimum standard under customary international law is breached in the presence of a manifest arbitrariness, a gross denial of justice or a blatant unfairness, in line with the findings of the tribunal in *SD Myers* and the *Neer* fundamentals. However, Claimant also contends that the standard has evolved and includes an obligation to not discriminate, the concept of transparency, a broad conception of due process as well as the

---

351 Reply, para. 210, fn. 287.

352 *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. 441 **[CL-026]**.

353 *Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41*, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 745 **[CL-023]** ("*The Tribunal also accepts that Colombia is under no obligation to exceed this standard and, as it is not considering an autonomous treaty standard of FET but a "minimum" standard, the Tribunal further accepts the obligation should not be interpreted expansively*.").

354 *Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41*, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 755 **[CL-023]**.

355 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2022, para. 125 **[CL-024]**.

356 *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. 153 **[RL-086]**.

357 *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 273 **[CL-018]** ("*The burden of establishing any new elements of this custom is on Claimant. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted*."); *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 603 **[CL-017]** ("*Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom*."); *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 185 **[CL-025]** ("*The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts*.").

protection of investors' legitimate expectations. Yet, as detailed below in the sections pertaining to these alleged violations, Claimant has failed to prove that these concepts are independent components of the customary minimum standard of treatment.

177. As noted in the Counter-Memorial and confirmed by the Unites States in their NDPS, in order to show such evolution Claimant would need to demonstrate two elements under international law: (i) a State practice (i.e. a general and consistent conduct of States)[358] and (ii) an *opinio juris* (i.e. the belief that the practice is made mandatory by the existence of a rule of law).[359] Claimant has not even attempted to demonstrate these two elements and it cannot exempt itself from undertaking such demonstration by simply stating that it is "*inapposite to this dispute*" on the basis that a few NAFTA awards have considered that arbitral awards may serve as illustrations of customary international law.[360] Indeed:

- The need of applying this two element approach is widely established under international law, the International Court of Justice having embraced it on several occasions;[361]

- Several tribunals applying the minimum standard of treatment under Article 1105 of NAFTA have confirmed the need for a Claimant to demonstrate that these two requirements are met.[362] Claimant has simply preferred to ignore these authorities;

- The very few NAFTA awards that Claimant cites in support of its allegation, including the *Glamis* award, accept that the content of a rule of customary international law has to be

---

358 International Law Commission, *Draft Conclusions on Identification of Customary International Law*, 2018, Conclusions 5 and 8 **[RL-150]**.

359 *Case concerning the North Sea Continental Shelf (Federal Republic of Germany/Denmark*), Judgment, 20 February 1969, I.C.J. Reports 1969, p. 3, at p. 44, para. 77 **[RL-151]**.

360 Reply, para. 213.

361 *Case concerning the North Sea Continental Shelf (Federal Republic of Germany/Denmark*), Judgment, 20 February 1969, I.C.J. Reports 1969, p. 3, at p. 44, para. 77 **[RL-151]** ("*In order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must be such, or be carried out in such way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*."); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, I.C.J. Reports 1985, p. 13, para. 27 **[RL-083]** ("*It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States*."); *Case concerning the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*), Judgment, 3 February 2012, I.C.J. Reports 2012, p. 99, para. 55 **[RL-152]** ("*To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the North Sea Continental Shelf cases, the existence of a rule of customary international law requires that there be "a settled practice" together with opinio juris.*"); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile*), Judgement, 1 October 2018, I.C.J. Reports 2018, p. 507, para. 162 **[RL-153]** ("*The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained*.").

362 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, para. 185 **[CL-025]** ("*The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.*"); *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on Jurisdiction, 22 November 2002, paras. 84-92 **[RL-191]** ("*To establish a rule of customary international law two requirements must be met: consistent practice and understanding that that practice is required by law*"); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, p. 274, para. 26 **[CL-050]**.

determined by demonstrating State practice and *opinio juris,*[363] and that, it is only secondarily that arbitral awards may serve "*as illustrations of customary international law if they involve an examination of customary international law*" [364]. However, as noted by the same tribunal, " [a]*rbitral awards Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law*."[365] Thus, as stressed by the United States in their NDPS, "*while arbitral awards might be relevant for determining State practice when they include an examination of such practice [...] [a] formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and opinio juris fails to establish a rule of customary international law as incorporated by Article 10.5 [of the TPA]"*;[366] and,

- Above all, the TPA expressly requires the application of this two-step approach to determining whether a customary international law covered by Article 10.5 of the TPA has crystallised. As rightly highlighted by the United States in their NDPS,[367] Annex 10 A expresses the Parties' "*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*."[368] Thus, in light of the parties' validation of this two-step approach in the TPA, Claimant's attempts to avoid such demonstration should be disregarded.[369]

(b) **Colombia complied with the minimum standard of treatment under Article 10.5 of the TPA**

178. In its largely unsubstantiated Reply, Claimant incredibly persists in alleging that Colombia breached the minimum standard of treatment prescribed by the TPA because Colombia would have engaged in arbitrary conduct (including discriminatory conduct), failed to respect due process (including by lacking transparency) and violated Neustar's legitimate expectations.

179. Nevertheless, Claimants' rhetorical assertions are groundless. Not only are they outside the scope of Article 10.5 of the TPA as they pertain to the alleged treatment afforded to Neustar as a purported "investor" (as opposed to its investment) (**i**), but they are also in legally and factually untenable (**ii-iv**). In fact, as Respondent demonstrated in the Counter-Memorial and further evidences below, its conduct with relation to the decision not to renew the 2009 Contract and the 2020 Tender

---

363 *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award, 27 December 2016, para. 351 **[CL-031]**. *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 602 **[CL-017]**.

364 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 605 **[CL-017]**.

365 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 605 **[CL-017]**.

366 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 30.

367 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 26.

368 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 26.

369 Claimant also misleadingly argues that Respondent wishes the Tribunal to apply a double standard to its benefit because it relies on arbitral awards when articulating its view on the minimum standard and has not provided evidence of state practice and *opinio juris*. This argumentation is obviously groundless considering that it is the Claimant that bears the burden of proving any evolution of customary international law. *See* para. 177 above.

Process (although to this date, Claimant still fails to explain the relevance of the 2020 Tender Process to its claims) fully complied with its obligations under Article 10.5 of the TPA.

(i) Claimant's FET claims fall outside the scope of Article 10.5 as they relate to treatment afforded to Neustar as an "investor"

180. It its Counter-Memorial, Respondent pointed out the fact that the obligation to provide minimum treatment under Article 10.5 of the TPA expressly applies only to "*covered investments*" and not to "*investors*", meaning that Claimant's claims fall outside this scope of this provision as their examination shows that Neustar is complaining of the treatment it was afforded as a purported "*investor*".[370]

181. In its Reply, while claiming with no substantiation that Respondent has conceded that the alleged arbitrary treatment concerns its alleged investment (which is false), Claimant is incapable of disputing Respondent's demonstration that Neustar's claims are effectively related to the treatment it was afforded as a purported investor.[371]

182. Claimant's main contention is therefore that the distinction between covered investors and covered investment is "*without […] difference*" under the TPA, which was allegedly intended to cover both.[372] In support of this contention, Claimant puts forward the fact that that Annex 10-A of the TPA and Article 10.5.2 of the TPA refer to "*the customary international law minimum standard of treatment of aliens"* and "*not to the alien's investment*". However, this argumentation is flawed as it is contrary to the text of the TPA.

183. *First*, it is plainly clear from the text of Article 10.5 of the TPA that the obligation to afford minimum treatment only relates to "covered investments":

> *"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 […]" (emphasis added).*[373]

---

370 Counter-Memorial, paras. 318-321.
371 Reply, paras. 217-222.
372 Reply, para. 222.
373 TPA, Article 10.5 **[C-0002]**.

184. As can be read from the text, the expression "*covered investments*" is included twice in the Article, including in Article 10.5(2) of the TPA on which Claimant relies, confirming thereby that the minimum standard is limited to the treatment afforded to "*investments*".

185. *Second*, the importance of the distinction is further reaffirmed by other provisions of the TPA which do refer to "*covered investors*". In particular, Article 10.3 on National Treatment and Article 10.4 on Most Favoured Nation Treatment both specify that the obligation to afford such treatment extends to both "*investors of another Party*" and "*covered investments*". For example, Article 10.3 provides:

> *1. Each Party shall accord **to investors** of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *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 […].*[374]

186. Had the parties wished to extend the protection of the minimum treatment standard to "*investors*" in addition to the "*covered investments*", they could have done so (as they did in Article 10.3 and 10.4 of the TPA), but such language is absent from Article 10.5 of the TPA. This distinction shows that the limitation of the minimum standard of treatment provision was not an accidental but intended. Claimant's attempt to erase this limitation because Annex-10 G did not reiterate it should therefore be disregarded.[375]

187. *Third and finally*, as already noted in the Counter-Memorial, the United States (i.e. the other state party to the TPA) has regularly confirmed that Article 10.5 of the TPA applies only to "*covered investments*".[376] Claimant tries to undermine these confirmations by claiming that they are not a

---

374 TPA, Article 10.3 **[C-0002]** (emphasis added).

375 *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 220 **[CL-073]** ("*The narrowly framed language of Article 1105—assuring the minimum standard of protection for investors' investment, not for the investors themselves—suggests a further complication. Many of the legal principles and instruments invoked involved Claimants' (including Arthur Montour's) individual status or rights as members of indigenous communities. These claims of individual rights may be in tension with Article 1105's limitation to protection of investments, not investors*"). See also *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 294 **[RL-154]** ("*Claimant cannot request moral damages for himself in his individual capacity because the Tribunal can award damages only for the investment. Indeed, Article 2(2) of the Treaty, the provision under which this claim is asserted, protects "Investments by investors of a Contracting Party.*"). Scholars have also acknowledged this difference in NAFTA: M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA* (2006), 'Article 1105 - Minimum Standard of Treatment', Kluwer Law International, pp. 1105-17 **[RL-155]** ("*The opening phrase of Article 1105 sets out a general proposition: investments of investors of another Party shall be accorded treatment in accordance with international law. Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1).*").

376 Counter-Memorial, para. 308. *See*, *Angel Samuel Seda et al v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 5 **[RL-078]**; *Gramercy*

valid means of interpretation. This is wrong. The United States is a party to the TPA and therefore its interpretative practice, supported by Colombia, is very much relevant for interpreting the TPA. According to Article 31.3(c) of the VCLT, when interpreting a treaty "*any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation*" shall be taken into account. Indeed, and as recognised by the ICJ, the parties to a treaty are able to understand the meaning of its provisions and to determine what they really intended.[377]

188. Accordingly Claimant's attempts to disregard the wording of Article 10.5 of the TPA should be disregarded and its claims under this article – which are outside its scope – should be rejected without further examination.

(ii) ***Colombia's actions were not arbitrary, let alone "manifestly arbitrary"***

189. As shown in the Counter-Memorial, a closer examination of Claimant's allegations on arbitrariness should in any event only result in their dismissal: while it is denied that MinTIC's exercise of its contractual possibility *not to* renew the 2009 Contract in the same manner as any private party with the same right could constitute any 'arbitrary action' under Article 10.5 of the TPA, the evidence on the record in any event shows abundantly that Colombia did not act arbitrarily, let alone in a "*manifestly*" arbitrary manner with respect to both its decision not to renew the 2009 Contract and its conduct of the 2020 Tender Process.

190. Being well aware of this, Claimant first takes issue with the threshold required for establishing a breach of the minimum standard on the basis of arbitrariness in the hopes of circumventing the bar it would need to meet. It conveniently argues that Respondent's contention that *manifest* arbitrariness is required to establish a breach of the minimum standard "*should be given little weight*".[378] While, as reiterated further below, the facts demonstrate that Colombia's actions were in any case not arbitrary to any degree, Claimant's attempts to exempt itself from its burden of proof are also unavailing.

191. <u>*First*</u>, Claimant blatantly ignores the overwhelming number of authorities and awards (including those upon which it relies) confirming the need to apply a high threshold when assessing a claim for arbitrariness.[379] As noted by Professor Dumberry in his study of the minimum standard in the

---

Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru, ICSID Case No. UNCT/18/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 21 June 2019, para. 42 **[RL-079]**; *Bridgestone v. Panama*, ICSID Case No. ARB/16/34, Third submission of the United States of America as Non-Disputing Party, 7 December 2018, para. 3 **[RL-156]**.

377 The ICJ has frequently examined the parties practice when interpreting treaty provisions: *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgement, 13 December 1999, I.C.J. Reports 1999, p. 1045, para. 50 **[RL-124]**; *Case Concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 66, para. 19 **[RL-157]**; *Territorial Dispute* (*Libyan Arah Jamahiriyal Chad*), Judgment, 3 February 1994, I.C.J. Reports 1994, pp. 34-37, paras. 66-71 **[RL-158]**; *Corfu Channel case* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgement, 9 April 1949, I.C.J. Reports 1949, p. 4, at p. 25 **[RL-159]**.

378 Reply, para. 224.

379 Counter-Memorial, para, 324; *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB/ ARB(AF)/00/3, Award, 20 April 2004, para. 98 **[CL-027]**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No.

context of NAFTA, " *the threshold applied by NAFTA tribunals in order to establish a finding of arbitrariness has been consistently high.*"[380] Tribunals therefore require that a finding of arbitrariness be "shocking", "surprising", "rises below to the level that is acceptable from the international perspective" or be "manifestly arbitrary". For example:

- In *Cargill* the tribunal held that there must be conduct which is "*arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an* ***unexpected and shocking*** *repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve[s] an utter lack of due process so as to offend judicial propriety*".[381]

- The *Glamis* tribunal concluded that "*[a] finding of arbitrariness requires a determination of some act far beyond the measure's mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective*."[382]

- In *Genin*, the tribunal concluded that "*[i]n order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action*"[383].

- In *Thunderbird*, the tribunal ascertained that the measure in question was not arbitrary because it could "*not find sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment*."[384]

- In *Spence International Investments et al. v. Costa Rica*, when applying CAFTA's Article 10.5, the tribunal agreed with the *Glamis* award, stating that conducts that violate the customary international law minimum standard of treatment encompass "*manifest arbitrariness and blatant unfairness*".[385]

192. <u>*Second*</u>, Claimant's attempt to disregard this standard on the basis that the *ELSI* decision of the ICJ cited by Respondent does not contain the word "manifest" is specious.[386] Indeed this is a

---

UNCT/17/1, Award, 5 June 2020, para. 323 **[RL-098]** ("*The Tribunal notes that the use of language such as "gross," "manifest," and "complete lack" indicates that the threshold for showing a breach of this obligation is particularly high.*").

380 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), Chapter 3: 'The Substantive Content of Article 1105', pp. 160-323, p. 23 of the pdf **[RL-084]**.

381 *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 para. 296 **[CL-018]**.

382 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 626 **[CL-017]**.

383 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras. 370-371 **[CL-084]**.

384 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 197 **[CL-059]**.

385 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017, paras. 282-286 **[CL-085]**.

386 Reply, para. 224.

widely recognized decision,[387] in which the ICJ defined arbitrariness in the following terms: "*[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law […] It is a willful disregard of due process of law, an act which* ***shocks****, or at least* ***surprises****, a sense of judicial propriety*."[388] Thus, it is clear from this definition that the threshold to establish an arbitrary conduct is particularly high since the claimant must demonstrate it to be "s*hocking*" or at least "*surprising.*"

193. *Third*, this high threshold is of particular relevance since it implies that not any alleged arbitrary conduct can constitute a breach of the minimum standard. As stated by the tribunal in *S.D Myers* a violation occurs "***only when*** *it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to* ***the level that is unacceptable from the international perspective***", while giving a "*high measure of deference [to] the right of domestic authorities to regulate matters within their own borders".*[389]

194. As explained below, Claimant has failed to demonstrate this, which is not surprising as Colombia's actions were at all times compliant with Article 10.5 of the TPA and were not arbitrary, let alone "manifestly" arbitrary. Claimant's farfetched attempts to argue that Colombia acted arbitrarily because its conduct was irrational (**1**), discriminatory (**2**) or in bad faith (**3**) are wrong on all counts.

---

387 A. Reinisch, *Standards of Investment Protection*, Oxford University Press(2008), p. 101 **[RL-160]** ("*The ELSI standard is often cited in international investment arbitration as an appropriate way of describing what counts as arbitrary*."); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 625 **[CL-017]**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127 **[CL-024]**; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020, paras. 324-325 **[RL-098]**. See also: *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 577 **[RL-087]** ("*An authoritative definition of arbitrariness was given by a Chamber of the ICJ in the ELSI case*"*); Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, paras. 522-523 **[RL-161]** ("*Conforme a lo señalado [ELSI], el Tribunal adoptará en el presente caso la interpretación según la cual una conducta arbitraria es aquella que no responde a la ley, la justicia o la razón, sino que se basa únicamente en el capricho.*" (original version); "*In accordance with [ELSI], the Tribunal will adopt in the present case the interpretation according to which arbitrary conduct is that which does not respond to law, justice or reason, but is based solely on caprice.*" (our translation)); *Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational Republic of Bolivia*, ICSID Case No. ARB(AF)/18/5, Award, 12 July 2022, para. 549 **[RL-162]** ("*Al respecto, el Tribunal destaca que no existe discusión sobre la noción de arbitrariedad. Ambas Partes toman como referencia la definición establecida en la decisión de la CIJ en ELSI, donde se consideró que el actuar arbitrario es aquél "contrario a derecho porque hiere o por lo menos sorprende un sentido de corrección jurídica*."(original version); "*In this regard, the Tribunal notes that there is no discussion on the notion of arbitrariness. Both Parties take as a reference the definition established in the ICJ decision in ELSI, where it was considered that an arbitrary act is one that is "contrary to law because it injures or at least surprises a sense of legal correctness*." (our translation)).

388 Counter-Memorial, para. 324.

389 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-111]**. In the same vein, the *Eco Oro* decision on which Claimant attempts to rely states that ""*the conduct in question must engender a sense of outrage or shock, amount to gross unfairness or* ***manifest arbitrariness falling below acceptable standards.***" Contrary to Claimant's contentions, Respondent has not accepted that the "*indicia*" of arbitrary measures identified by the tribunal in *Eco Oro* constitute "*the standards applicable to determining the meaning of arbitrariness*". (*see* **[CL-032]**, para. 755 Even on the reasoning of the *Eco Oro* tribunal (which Respondent does not adopt), these are just "*indicia*" and nothing more.

(1) *Colombia's conduct was justified*

195. In its Reply, Neustar persists in claiming that Colombia acted in an "*arbitrary manner*" in breach of Article 10.5 of the TPA because Colombia's refusal to renew the 2009 was allegedly *"not rationally connected to any legitimate policy objective".*

196. To recall, in the Counter-Memorial, Respondent demonstrated that this allegation was meritless because (i) Colombia was only exercising a contractual prerogative and had no obligation to renew the 2009 Contract,[390] (ii) Claimant had failed to produce any evidence showing that there was no legitimate purpose,[391] and (iii) in any event Colombia's decision pursued a legitimate objective.[392]

197. In its Reply, Claimant simply ignored the first point. This failure is sufficient to reject Claimant's farfetched allegations on arbitrariness. Indeed, as consistently explained throughout Respondent's submissions, under the 2009 Contract MinTIC had no obligation to renew the contract: the parties had the possibility to agree or not a renewal of the contract after its term, and this was at their discretion. Thus, when Colombia refused to renew the 2009 Contract, it was merely exercising a discretionary contractual prerogative.

198. As of today, Claimant has been incapable of explaining how the exercise of such discretionary contractual prerogative could give rise to a claim for arbitrariness under the minimum standard of treatment of Article 10.5. And the reason for such failure is simple: there is nothing improper, let alone "*shocking*", "*outrageous*", "*surprising*" or "*manifestly arbitrary*" in one party refusing to renew (or even to refusing to negotiate a renewal) when it has the possibility to do so. In fact, in similar circumstances (though an autonomous FET standard was at stake), [393] the tribunal in *EDF Services Limited v. Romania* considered that Romania's failure to extend the contract was "*a contractual issue*" which could not lead to a finding of arbitrariness and concluded that "*the claim in question does not rise therefore to the level of a treaty claim for breach of the FET obligation*".[394] The same conclusion should obviously be reached in this case where the minimum standard of treatment is at stake.

---

390 Counter-Memorial, para. 325.

391 Counter-Memorial, para. 326.

392 Counter-Memorial, para. 327.

393 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 242-247 **[CL-037]**. In this case, Claimant contended that Respondent had violated its FET obligation because it had not extended the duration of a joint venture to which EDF belonged together with two Romanian entities. The clause of the joint venture's contract held that the initial period of the company would be 10 years and that it "*will be extended for further ten (10) years with the Agreement of the General Assembly*" (unlike Article 4 of the 2009 Contract pursuant to which the term "*may be renewed*"). Claimant argued that it had legitimate and reasonable expectations regarding the extension of the joint venture "*since it was led to believe that the term would be extended for at least an additional ten year term*". The tribunal rejected Claimant's allegations considering that the contract was "*indicative only of the Parties' willingness to consider an extension of the Company's duration at the time of expiry of the initial term in light of the prevailing circumstances*." Further, the tribunal considered that "***[t]his provision**, which is customary in these kinds of agreements and in a company's articles of association, **cannot constitute a valid basis for a legitimate and reasonable expectation that there would necessarily be an extension of the Company's duration or that there was a legal obligation to extend the term beyond the initial ten-year period.***" (emphasis added).

394 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 247 **[CL-037]**.

199. Were this not enough, Claimant also ignored Respondent's second point on lack of evidence. Claimant has been incapable of supporting its speculative allegations that Colombia was acting irrationally, or to dispute the abundant evidence introduced with Colombia's Counter-Memorial that its decision not to renew the 2009 Contract was perfectly appropriate and connected to a legitimate public policy objective of adapting the .co domain model to market conditions which had drastically evolved since the inception of the 2009 Contract (including notably revising upwards Colombia's share of proceeds), while respecting fundamental Colombian administrative law principles.[395] Claimant's speculative assertions should therefore be categorically rejected.

200. Having no case of its own, in its Reply Claimant has been left to trying to criticize Respondent's submissions that Colombia was acting with a legitimate objective and tries (in vain) to question them. However, none of Claimant's artificial criticisms hold water.

201. *First*, Claimant argues that MinTIC could have negotiated with .CO Internet if it had wished to obtain "*better economic conditions*", and asserts that MinTIC's refusal to consider .CO Internet's 21 May 2019 offer confirms that MinTIC was not acting in pursuit of a legitimate policy objective.[396] Claimant however omits that:

- As explained in detail at paragraphs 251-262 below, it is clear on the face of Article 4 of the 2009 Contract that renewal was only a contractual prerogative which could be pursued should both parties agree on it. In addition, Claimant has been unable to point to any Colombian law , regulation, contractual obligation or principle which would have required MinTIC to negotiate with .CO Internet for a certain period of time prior to deciding whether to renew. The reality is that MinTIC only acted in the same manner as a private party when considering its options under the 2009 Contract with respect to renewal. Irrespective of any objective that MinTIC would allegedly have pursued in deciding not to renew the 2009 Contract, the contractual language is in itself fatal to Claimant's claims that Respondent's conduct was "*arbitrary*", let alone manifestly so. MinTIC had a discretionary contractual prerogative to consider whether or not to discuss renewal with .CO Internet, and was not forced to renew the 2009 Contract. This was acknowledged by Neustar and .CO Internet in both a legal opinion transmitted to MinTIC on 27 December 2018,[397] and in a further communication of 5 March 2019 whereby they acknowledged that "*the renewal of the contract is not automatic […]*"[398]

---

395 *See inter alia* Counter-Memorial, paras. 103-107; 117. Crucially, this is all supported by the report by the ITU, a recognized international organization under the aegis of the UN with expertise in domain names. *See* ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**. *See also*, First Witness Statement of Ms. Sylvia Constaín, paras. 8-9, 14 **[RWS-01]**; First Witness Statement of Mr. Iván Darío Castaño Pérez, paras. 17-18 **[RWS-02]**.

396 Reply, para. 228.

397 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**.

398 Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.

- In any event, as explained at length in the Counter-Memorial,[399] Respondent's focus was not only on "*obtaining better conditions*" for the Colombian people, but also on ensuring full compliance with its own administrative law in the process of deciding on the future of the .co domain. In this context, the record abundantly shows that Colombia identified clear legal risks that a renewal of the 2009 Contract associated with a significant modification of the contractual terms (including chiefly Colombia's share of proceeds) could breach fundamental administrative law principles of transparency and equal opportunity:

    - With its Counter-Memorial, Colombia exhibited different decisions by the Council of State which clearly show that under Colombian administrative law, renewing a contract while substantially modifying its terms (and without going through the public procurement process mandated by law) can breach principles of transparency and equal opportunity.[400] For instance, the Council of State has held that the renewal of a public contract is permitted only "*as long as the conditions or essential elements that gave rise to its subscription are maintained*, *that is, without altering or modifying the clauses that motivated the parties to agree on the object , content and economic compensation*"[401]. Claimant fails to dispute these clear decisions (or to even try to allege that a modification of the economic terms of the 2009 Contract would not have been a modification of an "*essential element*" of the 2009 Terms of Reference and 2009 Contract), and has instead chosen to simply omit them in its Reply;

    - As Respondent further explains at paragraph 202 immediately below, this risk was mentioned several times in official MinTIC documents, from mid-2018.[402] It was notably discussed by the Advisory Committee in its 18 March 2019 session, during which it ultimately decided to recommend not to renew the 2009 Contract.[403]

    - Neustar and .CO Internet themselves acknowledged this risk in a communication sent in early March 2019, stating that they "*shared the approach of the Ministry, in light of the principles that regulate state contracting, in particular principles of transparency, planning, and objective selection mentioned [in MinTIC's letter]*".[404]

---

399 Counter-Memorial, paras. 105-106.

400 Council of State, Decision of 31 August 2011 (case No. 18080) **[R-0036]**; Council of State, Decision of 28 June 2012 (case No. 23966) **[R-0037]**; Political Constitution of the Republic of Colombia, 1991, Art. 209 **[C-0111]**.

401 Council of State, Decision of 16 February 2022 (Case No. 2473), p. 81 **[R-0092]**.

402 In its communication of 15 February 2019, MinTIC highlighted the need to take into account "*the public interest, and state contracting principles, in particular transparency, planning and objective selection.*" *See* Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**.

403 *See* Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**: the Advisory Committee considered that agreeing on a modification of the share of proceeds under the 2009 Contract would create "*an unnecessary risk regarding compliance with the legal framework for the administrative function and contractual activity of the State.*"

404 Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.

- This is not only clear from documentary evidence, but also confirmed by *inter alia* Ms. Sylvia Constaín (Minister of Telecommunications during the relevant time period),[405] Ms. Luisa Trujillo (Secretary General of MinTIC, legally responsible for all tender processes at the Ministry during the relevant time period, including the 2020 Tender Process),[406] and Mr. Iván Castaño (Director of Telecommunications Industry Development at MinTIC during the relevant time period) in their witness statements.[407] It bears reminding that in a further effort to ensure transparency (and in stark contrast to Claimant's approach of multiplying unsubstantiated and disparaging insinuations with the support of no witnesses at all), Respondent has ensured the participation of these three high-ranking officials in the present proceedings in spite of their abusive character outlined at Section 2.6 *supra*.

- As Respondent also explained in the Counter-Memorial, it was clear to all the parties involved (both MinTIC and .CO Internet) that any renewal of the 2009 Contract would be conditioned on a substantial modification of the economic conditions,[408] which meant that such a renewal would necessarily put the parties to the 2009 Contract at risk of breaching Colombian administrative law:

  - This is evidenced notably by the July 2018 Report as well as .CO Internet's unsolicited letter of 20 September 2018,[409] whereby it expressed its interest in renewing the 2009 Contract while acknowledging that this would necessitate modifying its financial terms, in the following words:

    > *We are conscious of the dynamism of the industry and that a renewal of the contract would entail working on a restructuration of the compensation package, where in addition to revising the formula and calculation value of the same, it would also be possible to discuss other mechanisms that, taken together, would improve the contribution of the .co ccTLD to the digital transformation efforts in Colombia*[410]

  - Faced with this unequivocal evidence, Claimant has pivoted in its Reply to arguing for the first time that this 20 September 2018 letter was elicited by Respondent *through coercion*:[411] Claimant incredibly submits that this offer "*was directly*

---

405 First Witness Statement of Ms. Sylvia Constaín, paras. 12-17 **[RWS-01]**.

406 First Witness Statement of Ms. Luisa Fernanda Trujillo Bernal, paras. 9-10 **[RWS-03]**.

407 First Witness Statement of Mr. Iván Darío Castaño Pérez, para. 18 **[RWS-02]**.

408 Counter-Memorial, para. 84.

409 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]**.

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

411 *See* Memorial, paras. 65-67 ("*In July 2018, the Colombian Government released a report on the .CO domain, recognizing the viability of extending the .CO Concession for a further ten years. The Vice Minister of Digital Economy acknowledged the extension of the Concession, and noted that such an extension should go "hand in hand" with an economic renegotiation of the consideration contemplated.78 Respondent recognized that while a bidding process may be opened, any such process must be considered only after negotiations on the extension of the Concession.79 Such negotiations for extensions are required, of course, as the parties have to work out the specific terms of the extension. On 20 September 2018, 72 weeks before the Concession was due to expire (on 7 February 2020), .CO Internet wrote to the Minister of Information Technology and Communications ("the MinTIC Minister"), providing notice of its intention*

responsive to the recommendations communicated in Respondent's July 2018 report."[412] This assertion is an embodiment of Claimant's opportunistic and voluntarily misleading approach, as it is entirely unsupported and in fact contrary to the evidence on the record and Claimant's own submissions:

- Claimant does not prove in any manner (nor even alleges) that it had obtained communication of this document prior to sending its 20 September 2018 letter. In fact, the July 2018 Report clearly specifies that it was prepared for internal purposes, with its introduction stating that "*the present document has been prepared with the aim of serving as a recommendation document for the new Government*".[413] Even if Neustar had obtained communication of this report, it fails to explain how exactly it could have 'coerced' it into making its offer;

- Further, .CO Internet's 20 September 2018 letter to MinTIC does not make any reference to the July 2018 Report or to any prior action by MinTIC that would have triggered this offer. Had 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*" in September 2018, as Claimant conveniently alleges,[414] one would have expected that (i) this threat be mentioned in the 20 September 2018 communication or at least that (ii) there would have been prior communications between .CO Internet and MinTIC on this issue. Yet, the letter does not refer to any prior action by MinTIC which would have elicited .CO Internet's letter, and in a now familiar pattern Claimant has submitted absolutely no documentary or witness evidence to back up its vituperations.

- In any event, Claimant simply omits that MinTIC *did* consider not only its initial 20 September 2018 general request for renewal,[415] but also its unsolicited 21 May 2019 offer

---

to formalize the extension of the Concession as contemplated by the parties, and offering to improve the financial consideration by negotiation. Neustar, through .CO Internet, offered to meet with MinTIC as a priority to discuss these issues."). At no point in its Memorial did Claimant allege that its 20 September 2018 letter was *responsive* to MinTIC's July 2018 Report.

412 Reply, para. 235, 249.

413 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]**.

414 Reply, para. 249.

415 This request was discussed at length internally by MinTIC, as Mr. Castaño explains, and was also considered in detail during the Advisory Committee's 18 March 2019 session. *See* First Witness Statement of Iván Darío Castaño Pérez, paras. 10-15 **[RWS-02]**; Minutes of the Advisory Committee session of 18 March 2019, pp. 5-6 **[C-0039]** ("*En este punto, efectuado el análisis de las dos alternativas planteadas en la sesión del 18 de marzo del 2019, surgen las siguientes consideraciones que se deben tener en cuenta para efectos de la escogencia de Ia mejor alternativa [...]* ***Luego del análisis de las dos alternativas presentadas****, el Comité Asesor recomienda continuar con la estructuración del proceso de selección (licitación pública), para escoger el operador para la administración del dominio .co, para lo cual deberá realizarse los respectivos estudios previos, del mercado y del sector, que permitan encontrar las condiciones más idóneas para establecer una nueva relación contractual.*" (original version, emphasis added); "*At this point, after the analysis of the two alternatives presented in the session of March 18, 2019, the following*

which, as a reminder, had come long after MinTIC had taken and announced the decision to launch a new tender process. Specifically, the Advisory Committee met on 30 May 2019 to discuss *inter alia* .CO Internet's offer.[416] Even more importantly, MinTIC subsequently answered to .CO Internet on 21 June 2019, reiterating its decision to proceed with a tender process and specifically inviting .CO Internet to present any offer it might wish to present within the framework of the competitive tender process to be implemented.[417] Claimant had produced these documents with its Memorial, yet it entirely disregards their content in the Reply in an attempt to continue its whimsical narrative.

- Finally (and although this is entirely irrelevant since Colombia had to open a tender process in accordance with principles of equality and transparency, with Claimant's offer in fact *confirming* that it was necessary to adapt the economic conditions of the contract), Claimant's contention that its 21 May 2019 offer was the best available option for the State is simply unsupported:[418] as explained in the Counter-Memorial, Colombia increased its share of the proceeds from 7% at best under the 2009 Contract to 81% under the 2020 Contract, which has generally also proved more successful for the growth of the .co domain.[419] As also explained in the Counter-Memorial, Claimant's allegation further overlooks the fact that the 2009 Contract as a whole (besides its economic terms) was not in line anymore with international best practices.[420]

---

considerations arise that must be taken into account for the purpose of choosing the best alternative [...] ***After analyzing the two alternatives presented****, the Advisory Committee recommends continuing with the structuring of the selection process (public bidding) to choose the operator for the administration of the .co domain, for which the respective previous studies of the market and the sector should be carried out, in order to find the most suitable conditions to establish a new contractual relationship."* (our translation, emphasis added)).

416 Minutes of the Advisory Committee session of 30 May 2019 **[C-0070]**.

417 Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**.

418 As an initial point, while Claimant argues that its offer was worth USD 200 million this was not adequately supported : its initial four-page 21 May 2019 letter does not refer to this figure nor does it attach any financial analysis. *See* Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**. Claimant did provide more information on the contents of its offer on 5 August 2019: *see* Communication from .CO Internet to MinTIC of 2 August 2019 **[C-0082]**. However, this letter too failed to provide adequate financial details to back up the alleged USD 200 million valuation of the offer.

419 *See* Counter-Memorial, Section 2.7. It should also be noted that while Neustar indicates that this offer was worth USD 200 million, its 2 August 2019 letter detailing the different components of this (otherwise unsupported) valuation points otherwise. Specifically, this letter offers to increase MinTIC's share of proceeds from 6.32% to **28%**. This is nowhere near the 81% MinTIC has obtained through the transparent 2020 Tender Process. In the alternative, Neustar offered to make an upfront payment of USD 54.66 million (which it explains in fact amounts to USD 116 million, *but with a 15% discount rate which it entirely fails to substantiate*). Further, it also appears that a large part of the alleged USD 200 million value of the offer consists of Neustar's offer to provide for domain names free of charge to Colombian small companies: Neustar values this support at USD 7.2-9 million per year (i.e. USD 72 to 90 million over the ten-year term of the renewed concession), although this component is based on pure speculation and Neustar does not substantiate the 'real costs' of providing support for these companies. *See* Communication from .CO Internet to MinTIC of 2 August 2019 **[C-0082]**. In sum, a detailed examination of this letter reveals Neustar's inaccuracies and exaggerations regarding its alleged 'USD 200 million' offer, which was in fact far from that value or from the value that MinTIC was able to obtain through the 2020 Contract.

420 *See inter alia*, Counter-Memorial, paras. 79-83, 103-106; Mr. Iván Darío Castaño Pérez, para. 9 **[RWS-02]**; First Witness Statement of Sylvia Constaín, para. 14 **[RWS-01]**. This is confirmed by the investigations carried out by the MinTIC's advisory team on the .co domain, including through documents that Colombia has been able to locate during the document production phase and disclosed to Claimant (which in turn carefully refrained from mentioning any of these in its Reply in an effort to continue its misleading narrative). *See* Viveka Consultors, Lucas Quevedo Barrero, Orlando Garcés (GACOF), *Final Report Valuation of .co Domain*, September 2018 **[R-0088]** (disclosed as HLI01); A. Arcila, *Market analysis to ascertain the opportunity of either initiating a new tender process or renew the current concession contract for the .co domain*, March 2019 **[R-0089]** (disclosed as HLI07); A. Arcila, *Presentation to the*

202. <u>*Second*</u>, Claimant's assertion that the risk of breaching fundamental administrative law principles (such as transparency and equality of opportunities) is nothing more than a "*post-hoc rationalization*" by Respondent of its decision not to renew the 2009 Contract which has been "*developed in this arbitration*" is also disproved by an examination of the evidence on the record:[421]

- As a preliminary point, it bears noting that Claimant systematically misrepresents or ignores the contents and purpose of the July 2018 Report, in this case by arguing that Respondent did not address the importance of administrative law considerations in this report.[422] In this respect, it is interesting to note that Claimant submitted in its Memorial that the July 2018 Report actually supported a renewal of the 2009 Contract.[423] After Respondent demonstrated this was incorrect in its Counter-Memorial, with this report instead supporting a new tender process, Claimant has quietly dropped these allegations in its Reply.[424] Instead, Claimant now pivots to assert that this report was pre-textual as MinTIC did not have the required knowledge to elaborate such a report or find that a renewal was unwarranted at that time.[425] As Respondent explains at paragraph 215 *infra.*, and as can be confirmed by a simple glimpse at the actual contents of the report, this contention is plainly incorrect.

- With respect to the legal risks associated with a renewal of the 2009 Contract, and as already explained in the Counter-Memorial, the July 2018 Report confirms that MinTIC had started to identify these:

> *It is therefore essential to emphasize the necessity that any renewal 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/FONTIC. It is important to take into account that this modification scenario* ***could imply a long and complex negotiation period****, given that the consideration offered [by the proponents] was one of the determining factors at the time of choosing between the proposals,* ***so the concessionaire would undoubtedly request a series of additional modifications to the contract that could eventually be subject to questions regarding*** *[compliance with]* ***the principle of transparency in the current concession****.*[426]

Advisory Committee on the .co ccTLD policy, March 2019 **[R-0090]** (disclosed as HLI08); Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]** (while Respondent does not waive privilege it notes that two of the documents "*analyzing legal risks associated with renewing the 2009 Concession*" and "*recommending to initiate a new tender process*" are dated <u>March 2019</u>, that is before MinTIC formalized the decision not to renew the 2009 Contract; This was also later confirmed by the ITU Report. *See* ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

421 Reply, para. 229.

422 In order to correct these mischaracterizations once and for all and provide the Tribunal with a truthful picture of MinTIC's internal position as at July 2018, Respondent provides a *full* translation of this report together with the present Rejoinder, in line with Procedural Order No. 1.

423 *See, for instance*, Memorial, para. 100.

424 *See* Counter-Memorial, Section 2.4(a).

425 Reply, para. 250.

426 MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 9 **[C-0027]**.

- In any event, Claimant omits that the July 2018 Report was only a *preliminary* report prepared more than 18 months before the term of the 2009 Contract, with the sole purpose of providing the incumbent administration of MinTIC with a "*complete panorama of the current situation and future projections of the .co domain, both from a financial, legal and operational standpoint.*"[427] Claimant's suggestion that this report should necessarily have included all of MinTIC's final recommendations and analyses in respect of the .co domain is just an attempt to overlook the numerous other evidence on the record showing that such risks were indeed at the forefront of MinTIC's preoccupations:

    - Ms. Trujillo (as well as Mr. Castaño) confirms that in addition to financial considerations, legal issues were also at the forefront of MinTIC's investigations regarding the opportunity to renew or conduct a new tender process, and that these specific legal risks were both (i) discussed at length by the MinTIC team in charge of studying the .co domain issue, and (ii) key in MinTIC's decision to opt for a new tender process;[428]

    - Crucially, it is apparent from the Advisory Committee's 18 March 2019 session minutes that this risk was one of the main factors taken into account by the members of the Committee when reaching their recommendation not to renew the 2009 Contract. Specifically, the General Counsel of MinTIC at the time explained that:

> *On the one hand, although the legal and conventional norms have opened the possibility of a renewal or extension of the concession contract for another 10 years, as the case may be, this possibility should be accompanied by a renegotiation of the share of proceeds, a fundamental element of the contract.*
>
> *The jurisprudence of the Council of State (Third Section and the Chamber of Consultation and Civil Service), has recognized that it is possible to modify and extend concession contracts, due to their incomplete nature.* ***However, such modifications must be due to the proven existence of a fault in the technical structuring, or to the occurrence of a specific circumstance of force majeure that has made it unfeasible for the contractor to continue with the execution of the contract*** *under the current conditions. In this case and based on the technical reports, in the absence of the aforementioned conditions, this first alternative would not be viable.*
>
> *An economic renegotiation of the share of proceeds,* ***as proposed by the current concessionaire, would imply a modification to one of the essential elements of the contract, which would not be justified by a deficiency in any technical component, nor in any***

---

427 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]**.

428 First Witness Statement of Mr. Iván Darío Castaño Pérez, paras. 18-20 **[RWS-02]**; First Witness Statement of Ms. Luisa Fernanda Trujillo Bernal, para. 10 **[RWS-03]**.

> ***other circumstance*** *that would jeopardize the provision of the service to the final users.*
>
> *Given that the share of proceeds is an essential element of the contract, and since preliminary market comparisons made with countries that have a similar number of domains according to the research carried out by the .co Advisor, Engineer Adriana Arcila, show that the variation of the consideration would have to be significant in order to adjust to the current market conditions.*
>
> *Likewise, the Legal Advisor of .co Dominique Behar stated that undertaking this extension and modification* ***would entail an unnecessary risk with respect to compliance with the rules governing the administrative function and the contractual activity of the State****. On the contrary, by carrying out a new selection process, a contractual relationship would be established in accordance with the current market conditions, as well as with the best international practices in the matter.*[429]

- Further, it should be noted that as part of the document production phase, Claimant requested that Respondent disclose any internal documents "*analyzing legal risks associated with renewing the 2009 Concession.*"[430] Respondent identified four documents responsive to this request, which it listed in a log given their privileged character.[431] While Respondent does not waive privilege with respect to these documents, it notes that two of the documents "*analyzing legal risks associated with renewing the 2009 Concession*" and "*recommending to initiate a new tender process*" are dated March 2019, that is before MinTIC formalized the decision not to renew the 2009 Contract.[432]

---

429 Minutes of the Advisory Committee session of 18 March 2019, pp. 5-6 **[C-0039]** (our translation, emphasis added; "*Por una parte, si bien las normas legales y convencionales han abierto la posibilidad a una prórroga o renovación, según el caso del contrato de concesión por otros 10 años, esta posibilidad debería ir acompañada de una renegociación de la contraprestación, elemento fundamental del contrato. La jurisprudencia del Consejo de Estado (Sección Tercera y la Sala de Consulta y Servicio Civil), ha reconocido que es posible modificar y prorrogar los contratos de concesión, en razón de su naturaleza incompleta. No obstante, tales modificaciones deben obedecer a la existencia comprobada de una falencia en la estructuración técnica, o al surgimiento de una circunstancia especifica de fuerza mayor que haya hecho inviable continuar con la ejecución del contrato en las condiciones actuales para el contratista. En este caso y con base en los reportes técnicos, al no presentarse las condiciones mencionadas, esta primer alternativa no resultaría viable. Una renegociación económica de la contraprestación, como la que plantea el actual concesionario, implicaría una modificación a uno de los elementos esenciales del contrato, que no estaría justificada en una falencia del componente técnico, ni en ninguna otra circunstancia que ponga en riesgo la prestación del servicio a los usuarios finales. Dado que la contraprestación es un elemento esencial del contrato, y como quiera que las comparaciones de mercado preliminares que se han hecho con países que tienen similar número de dominios de acuerdo con la investigación realizada por la Asesora del dominio .co, Ingeniera Adriana Arcila, muestran que la variación de la contraprestación tendría que ser significativa para que se ajustara a las actuales condiciones del mercado. Igualmente, la Asesora Jurídica del dominio .co Dominique Behar manifestó que acometer esta prórroga y modificación supondría un riesgo innecesario frente al cumplimiento de las normas que rigen la función administrativa y la actividad contractual del Estado. Por el contrario, al surtirse un nuevo proceso de selección, se estableceria una relación contractual acorde con las actuales condiciones de mercado, así como a las mejoras prácticas internacionales en la materia*" (original version).

430 Procedural Order No. 2, Annex A, Request No. 12 (pp. 33-35).

431 Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]**.

432 Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]**: these two documents are a (i) Memorandum on the legal framework of the 2009 Contract recommending to initiate a new tender process, and a (ii) Memorandum on the legal framework of the 2009 Contract and the legal risks associated with a renewal, recommending to initiate a new tender process.

- Finally, Claimant's fallback argument that "*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)*" is nonsensical, and once more based on a misrepresentation of Respondent's position.[433] At no point did Respondent contend that the clause on renewal is contrary to its own administrative and constitutional law. Rather, Respondent explained that:

    - Clauses providing for the *automatic* renewal of concession contracts are prohibited under Colombian law, notably in light of the general principles of transparency and equality.[434] As explained in the Counter-Memorial, Claimant could not ignore this if it had performed reasonable due diligence when it participated in the tender for the 2009 Contract along Arcelandia, or when it acquired .CO Internet's full share capital in 2014.[435] Claimant does not appear to dispute this in its Reply. This would in any event be difficult given that the very legal opinion Claimant used in support of one of its communications to MinTIC requesting renewal (on 27 December 2018) acknowledges this point.[436]

    - Clauses providing for the *possibility to renew* concession contracts are permitted. However, when a concession contract is renewed the parties cannot amend the *essential elements* of the contract (save in case of *force majeure* or a flaw in the technical conditions) as this would breach Colombian constitutional and administrative law principles of transparency and equal opportunity.[437]

    - In the instant case, even .CO Internet recognized that a renegotiation of the economic terms was necessary – as explained at paragraph 201 immediately above. However, such economic terms were undoubtedly one of the "*essential elements*" of the 2009 Contract, and could therefore not be modified through direct negotiation without breaching Colombian administrative law. As aptly put by the General Counsel of MinTIC during the 18 March 2019 session of the Advisory Committee cited immediately above, "*[a]n economic renegotiation of the share of proceeds,* ***as proposed by the current concessionaire, would imply a modification to one of the essential elements of the contract, which would***

---

433 Reply, para. 229.

434 Counter-Memorial, para. 44. *See* Decree Law 222 of 2 February 1983, Art. 58 **[R-0002]**; Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01), p. 14 **[R-0003]**.

435 Counter-Memorial, para. 387.

436 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 12 of the pdf **[R-0035]**, *referring to* Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01) **[R-0003]**. *See also*, Letter from .CO Internet to MinTIC of 25 September 2019, pp. 5-6 **[C-0079]**, stating that "*automatic renewal is not valid.*"

437 Counter-Memorial, para. 106; Council of State, Decision of 31 August 2011 (case No. 18080) **[R-0036]**; Council of State, Decision of 28 June 2012 (case No. 23966) **[R-0037]**; Political Constitution of the Republic of Colombia, 1991, Art. 209 **[C-0111]**.

not be justified by a deficiency in any technical component, nor in any other circumstance".[438]

203. *Third*, Claimant alleges that Respondent "*admits that MinTIC put aside the non-partisan exercise of public administration in favor of political favoritism.*"[439] The basis for Claimant's allegations is somewhat unclear, with Claimant failing to reference any documentary or witness evidence or to distinguish between any allegations relating to (i) the decision not to renew the 2009 Contract on the one hand, and (ii) the manner in which Colombia carried out the 2020 Tender Process, on the other hand. It would appear that Claimant continues to put forward its wholly unsupported theory that MinTIC's actions in respect of these two issues were guided by some sort of 'grand scheme' to install another company, Afilias, as operator of the .co domain. To this end, it would appear that in its Reply Claimant attempts to rely on the fact that presidential elections took place in the second quarter of 2018 to argue that there was necessarily political intervention, and that Colombia would have "*refused to carry out an evaluation of the Concession.*"[440] A cursory reading of Respondent's Counter-Memorial and the documents in question is sufficient to disprove Claimant's allegations and show that these are no more than a red herring, both in relation to the decision not to renew the 2009 Contract and with respect to the carrying out of the 2020 Tender Process.

204. With respect to the decision not to renew the 2009 Contract:

- Preliminarily, it bears reminding that at the time MinTIC prepared the July 2018 Report, there were more than 18 months outstanding under the initial term of the 2009 Contract (which was set to expire on 6 February 2020).[441] To the extent that Claimant contends that MinTIC was under the obligation to take a decision on renewal prior to July 2018, it has not produced any evidence of such an obligation.

- At no point have Claimant or Respondent argued that MinTIC would have "*refused*" to carry out an evaluation of the 2009 Contract, or that this was required of MinTIC at any point. Neustar's letter of 20 September 2018 marks the *first time* a party to the 2009 Contract contacted the other with respect to renewal, and Claimant does not argue otherwise. Claimant does not explain how there could have been a "*requirement*" for MinTIC to carry out an evaluation even prior to the concessionaire's first request for a renewal.

- Respondent has certainly not admitted (and strongly denies) any political intervention or wilful delaying of the decision on the .co domain due to the upcoming elections. Claimant

---

438 Minutes of the Advisory Committee session of 18 March 2019, pp. 5-6 **[C-0039]** ((our translation); *"[u]na renegociación económica de la contraprestación, como la que plantea el actual concesionario, implicaría una modificación a uno de los elementos esenciales del contrato, que no estaría justificada en una falencia del componente técnico, ni en ninguna otra circunstancia*" (original version)(emphasis added)).

439 Reply, paras. 230-232.

440 Reply, para. 231.

441 Contract 19 of 3 September 2009, Art. 4 **[C-0017]**; Counter-Memorial, para. 70.

appears to rely on paragraph 79 of the Counter-Memorial to make this allegation. However, this excerpt reads:

> *By late 2017, as the initial term of the 2009 Contract was nearing completion (it was due to expire on 6 February 2020), MinTIC started to carry out an evaluation of the 2009 Contract and the options open to Colombia for the future administration and operation of the .co domain name. However, presidential elections were set to take place during the second quarter of 2018. In light of this, and* ***as in any event the term of the 2009 Contract would only expire after these elections****, the then MinTIC decided to focus on doing the groundwork to enable the new administration that would assume office by mid-2018 to decide on the future of the .co domain name.*

- Contrary to Claimant's contention, there was no 'hidden' motive, and MinTIC had certainly not delayed carrying out an evaluation of the .co domain in light of the upcoming presidential elections. Quite to the contrary, as explained by Ms. Constaín,[442] MinTIC had started carrying out the evaluation of the .co domain but was aware that it would not be able to finalize it in full before the change to a new government. The stated goal of this report was therefore to provide the new government with as complete of a picture of the .co domain situation as possible, to ensure that no useful information (and past work) would be lost during the transition between governments. This goal, far from 'revealed' in Respondent's Counter-Memorial, is set out plainly in the introduction to the July 2018 Report:

> *This document has been prepared with the purpose of serving as a* ***recommendation document for the new Government, so that the same can be provided with a complete panorama of the current situation and future prospects of the .co domain****, both from a financial, legal, and operational standpoint.* ***This has been done with the intention that the new Government be able to take its own decisions regarding the future of the Colombian domain in an informed manner and basing its analysis on real and hard*** *data.*[443]

205. With respect to the carrying out of the 2020 Tender Process, as already demonstrated in the Counter-Memorial, and as further explained at paragraph 214 below, Respondent has not only debunked all of Claimant's allegations that the terms of reference were 'tailor-made' for Afilias or that the 2020 Tender Process was not carried out transparently, but also provided detailed documentary evidence of each and every step of the 2020 Tender Process which shows the constant interaction with interested parties and the general transparency and openness of the process.

---

442 First Witness Statement of Sylvia Constaín, paras. 5-6 **[RWS-01]**.

443 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]** (our translation, emphasis added; "*El presente documento ha sido construido con la finalidad de servir como* ***documento de recomendación para el nuevo Gobierno****, de tal manera que podrá ver en el mismo un panorama completo de la situación actual y proyecciones a futuro del dominio .co, tanto a nivel financiero como legal y operativo. Lo anterior con el ánimo que pueda* ***tomar sus propias decisiones en cuanto al futuro del dominio colombiano de manera informada y partir del análisis de datos reales y contrastados***." (original version, emphasis added)).

206. *Fourth*, Claimant attempts to rely on a "*chronological look*" at the events in order to argue that MinTIC had taken an "*internal decision*" late in 2017 (presumably not to renew the 2009 Contract) which then contradicted its communications about the 2009 Contract.[444] Claimant's conspiracy theory however rests wholly on an utter mischaracterization of Respondent's position and the documents that it invokes:

- The first prong of Claimant's theory is that MinTIC had taken an "*internal decision*" on the .co domain "*late in 2017*".[445] As shown immediately above, this position relies on a (wilful) misunderstanding of Respondent's submissions, and is disproved by a simple examination of the introduction to the July 2018 Report.

- Claimant then argues that MinTIC publicly expressed its satisfaction with the performance of the .co domain in November 2017, and again in June 2018, through minutes of the Advisory Committee's sessions.[446] Preliminarily, it should be noted that contrary to Claimant's submission these documents are not "*public, external communications about the 2009 Concession*" but internal documents which, on their face, examined the performance of .CO Internet under the 2009 Contract.[447] In any event, these documents are entirely irrelevant to the issue at hand: that .CO Internet was performant under the 2009 Contract does not change the fact that it was not *entitled* to a renewal of this contract under Article 4 of the same, or the accompanying legal framework, and Claimant has not argued otherwise.

- Finally, Claimant once more points to the July 2018 Report, alleging that this report supported the conclusion of a renewal rather than the opening of a new tender process. Even if this misrepresentation of the contents of the July 2018 Report was true, it is unclear how a purely internal recommendation made more than a year and a half before the term of the 2009 Contract could possibly have bound MinTIC to renew the 2009 Contract. But in any event, Claimant's statements regarding the conclusions of the July 2018 Report are simply false or at best misleading. Respondent has already debunked Claimant's claims about the contents of the July 2018 Report in detail in the Counter-Memorial.[448] Respondent will provide a full translation of this Report (despite it being a Claimant's exhibit) and invites the Tribunal to parse the minutiae of its contents (in particular Section 2 thereof). The inescapable conclusion, in the words of the July 2018 Report itself, is that

---

444 Reply, para. 234.
445 Reply, para. 234.
446 Reply, para. 234, referring to Minutes of the Advisory Committee session of 21 November 2017 **[C-0025]**; Minutes of the Advisory Committee session of 13 June 2018 **[C-0026]**.
447 Minutes of the Advisory Committee session of 21 November 2017 **[C-0025]**; Minutes of the Advisory Committee session of 13 June 2018 **[C-0026]**.
448 Counter-Memorial, paras. 79-83.

the "*best option [would be] to initiate a new public contracting process which would result in a new concession contract.*"[449]

207. It follows from all of the above that Colombia did not act arbitrarily let alone in a *"manifestly arbitrary"*, *"shocking"*, or *"outrageous"* manner that would be *"unacceptable"* from an international perspective. Claimant's delusory, unsubstantiated, and/or voluntarily misleading allegations should therefore be categorically rejected.

(2) *Colombia's conduct was based on legal standards and was not discriminatory*

208. Similarly, Claimant's allegations that Colombia's conduct was arbitrary because it allegedly engaged in "*blatant discrimination*" with respect to Neustar when refusing to renew the 2009 Contract remain meritless. Essentially, Claimant's argument is still that Neustar was discriminated against because other concessionaires in the telecommunications, the mining, and the port sectors had their concession renewed, while Colombia's refusal to renew the 2009 Contract was motivated by its alleged desire of favouring another operator, Afilias.[450] This line of argument is unavailing not only due to Claimant's failure to take into account the limitations of Article 10.5, but primarily because Claimant has failed entirely to show that Respondent engaged in any kind of discrimination with respect to either its decision not to renew the 2009 Contract or its conduct of the 2020 Tender Process.

209. *First*, as explained in the Counter-Memorial, Claimant has failed to show that the minimum standard of treatment provides protection against non-nationality based discriminations such as those it alleges. While nationality based discriminations are addressed in Articles 10.3 and 10.4 of the TPA, to prove that protection against non-nationality based discrimination is covered, Claimant would need show that it constitutes a rule of customary international law in the *opinio juris* of the States and State practice. However, it has not even attempted to do so and its allegations should therefore be dismissed on this basis alone.

210. In order to circumvent its failure to demonstrate the requisite international practice, Claimant argues in its Reply simply that "*there is a wide consensus that the minimum standard of treatment covers non nationality based discrimination*" and that this is demonstrated by the commentaries and decisions cited in its Memorial.[451] However, proposition is false and misguided:

---

449 MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 16 **[C-0027]**.

450 Reply, para. 243.

451 Reply, para. 241.

- Claimant relies on four academic commentaries and the UNCTAD 2012 report.[452] Yet, most of the sections on which Claimant relies refer to autonomous and general fair and equitable treatment analysis and not to minimum standard of treatment.[453]

- Similarly, Claimant refers to several cases where the FET clauses at stake were not linked to the minimum standard.[454] The conclusions reached in such cases have of course no relevance in the present proceedings were the minimum standard is at stake.

- As regards the cases it cites brought under a treaty linked to the minimum standard of treatment, none of the tribunals effectively ruled that the customary minimum standard protected investors against non-nationality based discrimination:

    - Some of these cases explicitly rejected that discrimination is incorporated in the customary international minimum standard of treatment;[455]

    - In the majority of the cases, the tribunals did not include discrimination in the definition of the minimum standard[456], nor did they discuss discrimination.[457] Instead, they considered that the threshold for a breach of the minimum standard of treatment was generally a high one;[458]

    - The only two awards that supposedly included customary protection against so-called "*targeted discrimination*" did not examine that allegation autonomously and,

---

452 Memorial, para. 202, fn. 266.

453 In A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) **[CL-053]**, the section cited by Claimant explicitly examines FET as an autonomous standard from the minimum standard of treatment; in Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law* (2005) 6(2) J. World Invest & Trade 297 **[CL-055]** at p. 301, the author expressly reminds that the section of the article cited by Claimant "*examines the cases and themes emerging from international panel discussions interpreting the fair and equitable treatment standard which refer to and go beyond the elements described by the Waste management Tribunal*"; in C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd Edition, Oxford University Press, 2017 **[CL-056]** at para. 7.222, the authors are clearly referring to cases like *Saluka v. Czech Republic,* in which the underlying treaty did not linked the FET to the minimum standard of treatment.

454 *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 77 **[CL-045]**; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 294 **[CL-049]**; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on jurisdiction and liability, 14 January 2010, paras. 252-253 **[CL-036]**; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 428 **[CL-052]**. In other cases, the definition of a discriminatory measure was given by the treaty and examined in the framework of a non-impairment clause. *Ronald S. Lauder v. The Czech Republic, UNCITRAL,* Final Award, 3 September 2001, para. 220 **[CL-046]**.

455 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, pp.. 269-274 of the pdf **[CL-050]**. The prohibition of discrimination has also not been explicitly recognized as part of an expression of the general principles of international law (*Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 187 **[CL-033]**).

456 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 458 **[CL-030]**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127 **[CL-024]**; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, para. 224 **[CL-048]**.

457 *Gami Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 94 **[CL-034]**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 92 **[CL-044]**.

458 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**.

once again, retained a high threshold for a breach of the minimum standard of treatment:

- In *Cargill,* the tribunal decided that one of the measures taken by Respondent State breached NAFTA's Article 1105 not because it was *"targeted discrimination*", but because the host State's measures were considered "*to surpass the standard of gross misconduct and be more akin to an action in bad faith".* Indeed, the tribunal considered that the willful targeting was *"manifestly unjust*"[459] because it was used to influence United States' trade policy;

- As to the *Glamis Gold* award, the tribunal actually asserted that Claimant's argument that it was being discriminated by being targeted "*appeared primarily in the discussion of article 1110*" and in any event considered that under the prohibition of arbitrariness, solely "*evident discrimination*"[460] could be taken into account. The tribunal then rejected the claim because no evidence was brought that measures affecting Glamis projects reached a high threshold of unfairness. [461]

211. In reality, the wording of the TPA as well as numerous authorities and decisions support that discrimination is *not* encompassed in the minimum standard of treatment:

- Article 10.5 of the TPA does not contain any reference to a prohibition against discrimination. Yet, other articles of the TPA such as Article 10.7 on expropriation do contain an express obligation of non-discrimination[462]. Had the parties to the TPA wished to include such prohibition under Article 10.5 they could have done so. However they did not.

- That Article 10.5 of the TPA does not contain a general prohibition on discrimination has in fact been confirmed by the United States, the other party to the TPA, in its submission of 13 May 2022:

> *[T]he customary international law minimum standard of treatment set forth in Article 10.5* ***does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination****. As a general*

---

459 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2008, para. 300 **[CL-018]**.

460 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 22, 24, 616, 617, 627, 762, 776, 779, 788, 824 **[CL-017]**.

461 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 820, 828 **[CL-017]**.

462 TPA, Article 10.7 **[C-0002]**: "*1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner […]*"

proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[463]

- If that were not enough, several arbitral tribunals have also recognized that customary international law does not provide for a general prohibition on discrimination.[464] For example, in *Grand River Enterprises v. United States* the tribunal held that "*the language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection*."[465] Similarly, in *Mercer v. Canada* the tribunal concluded that "*so far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)*."[466]

212. It is therefore clear that Claimant's contention of a "*wide consensus*" is erroneous and its allegations should be rejected on this ground alone.

213. <u>*Second*</u>, even if (*quod non*) non-nationality based discriminations could fall under the scope of the minimum standard of protection under 10.5 of the TPA, Claimant's allegations would still be bound to fail. Claimant appears to accept that a high threshold would be required for finding a breach on this basis. Indeed, under such a scenario, only "*evident discrimination*"[467] or "*egregious*" discrimination that "*exposes claimant to sectional o racial prejudice*" could lead to a breach of the

---

463 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 36 (emphasis added).

464 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 368 **[CL-084]** ("*Customary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favorably as nationals. Indeed, "even unjustifiable differentiation may not be actionable.*"); *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 208 **[CL-073]** ("*The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection*."); *Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.58 **[RL-163]** ("*So far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).*").

465 *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 208 **[CL-073]**.

466 *Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.58 **[RL-163]**.

467 Counter-Memorial, para. 330, fn. 525.

customary minimum standard of treatment.[468] Yet, it is crystal clear that there was no discrimination in this case, let alone a "*manifest*" or an "*evident*" one as Claimant alleges.[469]

214. Indeed, Claimant continues to argue that MinTIC's decision not to renew the 2009 Contract was part of a broader 'scheme' to "*replace the current concessionaire with its favored concessionaire*",[470] in a desperate effort to link its purely contractual claim under the 2009 Contract to sovereign acts by Colombia, or to implicate Colombia's President in spite of a complete lack of evidence. However, Claimant's allegations regarding Afilias remain speculative and incorrect:

- With respect to MinTIC's decision not to renew the 2009 Contract, as explained above it was based on a contractual prerogative and was in any event amply justified and based on MinTIC's investigations;

- With respect to the 2020 Tender Process, Respondent debunked Claimant's allegations that the 2020 Terms of Reference were 'tailor-made' for Afilias in its Counter-Memorial. In particular, Respondent provided a detailed analysis of the 2020 Terms of Reference as well as the ITU Report, showing that each of the specific terms Neustar contended were inspired by Afilias were in fact recommended by the ITU.[471] Claimant does not try either to argue that the ITU (a recognized international organization established under the auspices of the UN) would lack the necessary expertise regarding domain names or would have tried to favor Afilias when recommending these terms to Colombia. Further, Claimant also has no answer to Respondent's demonstration that the impugned terms were in any event amended throughout the process following several instances of transparent exchanges with interested parties (including notably .CO Internet, which participated constantly in the process and submitted numerous comments to the 2020 Terms of Reference.)[472] Claimant has simply omitted this in its Reply. Claimant's corruption insinuations (and related discrimination allegations) are therefore bound to fail for these reasons alone.

- Respondent also explained at length in its Counter-Memorial that the 2020 Tender Process was characterized by a great level of transparency and openness, as confirmed *inter alia* by Ms. Luisa Trujillo (who, as a reminder, was *legally responsible* for the tender process in case of irregularities).[473] Claimant tries to brush aside Ms. Trujillo's entire witness statement on the (wrong) premise that she was not involved in detailed technical

---

468 *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, paras. 252-253 **[RL-086]**; The 2012 UNCTAD Report, itself, on which Claimant heavily relies, specifies, in relation to the general concept of FET, that "*the non-discrimination requirement appears to prohibits discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief*". *See* UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 82 **[CL-043]** (emphasis added).

469 Reply, para. 242.

470 Reply, para. 228.

471 Counter-Memorial, para. 129.

472 Counter-Memorial, para. 119-135. *See also*, First Witness Statement of Luisa Fernanda Trujillo Bernal, paras.16-32 **[RWS-03]**.

473 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 27 **[RWS-03]**.

discussions regarding some of the tender requirements.[474] Claimant however omits that while Ms. Trujillo explains that she was "*not **directly** involved in the technical and financial discussions*",[475] she also explains in the same paragraph that she was *directly* and *personally* responsible for directing the 2020 Tender Process and that she followed it closely, including technical and financial aspects:

> *I followed this process closely since ultimately I was the one who was directly responsible for the tender process. For the elaboration of the tender requirements, I understand that MinTIC's team and the external consultants relied on ITU experts' indications, who had more experience having participated in the preparation of other tender processes. Particularly, on the technical side, I understand that the general approach was to include quite high requirements in order to ensure that the future operator would have the necessary experience and infrastructure to ensure the smooth operation of the .co domain, one of the largest ccTLDs worldwide. However, we never sought to favour a specific operator; to the contrary, we also wanted to ensure that the process would be competitive, and that various interested* [sic] *companies would be interested in participating.*[476]

- Claimant additionally fails to address the documentary evidence on the record confirming the transparent manner in which the 2020 Tender Process was conducted. In particular:

  - After publishing the *draft* 2020 Terms of Reference on 5 November 2019,[477] MinTIC heard *comments* from interested parties (including .CO Internet which submitted three sets of comments[478]) and responded to *each and every one* of these comments in detail, accepting or rejecting the suggested modifications.[479]

  - On 13 December 2019, MinTIC published the 2020 Terms of Reference through Resolution 3316 of 2019,[480] which implemented a substantial number of changes suggested by the interested parties in order to ensure that "*a varied number of interested parties would be able to meet [the tender] requirements and participate in the process*."[481]

  - MinTIC organized a public hearing on 18 December 2019, during which interested parties had the opportunity to submit comments on the 2020 Terms of Reference,

---

474 Reply, para. 244.

475 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 20 **[RWS-03]**.

476 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 20 **[RWS-03]**.

477 2020 Terms of Reference (draft version) **[R-0043]**.

478 First observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0045]**; Second observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0046]**; Third observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0047]**.

479 Response of MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019 **[R-0048]**.MinTIC even responded to observations submitted outside the agreed timeframe. *See* Response from MinTIC to observations on draft 2020 Terms of Reference, 20 December 2019 **[R-0049].**

480 2020 Terms of Reference (final version) **[R-0051]**; Resolution 3316 of 13 December 2019 **[R-0052]**.

481 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 25 **[RWS-03]**.

which were then answered in writing by MinTIC. Representatives of .CO Internet and Neustar participated in this hearing.[482]

- After publishing the 2020 Terms of Reference and carrying out this public hearing, MinTIC heard *comments* to the 2020 Terms of Reference, with .CO Internet submitting more than forty pages of observations.[483] Several suggested changes (including by .CO Internet) were implemented to the 2020 Terms of Reference through successive Addenda.[484]

- All of these steps, as well as all the remaining stages of the 2020 Tender Process, were documented publicly on a government platform accessible to all interested parties, SECOP II.[485]

- A detailed look at Claimant's Reply shows that its corruption allegations in fact rely exclusively on a couple of articles by a *single* author (Kieran McCarthy), which Claimant markets as "*the media*" in order to claim that "*[the corruption] belief was widely held by the internet community in Colombia*."[486] If, in turn, we take a closer look at the actual content of these articles, it would appear that Mr. McCarthy's corruption allegations are as baseless and disproved by the evidence on the record as Claimant's:

  - Mr. McCarthy points to the similarity between the draft 2020 Terms of Reference and tenders which were allegedly previously won by Afilias.[487] However, as demonstrated in the Counter-Memorial and recalled above, the terms Mr. McCarthy criticizes were recommended by the ITU on the basis of objective indicia, and in any event several of these were amended throughout the 2020 Tender Process.[488]

  - Mr. McCarthy relies on the fact that Ms. Constaín participated in an event where an Afilias executive was also present.[489] In this regard, Ms. Constaín explains that:

---

482 Attendance list of the public hearing on the 2020 Tender Process of 18 December 2019 **[R-0054]**; Observations of .CO Internet to the final 2020 Terms of Reference of 3 January 2020 **[R-0055]**.

483 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 27, 30 **[RWS-03]**.

484 Counter-Memorial, para. 134.

485 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 27 **[RWS-03]**.

486 Reply, para. 243. *See*, K. 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', *The Register*, 15 January 2020 **[C-0096]**; K. McCarthy, 'Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?', *The Register*, 4 February 2020 **[C-0097]**. As noted in the Counter-Memorial (*see* fn. 198), Neustar relies on several instances on articles published by one author, Kieran McCarthy (on *The Register*) in order to argue that the 2020 Terms of Reference were tailor-made for Afilias. An examination of Mr. McCarthy's articles (*see, for instance*, K. McCarthy, 'Why Colombia is about to Make a Colossal Mistake with .CO', *Circle ID*, 27 November 2019 **[C-0119]**, p. 5) and Neustar's contemporaneous communications (*see, for instance,* Third observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019, pp. 2-3 **[R-0047]**) reveal troubling similarities: for instance, both Kieran McCarthy and Neustar argued that the evaluation criteria for the 2020 Tender Process should include a "*marketing*" component.

487 K. McCarthy, 'Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?', *The Register*, 4 February 2020 **[C-0097]**.

488 Counter-Memorial, paras. 129-134.

489 K. McCarthy, 'Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?', *The Register*, 4 February 2020 (p. 4 of the PDF) **[C-0097]**.

> *While I have surely participated in international telecommunications events in my capacity as Minister of Telecommunications of Colombia, and Afilias may have been present, I did not hold any private secret meetings with this company. Specifically, I understand that Neustar alleges I met with Afilias in New York on 23 September 2019: while I did participate in an event organized by Procolombia on that date, during which Afilias may well have been present, I did not meet specifically with them and certainly did not discuss details of the tender process at any stage.*[490]

- Finally, Claimant entirely fails to dispute that it was treated in the same manner as the other operators interested in the operation of the .co domain: it had the opportunity to participate in the 2020 Tender Process, on an equal footing with all the other candidates.[491] In fact, .CO Internet's bid was successful and it was retained as the operator of the .co domain under the 2020 Contract, decisively putting to lie Claimant's corruption allegations.[492]

215. Against this backdrop, Claimant has introduced no further documentary or witness evidence with its Reply that would in any manner support its allegations of corruption or rebut Respondent's demonstration that the 2020 Tender Process was conducted in a perfectly transparent manner. Being incapable of substantiating its assertions, as with other of its allegations, Claimant has been left to mischaracterizing Respondent's submissions or blatantly denaturing the evidence in an attempt to give them some semblance of coherence. This only stresses the abusive nature of its claims. For instance:

- Claimant continues to argue that it is because of the July 2018 Report that it was 'coerced' into offering to better the economic conditions of the 2009 Contract in its 20 September 2018 communication.[493] Yet, as seen immediately above at paragraph 201, this is the first time Claimant raises such an allegation and it has not proven in any manner that it had obtained communication of this confidential document prior to sending its 20 September 2018 letter. Even if this had been the case, Claimant fails to explain how it would had been 'coerced' into making its 20 September 2018 offer;

- Claimant argues that the July 2018 Report was "*completely pretextual*" because Respondent allegedly acknowledged that at the time this report was issued, MinTIC's knowledge on domain name issues was limited.[494] Claimant's argument is an entirely fallacious one resting entirely on wilful misinterpretations of the wording of Respondent's Counter-Memorial: that MinTIC did not consider it had enough information until early 2019 to make a final decision on the future of the .co domain should certainly not be equated to mean that MinTIC had absolutely *no* prior knowledge of .co domain issues before that point.

---

490 First Witness Statement of Sylvia Constaín, para. 22 **[RWS-01]**.
491 Counter-Memorial, para. 334.
492 Counter-Memorial, para. 335.
493 Reply, paras. 252-254.
494 Reply, paras. 250-251.

Mr. Castaño, who was responsible for technical aspects of Colombia's decision-making in relation to the .co domain and will be available to answer the Tribunal's questions, explains at length in his witness statement the progressive capacity-building of MinTIC between the fall of 2018 and the summer of 2019, with the assistance of the ITU experts.[495] In any event, a simple examination of the July 2018 Report reveals that the conclusion reached in that report that Colombia should improve the financial terms is justified. In particular, the July 2018 Report includes a detailed financial analysis of the proceeds of .CO Internet and MinTIC under the 2009 Contract, which was based on financial information provided by the concessionaire itself as required under the 2009 Contract.[496]

216. As regards Claimant's allegation that it was discriminated against because other concessionaires in the telecommunications sectors or other sectors had their concession extended, this does not hold water for three main reasons:

- *First*, as explained in the Counter-Memorial (and further demonstrated at paragraph 260 *infra*), the contractual language regarding renewal in the 2009 Contract is crystal-clear: Article 4 provides that the "*term agreed **may** be extended.*"[497] No discrimination can arise in these circumstances;

- *Second*, Claimant's attempt to rely on the fact that Respondent (and in particular MinTIC) may have renewed other concession contracts is disingenuous. In order for Claimant to rely on the situation of other concessionaires, it is uncontested that it should demonstrate that it is in "*like circumstances*" than these comparators.[498] As Respondent shows below, Claimant fails to identify appropriate comparators in the instant case.[499] In any event, as explained at paragraph 202 *supra*, Colombian law allows for the renewal of concession contracts provided that there is no change to the *essential elements* of the contract at

---

495 First Witness Statement of Iván Darío Castaño Pérez, paras. 8-26 **[RWS-02]**.

496 MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 40 **[C-0027]** ("*Además de la información histórica, se ha usado información contractual de la concesión, la cual es de importancia para entender el contexto de ésta y del negocio. […] Posteriormente, se usó la información financiera histórica de la empresa .CO Internet S.A.S., con el objetivo de analizar sus estados financieros históricos y realizar la proyección de los flujos de caja que tendría un concesionario que continuara con la administración, promoción, operación técnica, mantenimiento y demás funciones propias de la naturaleza del dominio .CO.*" (original version); "*In addition to historical financial information, contractual information on the concession has been used, which is important to understand the context of the concession and of the business. […] Subsequently, the historical financial information of the company .CO Internet S.A.S. was used, with the objective of analyzing its historical financial statements and making a projection of the cash flows that a concessionaire that would continue with the administration, promotion, technical operation, maintenance and other functions of the nature of the .CO domain would have.*" (our translation)). It bears noting that on Claimant's own case, it was aware of this financial analysis as soon as September 2018. Yet, it did not mention this analysis in its early communications to MinTIC, and did not allege at any point then that this analysis was 'pretextual'. *See, for instance,* Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**. None of these communications refer back explicitly to the July 2018 Report nor mention the financial analysis contained therein.

497 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]**.

498 Counter-Memorial, para. 336; Reply, para. 7.

499 *See* Section 3.2(b) *infra*.

issue.[500] In the present case, Neustar and .CO Internet themselves had recognized the need to renegotiate the financial conditions of the 2009 Contract, which is indisputably an *essential element* of this contract.[501] As such, a renewal in this context could have breached fundamental principles of Colombian constitutional and administrative law. Against this backdrop, Claimant's contention that improvement of fiscal terms "*could be – and typically were – achieved as part of contractual extensions*" is not only unsupported, but untrue.[502]

- *Third*, as explained at Section 3.2(d) *infra*, when deciding not to renew the 2009 Contract, Colombia was pursuing a legitimate objective which in any event further justifies the rejection of Claimant's discrimination allegations.

217. It is therefore abundantly clear that at no point was Claimant discriminated by Colombia in relation to the decision not to renew the 2009 Contract, or in the conduct of the 2020 Tender Process.

(3) *Colombia acted in good faith throughout the process of non -renewal of the 2009 Contract and attribution of the 2020 Contract*

218. In the Counter-Memorial, Colombia highlighted that Claimant's allegations on bad faith relied on speculations and were wholly unsubstantiated. Having submitted no evidence and not a single witness in support of its own case, here again, Claimant conveniently alleges in its Reply that the proof that Colombia acted in bad faith is "*bare in its "Counter-Memorial"*"[503]. In its Reply (and similarly to its Memorial), Claimant fails to explain exactly how Respondent would have acted in bad faith in relation to both the decision not to renew the 2009 Contract, and throughout the carrying-out of the 2020 Tender Process. In an attempt to connect these two subsequent phases, Claimant appears to rely on a speculative theory that MinTIC's 'hidden motive' all along these two phases was "*apparently to install a favored operator, Afilias*".[504]

219. As noted above however, these allegations are devoid of any merit and have no factual support, and Claimant's speculations do nothing to validate its theory:

- With respect to the non-renewal of the 2009 Contract, Claimant argues that Respondent admitted in its Counter-Memorial that "*MinTIC put aside the non-partisan exercise of public administration in favor of political favoritism*", relying once more on the 2018 presidential elections.[505] Respondent has addressed this voluntarily misleading argument at paragraphs 158 and 203-204 *supra*: it is simply untrue that MinTIC had been expressing

---

500 Counter-Memorial, para. 106; Council of State, Decision of 31 August 2011 (case No. 18080) **[R-0036]**; Council of State, Decision of 28 June 2012 (case No. 23966) **[R-0037]**; Political Constitution of the Republic of Colombia, 1991, Art. 209 **[C-0111]**.

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

502 Reply, para. 247.

503 Reply, para. 261.

504 Reply, para. 243.

505 Reply, para. 265.

public support for the renewal while harboring different opinions internally, as Claimant suggests. In fact, far from being a proof of political intervention, MinTIC's approach to the .co domain issue in the run-up to the 2018 presidential elections in Colombia was a perfectly reasonable one, as proven by the 2018 July Report.

- With respect to the 2020 Tender Process, Claimant contends that "*Respondent has provided no evidence in support of its denial that the TORs were tailored specifically to Afilias*".[506] This could not be farther from the truth: as explained at paragraph 214 immediately above, Respondent did provide detailed evidence in its Counter-Memorial that the 2020 Terms of Reference were based on ITU recommendations, were not tailor-made for Afilias but simply aimed at ensuring that the future .co domain operator would have adequate experience and capabilities, and were in any event adapted throughout the process, including at the request of .CO Internet and/or Neustar. Claimant also dismisses the witness evidence by the high-ranking officials directly in charge of the .co domain administration within MinTIC on the basis that the "*witness statements [were] developed for the purposes of this arbitration, several years later.*"[507] This exemplifies Claimant's opportunistic approach: rather than addressing the damning evidence for its speculative claims that Respondent introduced with its Counter-Memorial, Claimant choses to simply ignore it and instead question the truthfulness and reliability of Respondent's witnesses. Claimant is essentially attempting to reverse the burden by requesting that Respondent submit a positive proof that it did not engage in corruption (in a textbook example of *probatio diabolica*).

- Finally, Claimant asserts that .CO Internet's obtention of the 2020 Contract does not mean that MinTIC always acted in good faith.[508] Claimant however overlooks MinTIC's behavior throughout the 2020 Tender Process, recapped at paragraph 214 *supra*. The evidence on the record does show that MinTIC acted in good faith and transparently for the entire duration of the process, notably taking on board several of .CO Internet's comments and observations to the 2020 Terms of Reference and adapting these accordingly.

220. In reality, the evidence shows that Colombia acted in good faith *vis à vis* Neustar throughout:

- MinTIC refused to renew the 2009 Contract at the term of this contract on the basis that it did not have a contractual obligation to renew it;

- It then opted to open a public tender process in which .CO Internet was given the opportunity to participate, on an equal footings as all other participants: and

---

506 Reply, para. 263.
507 Reply, para. 263.
508 Reply, para. 264.

- Ultimately, MinTIC awarded the 2020 Contract to .CO Internet.

221. There is nothing improper in this conduct and Claimant's unsubstantiated statements do not remotely rise to the level of their allegations. Indeed, and as already demonstrated in the Counter-Memorial,[509] bad faith cannot be presumed[510] and the burden of the proof is a demanding one.[511]

222. Claimant's allegations on bad faith should therefore be categorically dismissed.

(iii) ***Colombia's actions respected the due process standard under the TPA***

223. In support of its allegation that Respondent breached Article 10.5 of the TPA by failing to accord it due process, Claimant asserts that Respondent (i) misused its administrative powers, (ii) did not act transparently or with candor, and (iii) did not provide mechanisms for review.[512] However, to date, Claimant has not even identified to which 'measure' or 'administrative action' Respondent's alleged lack of due process would relate: this is because, as already explained in the Counter-Memorial, Respondent's decision not to renew the 2009 Contract was certainly not an administrative action but simply an exercise of a contractual possibility (to discuss, *or not*, a potential renewal with the counterparty) under the same contract, in the same way as any private party.[513]

224. In any event, Claimant's allegations that Colombia breached Article 10.5 of the TPA by failing to accord it due process are also bound to fail as they are based on an improper interpretation of the legal standard (which only covers denial of justice) and a mischaracterization of the facts.

(1) *The due process standard under Article 10.5 of the TPA is limited to instances of denial of justice or at the very least to particularly serious irregularities*

225. As already shown in the Counter-Memorial, a breach of due process can only amount to a breach of the minimum standard prescribed under Article 10.5 of the TPA when it results in a denial of justice.[514]

---

509 Counter-Memorial, para. 340.

510 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 153 **[RL-164]** ("*The Tribunal fully agrees with the Respondent about the importance of good faith in international law […] and it is a well‑known and accepted fact that bad faith cannot be presumed.*"); *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, Dissenting Opinion of Judge Abraham, 31 March 2014, para. 28 **[RL-165]** ("*There is a generally accepted presumption of good faith.*").

511 *Bayindir Insaat Turizm Ticaret VE Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award of 27 August 2009, para. 143 **[CL-104]**.

512 Reply, paras. 279-288.

513 As explained in the Counter-Memorial (*see* para. 352), Article 17 of the 2009 Contract provides that only "*acts of an exceptional nature*" would be considered as administrative acts, while others would "*solely be considered as acts of contractual execution.*" (*see* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 17 **[C-0017]**). The decision not to renew was a purely contractual act, which did not involve the use of State powers and therefore did not entail the adoption of a specific administrative act.

514 Counter-Memorial, para. 345.

226. This results from the very wording of Article 10.5.2 of the TPA which expressly links the FET standard under the treaty to the "*obligation not to deny justices in criminal, civil, or administrative adjudicatory proceeding in accordance with the principle of due process*."[515] In order to circumvent this link, Claimant alleges that Article 10.5.2 does not exclude other type of due process claims as it only specifies that the obligation not to deny justice is included in the standard.[516] However, the express reference to denial of justice in the TPA would be deprived of any meaning if the provision were to be interpreted to extend to any breach of due process. Because the TPA frames due process alongside the obligation not to deny justice, a lack of due process can only constitute a breach of the TPA if it amounts to a denial of justice[517]. This is in line with the position of the United States pursuant to which "*a claim challenging a judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment*"[518].

227. As noted in the Counter-Memorial, a similar conclusion was also reached by the tribunal in *Aven v. Costa Rica*, when interpreting a provision identical to that of Article 10.5.2(a) of the TPA.[519] In an attempt to expand the due process standard under the TPA, Claimant however criticizes Respondent's reliance on *Aven v. Costa Rica* by claiming that this case "*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)*"[520]. This statement is simply not accurate.

228. Rather, the findings of the tribunal in *Aven* relate precisely to the interpretation of the minimum standard of treatment and its denial of justice component.[521] More specifically, in the *Aven* case the respondent State argued that claimants had asserted an unsupported claim for breach of due process with the clear purpose of avoiding the high threshold that that a claim of denial of justice entails (notably an exhaustion of local remedies).[522] In response, claimants argued that they had not brought a claim for denial of justice and that there was no need to exhaust local remedies since the treaty did not require the exhaustion of local remedies for the admissibility of a claim.[523] The *Aven* tribunal rejected claimants' position and drew a distinction between the exhaustion of local remedies requirement, as an admissibility issue, and denial of justice (which also entails an exhaustion of local remedies or non-existent remedies) as an international unlawful act.[524] And it

---

515 TPA, Article 10.5.2(a) **[C-0002]**.

516 Reply, para. 270.

517 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, U.S. Response to 1128 Submissions, 7 December 2001, p. 9 **[RL-166]**.

518 *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Non-Disputing Party Submission of the United States, 26 February 2021, para. 46 **[RL-078]**.

519 Counter Memorial, para. 345.

520 Reply, para. 272.

521 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 354 **[RL-011]**.

522 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 338 **[RL-011]**.

523 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, paras. 339, 349 **[RL-011]**.

524 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 355 **[RL-011]**.

was precisely in the analysis of the latter that the tribunal correctly pointed out that, under Article 10.5.2.(a) DR-CAFTA, the investor has the burden of proof to show a denial of justice when claiming a breach of the FET standard:

> *"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 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;*
>
> *[…]*
>
> ***Therefore, the claimant investor alleging the breach of the obligation to afford fair and equitable treatment has the burden of proof to show denial of justice, insofar as Article10.5.2.(a) DR-CAFTA may be applicable****. The investor may not be released of such burden invoking that DR-CAFTA does not require the prior exhaustion of domestic remedies to have access to arbitration, because what is at play is not the admissibility of the claim but the merit of the claim."*[525]

229. It follows that general due process claims which do not relate to a denial of justice are not covered by the TPA. As Claimant concedes that it has not brought a claim for denial of justice (which would require proving a "*systematic failure of the State's justice*"[526]), its due process allegations should be dismissed on this basis alone.

230. Even if it were to be considered (*quod non*) that the protection of Article 10.5 could expand beyond instances of denial of justice, the threshold for finding a breach for lack of due process would still be high. As explained in the Counter-Memorial (and recognized even by the awards upon which Claimant seeks to rely[527]) it is not that any procedural irregularity could amount to a breach of the

---

525 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 356 -357 **[RL-011]** (emphasis added).

526 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 254 **[RL-095]**; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 273 **[RL-096]**.

527 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, paras. 454-465 **[CL-030]** ("*The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety. […] There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.*"); *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]** ("*The 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.*"); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 219 **[CL-060]**.

FET standard,[528] but only particularly serious irregularities, such as an irregularity leading to an outcome "*which offends judicial propriety*",[529] a "*manifest failure of natural justice in judicial proceedings*",[530] "*a wilful disregard of due process of law or an extreme insufficiency of action*",[531] or a "*gross and flagrant disregard of for the basic principles of fairness*."[532] Should the Tribunal consider (*quod non*) that Article 10.5 is not limited to scenarios of denial of justice, Claimant has in any case been unable to refute the applicability of this high threshold for finding a breach for lack of due process , and its trivial attempts to undermine the threshold should be dismissed.[533]

(2) *Neustar's allegations on a misuse of administrative powers remain meritless*

231. In the Counter-Memorial, Respondent demonstrated that applying the above principles, Neustar's allegations on an alleged misuse of administrative powers could not amount to a breach of Article 10.5 of the TPA.

232. *First*, Respondent stressed that they had to be dismissed on the sole basis that Neustar's allegations on this point had nothing to do with a denial of justice.[534] In its Reply, Claimant does not dispute the absence of a denial of justice in this case but only claims that Respondent's position should not be upheld because the standard of Article 10.5 is broader.[535] However, as seen above this is incorrect and in any event Claimant has failed to prove that the minimum standard of treatment under customary international law would go beyond instances of denial of justice.

---

528 Counter-Memorial, para. 347-349. Even tribunals applying an independent FET have held that only a serious violation of due process could amount to a breach of fair and equitable treatment. *See for instance ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, para. 4.805 **[RL-167]** ("*Taking first the question of due process, the Tribunal has no doubt that a failure to accord due process in administrative or judicial proceedings may, if unremedied and of sufficient seriousness, result in a violation of the fair and equitable treatment standard.*"); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, para. 655 **[RL-161]** ("*El Tribunal Arbitral considera que una ausencia de debido proceso es efectivamente aquella que lleva a "un resultado que ofende la discrecionalidad judicial, como podría ocurrir con un fracaso manifiesto de la justicia natural en los procedimientos judiciales*" (original version); "*The Arbitral Tribunal considers that an absence of due process is effectively one that leads to "a result that offends judicial discretion, as might occur with a manifest failure of natural justice in judicial proceedings*." (our translation)); *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 455 **[RL-168]** ("*The Tribunal accordingly finds that Egypt's actions failed to afford the Claimants due process of law. The Tribunal further considers that the failure to provide due process constituted an egregious denial of justice to Claimants, and a contravention of Article 2(2) of the BIT, in that Egypt failed to ensure the fair and equitable treatment of Claimants' investment*").

529 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 200 **[CL-059]**.

530 *Waste Management, Inc. v. United Mexican States (II),* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**.

531 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,* ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 371 **[CL-084]**.

532 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390 **[RL-097]**.

533 Without disputing the application of this high threshold, Claimant simply argues that Respondent's submissions are inconsistent on this point (Reply, para. 277). This allegation is however misleading as it conveniently overlooks the fact that Respondent's submission that a high threshold would be applicable was made on subsidiary basis, i.e. if it were to be considered (quod non) that due process was covered by Article 10.5 of the TPA.

534 Counter-Memorial, paras. 351-352.

535 Reply, paras. 267-277.

233. *Second*, Respondent demonstrated that, even if it were to be considered that Article 10.5 could cover procedural irregularities going beyond a denial of justice, Claimant's allegations would still be bound to fail:

- As explained in the Counter-Memorial,[536] Claimant has not even identified the 'administrative action' of which it complains. Instead, MinTIC's decision not to renew the 2009 Contract was a purely contractual one (with .CO Internet having the same right to decide to discuss *or not* renewal with its contractual counterparty), which did not necessitate the adoption of any specific administrative act by the State. This is particularly relevant considering that Article 17 of the 2009 Contract provides that only "*acts of an exceptional nature*" would be considered as administrative acts, while others should be considered "*solely […] as acts of contractual execution.*"[537]

- Claimant explains that it "*maintains that the direction to refuse to extend and move ahead with the tender came from the President's office in the first instance*",[538] yet it failed both to adduce any evidence that the President dictated the decision or to tackle Ms. Constaín's indications to the contrary.[539]

- Claimant further alleges that "*MInTIC's administrative actions in furtherance of this improper direction were clearly beyond the scope of its position as a party to the Concession*."[540] Yet, here again Claimant fails to identify any specific administrative acts of MinTIC of which to complain, or to substantiate its submission that MinTIC would have used these acts for 'improper purposes'. Even if (*quod non*) it were considered that MinTIC's actions could be considered administrative acts, Respondent demonstrated abundantly in its Counter-Memorial that all of these acts were taken in furtherance of Colombian laws and for legitimate reasons. These acts would therefore fall far short of meeting the high threshold requested for a finding of improper use of administrative powers.

(3) *Claimant's allegations on transparency remain equally baseless*

234. In the Counter-Memorial, Respondent also showed that Claimant's transparency allegations were baseless. Claimant has been unable to refute this.

235. *First*, Claimant has not even addressed the numerous authorities and awards cited in the Counter-Memorial, confirming that the concept of transparency had not materialized as a component of the minimum standard of treatment under customary international law.[541] As stated by the tribunal in

536 Counter-Memorial, para. 352.
537 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 17 **[C-0017]**.
538 Reply, para. 280.
539 First Witness Statement of Sylvia Constaín, para. 15 **[RWS-01]**.
540 Reply, para. 280.
541 Counter-Memorial, para. 354.

Merril v. Canada, "*a requirement for transparency may not at present be proven to be part of the customary law standard*".[542] This has also been confirmed by the United States in its NDPS:

> *The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation of host State transparency under the minimum standard of treatment*.[543]

236. It follows that Claimant's broad allegations on transparency can be dismissed expeditiously on this basis alone.

237. <u>*Second*</u>, even if the Tribunal were to disregard the numerous authorities supporting the fact that the concept of transparency is not part of the minimum standard of treatment, Claimant's allegations would still fail. Indeed, Claimant does not contest the fact that tribunals which have referred to the concept of transparency (mostly when examining an autonomous FET standard) have generally set a very high threshold (requiring a "*complete lack of transparency*" or a "*manifest violation*" for the finding of a breach) and have considered that the concept only entails basic transparency requirements and does not require a State not to act "*under complete disclosure*".[544]

238. In an attempt to muddy the waters, Claimant only refers to a passage of the award in *TECMED v. Mexico* to claim that there is no established principle that a complete lack of transparency is required. However this argument is untenable in light of the authorities supporting the opposite view (and which Claimant has ignored) but also considering that in Tecmed the tribunal itself specified that its interpretation of the scope of the fair and equitable treatment resulted from an autonomous interpretation of the FET standard contained in the Mexico – Spain BIT [545] and that, subsequent tribunals have refused to apply this autonomous standard when defining the scope of the minimum standard of treatment.[546] Claimant seems to be well aware of this and therefore

---

542 *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, 31 March 2010, para. 231 **[CL-033]**.

543 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 34.

544 Counter-Memorial paras. 355-356 and notably *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307 **[CL-049]** ("*A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and on discrimination*"); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, para. 660 **[RL-169]** ("*While the Tribunal considers that a lack of transparency may constitute a breach of the FET standard under Article 10(1) independent of any consideration of legitimate expectations or stability, it also considers that, consistent with its views as to the standard referable to the concept of unreasonableness under Article 10(1), there is a high threshold to be met in order to establish a breach. The Tribunal sees no reason why, and no basis in the ECT to suggest that, a lower threshold would apply in the particular context of transparency*."). Claimant merely claims that Respondent is being inconsistent when relying on the analysis of the tribunal in *Urbaser* (which examined an autonomous FET standard) to assert that a State cannot be required to act under complete disclosure. This is only a further attempt by Claimant to create confusion and avoid addressing Respondent's arguments. There is nothing inconsistent in pointing out that even tribunals which have applied an autonomous FET standard have adopted a restrictive approach when coming to transparency.

545 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 23 May 2003, para. 155 **[CL-058]**.

546 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 610 **[CL-017]**.

argues that "*even if the Tribunal finds that there must have been a complete lack of transparency, this threshold is satisfied in the present case*."[547]

239. However, Claimant blatantly fails to explain how this threshold would be met in the instant case and ignores the evidence on the record referred to in the Counter-Memorial showing that there was not a lack of transparency, let alone a complete one. In particular, Claimant has been unable to dispute that, with respect to the decision not to renew the 2009 Contract:

- When Neustar and .CO Internet first approached MinTIC expressing an interest in renewing the 2009 Contract on 20 September 2018, MinTIC clarified to Neustar that the renewal of the 2009 Contract was only an option (and not an obligation) as early as 22 November 2018;[548]

- When Neustar and .CO Internet submitted further communications requesting a renewal, including *inter alia* on 27 December 2018,[549] MinTIC once more explained that it was still in the process of evaluating its options and that it was also considering launching a public tender process on 15 February 2019;[550]

- MinTIC officials continued to communicate with .CO Internet and Neustar before the Advisory Committee recommended the launch of a new tender process. Notably, in early March 2018 MinTIC officials (including Mr. Castaño) met with .CO Internet to discuss their request, following which they reiterated that "*the potential renewal contemplated by the current contract is only one of the alternatives that this Ministry is in the process of analysing with the goal of securing the Nation's best interest*";[551]

- Once the Advisory Committee formalized its recommendation to proceed with a new tender process on 18 March 2019,[552] MinTIC communicated this decision to .CO Internet through an official communication dated 10 April 2019, in the following terms:

> *In this regard, taking into account the regulations applicable to this case and the provisions of the concession contract, it is the sole and exclusive power of the Ministry of Information Technologies and Communications, through the advisory committee on the .co domain policy, to assess and decide on the pertinence of continuing with the current concessionaire or initiate a new public process to ensure the continuity of the service for the next ten years.*

---

547 Reply, para. 284.
548 Letter from MinTIC to .CO Internet of 22 November 2018 **[C-0029].**
549 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**.
550 Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**; Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007]**; First Witness Statement of Iván Darío Castaño Pérez, para. 22 **[RWS-02]**.
551 Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007].**
552 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

In this context, on March 18, 2019, the ccTLD .co Policy Advisory Committee decided to continue with the structuring of the selection process (public bidding process) to choose the operator for the administration of the .co domain.[553]

- As Mr. Castaño explains, MinTIC communicated with .CO Internet only *after* a public announcement of the decision to proceed with a tender had been made in order to ensure the equal treatment of the potential candidates to the tender process to come:

We took into account that .CO Internet, in addition to being the current concessionaire, could also be a potential bidder in the tender process that was to be announced. Accordingly, communicating this decision in advance to .CO Internet could have interfered with the equal treatment of the potential participants to the tender process.[554]

- In spite of its decision to proceed with a new tender process, MinTIC kept meeting with .CO Internet and responding to its many unsolicited communications.[555] In particular, as explained above, MinTIC convened a meeting of the Advisory Committee to consider Neustar's 21 May 2019 offer for a renewal of the 2009 Contract,[556] and responded to .CO Internet on 21 June 2019 to decline its offer and invite it to participate in the tender process.[557]

240. With respect to the 2020 Tender Process, as explained at length in the Counter-Memorial, and as recapped at paragraph 214 *supra*,[558] Colombia then proceeded with the same level of transparency: not only did it make all preparatory documents (including the ITU Report) available to the public, but it also ensured transparency and openness of this process throughout. In fact, Neustar itself specifically expressed its satisfaction with the 2020 Tender Process at the close of the adjudication hearing on 3 April 2020.[559]

241. Accordingly, Claimant's wholly unsubstantiated allegations that Colombia lacked transparency must fail on all counts. There was no lack of transparency, let alone a "*complete*" one.

(4) *Claimant's allegations that Colombia breached due process because it did not give them the opportunity to address any issue of concern are equally groundless*

242. Here again, Claimant's allegations on this point are so lightly-tethered that they only go to reveal the abusive nature of its claim.

---

553 Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**. *See also*, First Witness Statement of Iván Darío Castaño Pérez, para. 24 **[RWS-02]**.
554 First Witness Statement of Iván Darío Castaño Pérez, para. 24 **[RWS-02]**.
555 Counter-Memorial, Section 2.4(f).
556 Minutes of the Advisory Committee session of 30 May 2019, p. 5 of the pdf **[C-0070]**.
557 Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**.
558 Counter-Memorial, Section 2.5.
559 Video Recording of Public Tender Hearing of 3 April 2020, No. 2, min. 104 **[R-0067]**.

243. *First*, on the legal standard, Respondent stressed the fact that the cases on which Claimant relied only required for the State to make available legal mechanisms that would allow the investor to challenge its decisions and be heard.[560] Claimant does not dispute this in its Reply and thus its unsupported contention that due process could entail a broad obligation "*to consult with Neustar and .Co Internet and to give them the opportunity to address any issues of concern"* should be rejected.

244. *Second*, Respondent showed that there were legal mechanisms available to Neustar and .CO Internet had they wished to raise claims in relation to both the non-renewal of the 2009 Contract and the 2020 Tender process. In particular:

- With respect to the non-renewal, Respondent highlighted that (i) .CO Internet could have brought commercial arbitration proceedings against MinTIC had it truly believed that the MinTIC had an obligation to negotiate and renew the contract.[561] Tellingly, in its Reply, Claimant has failed to address this point. Its only argument is that it was simply asking Respondent to provide it with "*a full opportunity to be heard*".[562] This assertion however rings hollow in light of the fact that (i) Neustar chose not to initiate any commercial arbitration proceedings (presumably as any contractual claims were bound to fail in light of the unambiguous language of the contract, as Neustar itself recognized in its 27 December 2018 legal opinion[563]) and (ii) there were numerous exchanges between MinTIC (or other entities of the Colombian State) and .CO Internet and/or Neustar regarding the decision not to renew the 2009 Contract and the *rationale* for such a decision. The examination of the substantial corpus of exchanges between the parties (and in particular of MinTIC's constant responses to .CO Internet and Neustar's repeated communications) paints a picture far different from that of a complete lack of transparency, mechanisms for review, or consultation between the parties to address issues of concern.[564]

---

560 Counter-Memorial, para. 364.

561 Counter-Memorial, para. 366.

562 Reply, para. 287.

563 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**.

564 *See* Counter-Memorial, Sections 2.4, 2.8(a). *See, inter alia*, Letter from MinTIC to .CO Internet of 22 November 2018 **[C-0029]**; Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**; Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007]**; First Witness Statement of Iván Darío Castaño Pérez, para. 32 **[RWS-02]**; Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**; Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**; *See also*, in relation to Neustar's allegations under the TPA: Letter from MinTIC to .CO of 13 June 2019 **[C-0071]**; Letter from MinTIC to .CO of 21 June 2019 **[C-0072]** (both replying to .CO's offer: Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**); *see also* Letter from MinTIC to .CO Internet of 26 July 2019 **[C-0080]** (replying to Letter from .CO Internet to MinTIC of 4 July 2019 **[C-0078]**);Letter from MinTIC to .CO Internet of 26 August 2019 **[C-0076]** (replying to Letter from .CO Internet to MinTIC of 6 August 2019 **[C-0081]** and Letter from .CO Internet to Ministry of Commerce of 2 August 2019 **[C-0082]**); Letter from MinTIC to .CO Internet of 2 October 2019 **[C-0086]** (replying to Letter from .CO Internet to MinTIC of 25 September 2019 **[C-0079]**.); Letter from MinTIC to .CO Internet of 23 October 2019 **[C-0088]** (replying to Letter from .CO Internet to MinTIC of 16 October 2019 **[C-0087]**);Letter from MinTIC to .CO Internet of 20 December 2019 **[C-0098]**. (replying to Letter from .CO Internet to MinTIC of 25 November 2019 **[C-0093] and [C-0094]**); Letter from MinTIC to .CO Internet of 28 August 2019, p. 3 **[C-0076]**; Letter from MinTIC to .CO Internet of 17 September 2019, p. 3 **[C-0084]**; Letter from .CO Internet to MinTIC of 25 September 2019, pp. 5-6 **[C-0079]**.

- Similarly, regarding the 2020 Tender Process, Respondent showed that (i) Neustar/.CO Internet were given ample opportunities to give comments, (ii) their observations were responded to by MinTIC, (iii) MinTIC implemented some of the suggested amendments, and (iv) there were also numerous legal mechanisms available to Neustar if it had wished to challenge the tender.[565] Here again, Claimant has simply chosen to ignore these undisputed facts. Its only point is to repeat its speculative allegations that MinTic "*engage[d] with representatives from Afilias*" and that it developed "*its TORs to ensure that Afilias was the only company that could meet the requirements for tender*".[566] However, as explained repeatedly above Respondent has shown that the 2020 Terms of Reference were not 'tailor-made' for Afilias but instead based on independent recommendations by the ITU, and that these were amended following comments by interested parties (including .CO Internet, which participated fully in the process). It bears reminding that at the close of the 2020 Tender Process, both representatives of Neustar and of the other bidder (Consorcio Dotco) expressed their satisfaction with the MinTIC's handling of such a complex procurement process.[567]

245. Accordingly, Claimant's allegations on this point are also bound to fail.

(iv) ***Neustar's legitimate expectation claims go beyond the minimum standard and are in any event groundless.***

(1) *Legitimate expectations are outside the scope of the minimum standard of treatment*

246. In its Counter-Memorial, Respondent showed that, preliminarily, Claimant's allegations that Colombia violated its legitimate expectations of negotiation and renewal of the 2009 Contract must be dismissed as the concept of legitimate expectations is not a component element of the FET standard and Claimant had failed to prove otherwise.[568] For this purpose Respondent notably:

- Referred to the study of the NAFTA cases of Professor Dumberry concluding that "*there is little support for the assertion that there exists under customary international law any obligation for host States to protect legitimate expectations*";[569]

- Cited the findings of the *ad hoc* committee in its decision of annulment in *MTD v. Chile* confirming that the investor's expectations cannot impose on the host State obligations

565 Counter-Memorial, para. 366.
566 Reply, para. 288.
567 Video Recording of Public Tender Hearing of 3 April 2020, No. 2, min. 104 **[R-0067]**.
568 Counter-Memorial, paras. 371-376.
569 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), Chapter 3: 'The Substantive Content of Article 1105', pp. 160-323, p.160 **[RL-084]**.

beyond those in the applicable treaty and that a tribunal holding the contrary would exceed its powers;[570]

- Noted that the wording of the TPA confirmed this approach when specifying that the concept of FET under the treaty can "*not create additional substantive rights*";[571]

- Stressed that this view had also been embraced by the United States (and this has in fact been confirmed in the non-disputing party submission filed in this case);[572]

- Showed that, contrary to Claimant's misleading allegations, there was no established principle that legitimate expectations were part of the minimum standard of treatment after examining the cases cited by Claimant.[573]

247. In its Reply, Claimant has simply chosen to ignore all of these points. In light of this failure to rebut Respondent's arguments, Claimant's unsupported allegations – i.e. the allegations which suggest that the protection of legitimate expectations under the minimum standard of treatment prescribed by the TPA is well established – should be given no weight. This is all the more given that Claimant has not even attempted to prove that such concept would be embedded in State practice and *opinio juris*. Similarly, Claimant's allegation that Respondent's submissions on this question are "*selective*" is made without any explanation whatsoever and thus appears groundless.[574]

248. In a final attempt to expand the scope of the TPA, Claimant refers to some passages of the awards in *Al Tamimi v. Oman* and *Thunderbird v. Mexico* as well as to the "*principle of good faith*" and claims that Respondent has admitted that legitimate expectations are at least a relevant factor.[575] These arguments are, however, meritless:

- In *Al Tamimi*, the tribunal did not specifically address the issue of whether legitimate expectations were covered when examining an alleged breach of the minimum standard and in fact retained a very high threshold for it, requiring an "*egregious*" failure of protection and concluding that "*[i]t will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard*";[576]

---

570 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67 **[RL-106]**.

571 TPA, Article 10.5(2) **[C-0002]**.

572 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 33: "*The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host state obligation. The United States is aware of no general and consistent State practice and opinio juris under the minimum standard of treatment not to frustrate investors' expectations, instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment."*

573 Counter-Memorial, para. 376.

574 Reply, para. 292.

575 Reply, paras. 291-292.

576 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390 **[RL-097]**.

- Notwithstanding the general findings of the tribunal in *International Thunderbird* regarding the potential effect of legitimate expectations in the context of claims under Articles 1102, 1105 and/or 1110 of the NAFTA, that decision did not undertake a demonstration of the customary nature of the concept of legitimate expectations. Various awards have in fact explicitly determined that the obligations of the host State towards foreign investors "*derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have*".[577] Consequently, "*the expectations of an investor do not constitute a standalone source of obligations for the host State*";[578]

- Respondent has not admitted in its submissions that legitimate expectations are a relevant factor for determining a breach of the FET under the treaty. A cursory examination of the paragraphs of the Counter-Memorial referred to by Claimant shows the true position in respect of legitimate expectations.[579]

249. Claimant's allegations on legitimate expectations should therefore be discarded from the outset.

(2) *In any event, Colombia's conduct did not create legitimate expectation on which Claimant could now rely*

250. If *par extraordinaire* it were to be assumed that legitimate expectations could be part of the minimum standard of treatment prescribed by Article 10.5, Claimant's claims would still fail. Indeed, they simply do not fulfill the conditions under which expectations may be granted international protection.

(i) Colombia did not engage in specific conduct or representations that the 2009 Contract would be renegotiated.

251. Claimant accepts that for its alleged expectations to be potentially considered legitimate and be granted international protection, it would first need to show that Colombia engaged in a clear and specific commitment to renew the 2009 Contract.[580]

252. As explained in the Counter-Memorial,[581] is uncontested that a law or an alleged practice cannot constitute such clear and specific commitment: in its Reply, Claimant has not even tried to allege that Colombia's alleged practice of renewing concessions would be in themselves specific commitments capable of giving rise to legitimate expectations.

253. It however persists in alleging that Article 4 of the 2009 Contract constitutes somehow a specific commitment from Colombia to renew the 2009 Contract despite its unambiguous wording showing

---

577 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67 **[RL-106]**. *See also* Counter-Memorial, para. 373.

578 *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 574 **[RL-170]**.

579 Counter-Memorial, paras. 370-377.

580 Counter-Memorial, para. 380; Reply, para. 294.

581 Counter-Memorial, paras. 384-388.

there was no obligation of renewal. In particular, it criticizes Respondent for addressing this point only in a brief manner and then engages into a lengthy attempt to rewrite Article 4 in an attempt to make the agreement say what it does not say. None of these allegations are sound. In fact, they are so farfetched that even from a merits perspective Claimant's claim appears abusive.

254. As a reminder, Article 4 of the 2009 Contract provides:

> *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, for which it is required the extension and the expansion of the guarantee(s) and the prior subscription of a document that so provides, in which the circumstances that motivated [the renewal] must be stated.*

255. Evidently, Respondent (nor any reader) need not engage in a lengthy examination of Article 4 to conclude that it does not contain any specific commitment from MinTIC to renew the 2009 Contract. On its face, this clause only provides that the "*agreed term **may** be extended*". That the renewal of the contract is only a possibility, and not an obligation, could not be clearer.

256. Faced with this unescapable reality, Claimant's only resort is to try simply to modify its translation of Article 4 of the 2009 Contract: while Claimant had acknowledged in the Memorial that such provision states that the term "*may be renewed*" (original version: "*podrá ser prorrogado*"),[582] Claimant pivots to allege in its Reply that "*the future indicative in the second paragraph of Article 4 is 'will be able to' (podrá)*",[583] . A simple review of this provision however confirms that it states "*may be*", in spite of Claimant's dubious attempts to twist the translation of this provision to its advantage, which exemplify its entire abusive approach to the present proceedings.

257. On the basis of this mischaracterization of the translation of Article 4 of the 2009 Contract, Claimant argues (for the first time) that this provision constituted "*a covenant*".[584] While Claimant provides no explanation on this last resort choice of term, Claimant's argument seems to be that Article 4 provides for a binding undertaking by MinTIC to renew the contract after its term for an additional 10 years.

258. This argument, however, falls apart under its own weight. No specific promise was made by MinTIC in Article 4. This is confirmed by the language used in this article which is not the one normally

---

582 Memorial, para. 47; in fact, Claimant includes this translation again at para. 298 of its Reply, only to distort and misrepresent it at para. 300 of the Reply.

583 Reply, para. 300.

584 Reply, para. 297.

used in a covenant, in which the covenantor "obliges", "agrees", "grants" or "binds" itself to perform or abstain. The truth is that the 2009 Contract says "**may be**", making it clear that the renewal was only a possibility.

259. In addition, as Respondent has previously pointed out,[585] automatic renewals are forbidden under Colombian constitutional and administrative law because they ignore "*several principles that must govern the contractual activity of all State entities […] such as free economic competition, the right to participate in the economic life of the nation on an equal footing, the prevalence of the public interest, the duty of planning and the principles of objective selection, economy, transparency and efficiency, among others*."[586] In this legal and constitutional context, Claimant's proposed reading of Article 4 is misplaced as MinTIC could not have legally undertaken the obligation to automatically renew the 2009 Contract. Tellingly, Claimant has preferred not to engage with this evidence and insist on an absurd interpretation of Article 4 that, if accepted, would violate the above-mentioned constitutional principles.

260. In any event, Claimant's lengthy attempts to distort Article 4 of the 2009 Contract make no sense either from a linguistic point of view or from a contextual point of view:[587]

- The second paragraph of Article 4 must first be read appropriately with the ordinary meaning of its words. In its Reply, for the first time in these proceedings Claimant suggests that this paragraph should be read as "*the concessionaire will be able to renew the concession*" (in Spanish this would translate "*el concesionario tendrá la habilidad de prorrogar la concession*").[588] However, this position is untenable for the very basic reason that this is not the language used in this paragraph. This paragraph only provides that the "*agreed term may be extended" (i.e. "El plazo pactado podrá ser prorrogado") a*nd this is in fact how Claimant itself initially translated this provision.[589]

- It is incorrect to assert that the lead-in paragraph of Article 4 of the 2009 Contract "*memorialize[s] an obligation on the part of both parties.*"[590] As per basic civil law contract principles, a contract's term of duration determines the period of time during which the obligations of such contract are effective.[591] In the instant case, the lead-in paragraph of Article 4 of the 2009 Concession Contract provides for a fixed term of duration, while

---

585 Counter-Memorial, para. 44.

586 Council of State, Decision of 16 February 2022 (Case No. 2473), p. 80 **[R-0092]**.

587 Reply, para. 300.

588 Reply, para. 300(c).

589 *See* notably the Memorial at para. 47 where Claimant translated the second paragraph of Article 2 as " *Paragraph: The term agreed may be extended in the manner and terms established in the legislation in force at the time of its implementation. It may not be less than the term initially established, for which the expansion and extension of the guarantee(s) and the prior subscription of a document that so provides, are required, where the circumstances that motivated it must be indicated*".

590 Reply, para. 299.

591 H. Tapias-Rocha *et al*, *Manual de Derecho Civil Obligaciones*, Editorial Temis (2020), p. 25 **[RL-171]**; B. Fages, *Droit des Obligations*, LGDJ, 9th ed. (2019), paras. 148, 355 **[RL-172]**. The 2009 Contract was a fixed term contract, and it was stipulated that the contractual obligations would no longer apply after the term's expiry.

paragraph 2 of the same provision specifies that that term "*may be*" renewed. No obligation (and of course, no "covenants") engaging any of the parties of the contract arises from this contractual provision. Claimant's unclear allegation that because the lead-in paragraph would allegedly memorialize an obligation, the second paragraph should also be deemed to memorialize an obligation that the 2009 Contract *should the concessionaire desire so* fails for this reason alone;

- In any event, the complex and obscure explanation of the Claimant on the proper use of different tenses in the Spanish language does not resist a straightforward reading of the second paragraph of Article 4. This paragraph uses a modal periphrasis of possibility ("*podrá ser*"; "*may be*") to indicate that the renewal was contingent. In the Spanish language, the periphrasis, i.e. a syntactic construction of two or more verbs that together express gradation of modality, is commonly used to express a possibility. For example, in a phrase like "*La casa podrá ser vendida"* ("*The house may be sold*"), there is just a possibility that the house will be sold, but there remains the equal possibility that it could be retained. Under the same simple logic, the 2009 Contract's term of duration could be renewed or could not be renewed. The periphrasis "*podrá ser*" only conveys that this possibility could happen in the future. In this way, any reading of the second paragraph of Article 4 that goes beyond this linguistic explicitness should not be admitted: had the parties desired to make the renewal automatic or an obligation, they could have used the modal periphrasis "*deberá ser*" ("*shall be*"), but they did not. Claimant's attempts to overcome the common sense and use of these terms (which relies on a misrepresentation of the translation of Article 4 of the 2009 Contract) is therefore unavailing;

- Even if the context is used to interpret the second paragraph of Article 4, the fact that its lead-in paragraph contains a mandatory 10-year term does not mean that the second paragraph should be construed as containing an obligation. Besides the fact that a term of duration does not constitute an obligation *per se* (rather, it fixes the period during which the contract's obligations are binding), the first paragraph of Article 4 uses a different verb than the one used in paragraph two. The lead-in paragraph uses the verb "*tener*" meaning to contain or comprehend in itself. Accordingly, the first paragraph of Article 4 indicates that the contract incorporates a contractual term of 10 years and the future tense, "*tendrá*", only reflects the fact that this term of duration will remain the same over the performance of the contract. Despite notionally conceding that *"[w]hen interpreting a contract, the interpretation must look at the actual words of the contract"*[592], Claimant omits to acknowledge that the material words employed in each paragraph are different from each other, and carry distinct meanings.

---

[592] Reply, para. 300(a).

- Finally, it cannot be reasonably sustained that the renewal was an obligation assumed by the parties to the contract, only subject to the fulfilment of "*the manners and terms established in the legislation in force at the time of its implementation*".[593] This conception ignores the fact that, as explained above, the renewal was only a possibility and it was only if the parties were to agree on a renewal that it would have to be implemented in accordance with "*the manners and terms established in the legislation in force at the time of its implementation.*"

261. Finally, Claimant's alternative argument that "*good faith*" required MinTIC to negotiate a renewal fares no better:[594] Claimant is unable to point to any contractual undertaking, or general legal principle under Colombian law whereby MinTIC would have been required to negotiate a renewal if it had determined that it preferred to proceed with a tender process. As explained at length above, MinTIC decided not to negotiate a potential renewal based *inter alia* on concerns relating to administrative law principles under Colombian law.

262. In the absence of any commitment from Colombia to renew the Contract, Claimant's allegations that Colombia's conduct generated an expectation that the 2009 Contract would be renewed (and thus that such renewal would be negotiated) must be dismissed.

(ii) Claimant has failed to show that Neustar's expectations were objectively legitimate and reasonable and that it relied on Colombia's alleged conduct

263. Not only was there no commitment of renewal, but even if it were to be accepted (*quod non*) that Neustar could have an expectation of renewal as a result of Article 4 of the 2009 Contract, as shown in the Counter-Memorial, Claimant would still need to demonstrate that (i) such expectation was objectively legitimate and reasonable and (ii) that it relied on such conduct at the time of its investment.[595] Yet, none of these conditions are met.

264. Regarding the condition of legitimacy and reasonableness, Claimant does not dispute its relevance. Indeed, it is widely established that to be protected, expectations "*cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.*"[596] For this reason, the investors' expectations must be assessed on a case by

---

593 Reply, para. 300(c).

594 Reply, para. 303.

595 Counter-Memorial, paras. 389-393.

596 *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Award, 17 March 2006, paras. 301, 305 **[CL-049]**. *See also* the awards cited in Counter-Memorial at para. 389: *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 621, 627 and 799 **[CL-017]**; *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 217 **[CL-037]**; *Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 228 **[RL-076]**; *Invesmart B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 250 **[RL-109]**; *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**; *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 **[RL-086]**; *Duke*

case basis in light of the circumstances surrounding the investment, notably in light of an "*objective understanding of the legal framework within which the investor has made its investment*",[597] the risks in the host State at the time the investment was made,[598] the State's legitimate interests,[599] and whether the investor conducted an appropriate due diligence.[600]

265. As amply demonstrated in the Counter-Memorial,[601] the factual evidence demonstrates that it would not have been reasonable for a sophisticated foreign investor such as Neustar to expect at the time of its investment that the 2009 Contract would necessarily have been renewed. In particular both the Constitutional Court and the Council of State have repeatedly held that automatic renewals are illegal and unconstitutional and that the convenience of a renewal has to be determined on a case-by-case basis.[602] This was already the case when Neustar made its investment in 2009 and 2014 (and in fact is recognized in Claimant's own legal opinion).[603] Moreover, it would not have been reasonable to have such expectation in light of the clear imbalance between the revenues received by Neustar (93% of the proceeds) and those allocated to Colombia (7% of the proceeds) and considering that the asset had proved to be increasingly profitable since 2009.[604] Tellingly, in its Reply Claimant is incapable of denying these facts and has simply preferred to ignore them.

266. Yet further, the information publicly and readily available to Neustar at the time of its investment – information to which it would have necessarily been privy as part of any reasonable due diligence – again demonstrates that Neustar cannot have held any reasonable or legitimate expectation that the contract would necessarily have been renewed:

- As a reminder, Neustar first made its investment in 2009 by participating in the 2009 Tender Process through its joint-venture with Arcelandia, .CO Internet.[605] As explained by several tribunals, it should therefore have conducted its due diligence at that time, "*before committing funds to [this] investment proposal.*"[606] In the instant case, it precisely appears

---

Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340 **[CL-063]**; *Invesmart B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 250 **[RL-109]**.

597 *ESPF Beteiligungs GmbH, et al v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, para. 513 **[RL-173]**.*See also SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 714 **[RL-174]**.

598 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 986 **[CL-131]**.

599 *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Award, 17 March 2006, para. 305 **[CL-049]**; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 293 **[RL-175]**.

600 *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para. 318 **[RL-176]**.

601 Counter-Memorial, paras. 394-396.

602 Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01), p. 14 **[R-0003]**.

603 Reply, para. 333.

604 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].**

605 *See* RFA, Section III.F: Claimant itself refers to the 2014 acquisition of .CO Internet's full share capital as having "*expanded its investment in .CO Internet.*"

606 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 506 **[RL-177]**. *See also*, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.78 **[CL-064]** ("*Fairness*

that several public documents available to Neustar contemporaneously indicated that the renewal of the initial term of the contract would only be a possibility (and not a certainty).

- For instance, in the preliminary studies of the tender process, MinTIC indicated that it could decide to select a new concessionaire when the 10 years fixed term expired:

  > *In the **event** that the Ministry of Communications **decides** to select a new concessionaire due to deficiencies in the management of the concessionaire as defined in these documents or **the expiration of the term of the contract**, the concessionaire must ensure an orderly transition to the new concessionaire.*[607]

  This requirement clearly refers to the termination of the 10 years fixed term of the contract and not to a renewal term, as it points out that MinTIC could decide (or not) to select a new concessionaire.

- Similarly, in a public document containing the reply to comments made by interested parties in the tender process, MinTIC unambiguously stated that the renewal was contingent, again referring to it as an event that may or may not occur:[608]

- While Neustar "*expanded*" its investment in 2014 with the acquisition of .CO Internet's full share capital from Arcelandia,[609] this could not in and of itself create legitimate expectations distinct from those that Claimant allegedly had at the time it first made the investment.[610]

---

*and consistency must be assessed **against the background of information that the investor knew and should reasonably have known at the time of the investment** and of the conduct of the host State. While specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable […] Specific assurances will simply make a difference in the assessment of the investor's knowledge and of the reasonability and legitimacy of its expectations.*" (emphasis added)); *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para. 423 **[RL-178]** ("*Investors, for their part, are under an obligation to conduct a due diligence assessment **prior to investment to acquaint themselves with the applicable host state law and form their legitimate expectations accordingly***." (emphasis added)).

607 MinTIC, Preliminary studies for the 2009 Tender, May 2009, p. 9 **[R-0093]** (emphasis added; "*En el evento que el Ministerio de Comunicaciones decida seleccionar un nuevo concesionario por deficiencias en la gestión del concesionario respecto a lo definido en estos pliegos o por finalización del término del contrato, el concesionario debe asegurar una transición ordenada al nuevo concesionario*." (original version)).

608 Response of MinTIC to observations on draft 2009 Terms of Reference, 15 May 2009, p. 97 **[R-00944]** ("*En 2.2 se indica: "El plazo pactado podrá ser prorrogado en la forma y términos en que se establezca en la legislación vigente al momento de efectuarse, el cual no podrá ser inferior al inicialmente establecido." ¿El plazo pactado hace referencia a la duración de la concesión? y cuando hace referencia a el cual no podrá ser inferior al inicialmente establecido, ¿Significa entonces que la prorroga no podrá ser inferior a 10 años?" Respuesta: Las respuestas a los dos interrogantes son afirmativas; es decir, el plazo pactado es el termino de la concesión; y la prorroga, en el evento de presentarse, no podrá ser inferior a diez (10) años siempre y cuando se mantengan las circunstancias que le dieron origen al contrato*." (original version); "*In 2.2 it is indicated: "The agreed term may be renewed in the manner and terms established by the legislation in force at the time of the renewal." Does the agreed term refer to the duration of the concession? And when it refers to which may not be less than initially established, does it mean that the extension may not be less than 10 years?" Does this mean that the renewal cannot be less than 10 years? Answer: The answers to both questions are affirmative; that is, the agreed term is the term of the concession; and the renewal, **in the event that it occurs**, may not be inferior than ten (10) years, provided that the circumstances that gave rise to the contract are maintained.*" (our translation, emphasis added)).

609 *See, inter alia*, RFA, Section III.F; Counter-Memorial, paras. 70-78.

610 *See Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340 **[CL-063]** ("*The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. **To be protected, the investor's***

In any event, Claimant fails too to prove that it could have legitimate expectations that the 2009 Contract would be renewed at this juncture:

- Preliminarily, it is worth noting that Amendment No. 3 to the 2009 Contract (on which Claimant appears to rely) did not modify Article 4 of the 2009 Contract or affect the term of such contract in any manner; instead, it only removed certain conditions imposed in the 2009 Terms of Reference to permit the acquisition of .CO Internet's full share capital by Neustar;[611]

- Claimant has not produced any contemporaneous document showing that it had any expectation that the 2009 Contract would be renewed at the expiry of its 10-year term, or that they understood the legal framework under Colombian law to render the renewal compulsory. Claimant has also failed to produce any witness evidence regarding any due diligence that it would have conducted prior to its acquisition of Arcelandia's 99% share in .CO Internet in 2014, or explained where this alleged belief that the 2009 Contract would be renewed comes from.

- Under Procedural Order No. 2, Neustar was required to produce any "*communications between Arcelandia […] and/or .CO Internet, and/or Neustar regarding the potential renewal of the 2009 Contract, in the context of the negotiations for the acquisition by Neustar or Arcelandia's 99% interest in .CO Internet*."[612] Yet, Claimant produced no documents at all, explaining that any responsive documents would be held by .CO Internet and no longer in its possession due to the GoDaddy transaction.[613] These excuses however do not hold water: the Stock and Asset Purchase Agreement of 14 March 2014 (the "**Arcelandia SPA**") is between Arcelandia and Neustar, not .CO Internet: it is therefore evident that any communications on this issue would have taken place between Neustar and Arcelandia, and that Neustar should therefore have retained these. Further, as explained below, the potential renewal of the 2009 Contract was undoubtedly discussed between the parties in light of the fact that they so closely regulated the issue in the Arcelandia SPA: it is therefore not credible that no

---

expectations must be legitimate and reasonable at the time when the investor makes the investment*. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest*." (emphasis added)); *Mamidoil v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 695 **[RL-179]** ("***In broad terms, the Tribunal holds that legitimate expectations can only arise at the time the investment is made.*** *Investors base their plans on circumstances and conditions as they find them, and they can only rely on conditions as they exist at that period. These factors can legitimately be taken into account when weighing the environment of the investment decisions. Subsequent developments are speculative and to be left out of this consideration. This extends as much to improvements in the legal and regulatory environment as to unpredictable deteriorations in the same.*" (emphasis added)).

611 *See* Amendment No. 3 to the 2009 Contract of 3 February 2014, Preamble, Articles 1, 2 **[C-0019]**.

612 Procedural Order No. 2, Annex B, Request No. 2 (pp. 10-12).

613 Application from Respondent to Tribunal of 5 September 2022, p. 5.

communications at all would exist on this issue. In light of Claimant's blatant failure to disclose these documents, Respondent respectfully requests the Tribunal to draw adverse inferences and consider that such documents would have been contrary to Claimant's position (by showing that the parties to the Arcelandia SPA perfectly understood the renewal to be only a possibility at that time).

- In any event, as explained above, Claimant acknowledged in several posterior communications that it understood the renewal not to be automatic, and instead just an "*option*".[614]

267. Accordingly, Claimant cannot seriously contend that Neustar had a legitimate and reasonable expectation that the 2009 Contract would necessarily be renewed at the time of its investment. The evidence in fact shows that Neustar knew or should have known that the renewal was not automatic nor guaranteed. Claimant's "*legitimate expectation claim*" is thus bound to fail and should be rejected on this sole basis.

268. Claimant has also in any event failed to demonstrate that it effectively relied on the fact that the 2009 Contract was to be renewed. Various arbitral tribunals have ruled that a claimant's failure to demonstrate this reliance defeats a legitimate expectations claim[615]. Even where investors have a right to rely upon State's commitments, claims based on legitimate expectations can fail "*for lack of evidence of actual reliance thereon*"[616]. Thus, an investor must prove that it relied on the promises or assurances made by States as a matter of fact.[617] After Respondent flagged that Claimant had provided no evidence of such reliance, for the first time in its Reply Claimant argues that this is demonstrated by the price it paid to Arcelandia in 2014 for the acquisition of .Co Internet's full share capital.[618] However, not only has Claimant provided no evidence on how it valued the company and came up with this price at the time, but the contractual documentation, and more specifically the Arcelandia SPA in reality shows that Neustar understood that the renewal was only a possibility which may or may not happen:

- Under Section 5.18 (g) of the Arcelandia SPA, Arcelandia undertook to assist and cooperate with Neustar to obtain any renewal or extension of the 2009 Contract or to win

---

614 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 7 **[R-0035]**; Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.

615 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 216 **[CL-037]**; *AWG Group v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 226 **[CL-126]**; *Micula v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 668 **[CL-077]**; *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, para. 505 **[RL-101]**; *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, paras. 217-226 **[RL-180]** ("*Reliance by the investor on the host State's representations is an essential element of a claim of breach of the FET standard based on the notion of legitimate expectations. The reliance criterion requires that the investor's decisions to invest be made in reliance on representations made to him by the State, including both his initial investment decision and also further investment decisions, such as a decision to inject additional capital into an ongoing project*.").

616 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, para. 210 **[RL-181]**.

617 *Micula v. Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 668 **[CL-077]**.

618 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014 **[C-0133]**.

any bid or solicitation concerning the .co domain name. If there was an obligation of cooperation to obtain a renewal, it can be logically inferred that the renewal was not considered to be automatic;

- Under Section 5.19, Neustar agreed to make a contingent payment to Arcelandia of up to circa USD 6 million in the event of a "*Qualified Renewal*" of the 2009 Contract.[619] Such a "Qualified Renewal" was defined broadly as including not only (i) a renewal of the 2009 Contract but also ii) any other grant of the right to serve as registry operator *"on terms that are substantially consistent [...] than those of the current [2009 Contract]*"[620] or (iii) a binding determination by MinTIC that the 2009 Contract continued until 2030. The agreement also foresaw the possibility of no Qualified Renewal, in which case the sums deposited on an escrow account for this purpose were to be returned to Neustar.[621] This blatantly shows that the parties to this agreement, hence Neustar, understood that a renewal was not a certainty.

269. Accordingly, Claimant's unsubstantiated reliance allegations in relation to the purchase price of the deal with Arcelandia are rendered moot in light of the fact that the contractual documentation of this transaction actually shows that Neustar was well aware that a renewal was only a possibility and not a certainty. In any event, Neustar's dealings with Arcelandia, another private party, certainly do not constitute a valid proof that Neustar had any "*legitimate expectations*" that the 2009 Contract would be renewed or that MinTIC would have committed so.

270. Being well aware of the weakness of its position, Claimant then tries to create confusion by arguing in the Reply, that MinTIC was aware of the financial terms of the Arcelandia SPA, and that because it approved the transaction at such a high price (USD 113.7 million) MinTIC must have known that Neustar was counting on a renewal of the contract to ensue profitability of its acquisition.[622] Claimant curiously concludes that Respondent "*breached the TPA by approving a transaction that it knew included an understanding of a right to renew.*"[623] This argument is, respectfully, absurd and an embodiment of Claimant's abusive approach to the present proceedings:

- Claimant has not even attempted to show that MinTIC was aware of the *financial terms* or precise contents of the Arcelandia SPA when Neustar requested MinTIC's approval on 22 October 2013,[624] or when .CO Internet and MinTIC executed Amendment No. 3 to the 2009 Contract on 3 February 2014.[625] Claimant instead prefers to proceed with unsubstantiated

---

619 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014, Section 5.19(d) **[C-0133]**.
620 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014, Section 5.19(d) **[C-0133]**.
621 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014, Section 5.19(d) **[C-0133]**.
622 Reply, paras. 306-310. More specifically, Claimant appears to argue that if it "*did not consider that it would be able to renew the Concession, Neustar would have had to expect a profit of at least USD 113.7 million in the final five years of the concession*" to render its acquisition profitable, which was not a reasonable expectation in light of the performance of the 2009 Contract during the first five years of operation (having generated a total revenue of only USD 87.9 million).
623 Reply, para. 312.
624 Amendment No. 3 to the 2009 Contract of 3 February 2014, Preamble, p. 4, of the pdf **[C-0019]**.
625 Amendment No. 3 to the 2009 Contract of 3 February 2014 **[C-0019]**.

allegations, submitting without any proof that "*[t]he economics of the sale […] was* [sic] *known to Respondent contemporaneously.*"[626] A simple look at the text of Amendment No. 3 suffices to note that the financial terms of the private deal between Arcelandia and Nesutar were not a factor considered by Colombia in agreeing to remove the requirement under the 2009 Contract that there be no change of percentage of Colombian ownership in the concessionaire during the first five years of the contract.[627] It also bears noting that the Arcelandia SPA is dated 14 March 2014, that is more than a month after the authorization.[628]

- Even beyond this, assuming (*quod non*) that MinTIC would have been aware of the financial terms of the contemplated acquisition at the time of executing Amendment No. 3, Claimant does not explain how this could constitute a "*specific commitment*", both "*objectively legitimate and reasonable*" and on which it relied when making its investment. As a reminder, the sole purpose of Amendment No. 3 was to remove the requirement under the 2009 Contract that the percentage of Colombian ownership in the concessionaire do not change during the first five years of the concession. Even if MinTIC had been aware of the proposed price of USD 113.7 million, on Claimant's case MinTIC should have (i) performed a financial analysis of the proceeds received by .CO Internet up until that point, (ii) made its own assumptions about the way Arcelandia/Neustar had agreed the price to understand that they had acted on the understanding that the 2009 Contract would be renewed, and (iii) warned Neustar that the renewal was only an option. Claimant however disregards the requirement that legitimate expectations arise from "*specific commitments*" (not silence), and that they be "*reasonable*" (not predicated on a fanciful interpretation of MinTIC's approval of the removal of the ownership condition in the 2009 Contract). This is certainly not the case of Claimant's far-fetched theory on the Arcelandia acquisition.

271. In its Reply, Claimant argues that "*the economics of the sale […] made it clear that Neustar expected a ten-year renewal of the Concession.*"[629] Yet, Claimant has failed to prove that Respondent undertook any specific commitment to renew the 2009 Contract at the time it made its investment in 2009 (or when it expanded such investment in 2014). As such, while Neustar might well be disappointed with the "*economics of the [Arcelandia] sale*", this is a matter for Claimant in which Respondent has no part and the present international proceedings should not be used by Claimant as a tool to make up for the "*economics*" of such sale.

272. In conclusion and for all the above reasons, Claimant's allegations that Respondent violated its obligation to grant FET under Article 10.5 of the TPA should be dismissed.

---

626 Reply, para. 309.
627 *See* Amendment No. 3 to the 2009 Contract of 3 February 2014, Preamble, Articles 1, 2 **[C-0019]**.
628 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014 **[C-0133]**.
629 Reply, para. 309.

3.2 Claimant has no viable claim for discriminatory treatment under Articles 10.3 and 10.4 of the TPA

273. In its Reply, Claimant maintains that Respondent's non-renewal of the 2009 Contract is constitutive of discriminatory treatment prohibited under Articles 10.3 and 10.4 of the TPA because Respondent would allegedly have renewed concessions for other national or foreign companies. Claimant however still fails to establish that its allegations constitute actionable treatment under these provisions (**a**). In any event, Claimant's assertions fall far short of meetings the requirements for establishing such discriminatory treatment: Claimant has failed to establish that it is "*in like circumstances*" with the other operators that it lists (**b**) or that it was treated less favorably than its alleged comparators (**c**), and in any event Respondent's actions were amply justified by a public policy objective (**d**).

(a) Claimant's allegations do not constitute actionable treatment under Articles 10.3 or 10.4 of the TPA

274. As explained in the Counter-Memorial,[630] Claimant's allegations on discrimination do not fall within the scope of Articles 10.3 and 10.4 of the TPA because they are based on a discretionary contractual prerogative which does not constitute a "*treatment*" qualifying for protection.

275. To sustain the contrary, Claimant essentially argues that these articles do not limit the "*treatment for purposes of non-discrimination*",[631] and that the concept of "*treatment*" has been interpreted in a broad sense.[632]

276. However, Claimant misses the point. While a variety of measures may fall within the scope of these provisions (such as the examples of regulatory measures listed in the Counter-Memorial),[633] Respondent's argument is that when a State has no obligation of renewing a contract, it should preserve its ability to decide whether or not to renew at the term of the agreement. Because this right is discretionary and inherently linked to the freedom of contract, it cannot give rise to a claim for discrimination. Considering otherwise would result in forcing States to conclude contracts with specifics investors, which is something which these articles could not have been intended for. Freedom of contract is a protected principle both under Colombian[634] and international law[635]. UNCTAD has explicitly supported this viewpoint in the case of the MFN provisions recognizing that

---

630 Counter-Memorial, para. 406-412.

631 Reply, para. 319.

632 Reply, paras. 319-321.

633 Counter-Memorial, para. 410 and fn. 635.

634 Article 40, Law 80 of 28 October 1993 **[R-0041]**;

635 UNIDROIT Principles of International Commercial Contracts (2016), Article 1.1 **[RL-182]**; Commentary of Article 1.1, UNIDROIT Principles of International Commercial Contracts, p. 8 **[RL-183]**: "*The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order.*"

"*freedom of contract prevails over the MFN Clause*" as "*host country cannot be obliged to enter into individual investment contract*".[636]

277. In an attempt to overexpand the scope of these articles, Claimant refers to the findings of the Tribunals in *Merril & Ring v. Canada* and *Bayindir v. Pakistan*. This reliance is however inapposite:

- The tribunal in *Merrill & Ring v. Canada* did not decide that the "*treatment*" should be interpreted as broadly as *any* State measure or decision, as Claimant implies, but actually held that "*the treatment is no different that the aggregate of **regulatory measures** applied to the business*."[637] The tribunal did not analyze whether contractual measures were covered by the "*treatment*";

- The facts at stake in *Bayindir* were entirely different from the instant case. In Bayindir the issue was not an issue of renewal of the contract at the expiration of its term as in this case. Rather, Bayindir complained about the fact that its construction contract had been terminated before the completion date of the project and that following its expulsion from the project, the National Highway Authority of Pakistan awarded a new contract to a local company to complete the construction of the project. It is evident that this factual background bears no similarity with the instant case (where there was no termination and the subsequent contract was awarded to the same entity) and in any event, as will be explained below,[638] the tribunal rejected Bayindir's claim.

278. Claimant also tries from a factual perspective to argue that its allegations concern a variety of actions by Colombia relating to the conduct, operation and sale of its investment, including the announcement of a public tender process with respect to the .co domain, Colombia's refusal of Neustar's offer to renew the 2009 Contract and the fact that Colombia did not negotiate a renewal.[639] However, all of these actions stem from MinTIC's decision not to renew the 2009 Contract. Yet, as explained above, MinTIC was under no obligation to renew this agreement and therefore MinTIC's decision is not a treatment that can give rise to a discrimination claim. Claimant's discrimination claims should therefore be dismissed on this basis alone.

---

636 UNCTAD, 'Most-Favoured-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2010), p. 29 **[RL-184]** ("*As was pointed out in the first edition on MFN (UNCTAD 1999a) if a host country grants special privileges or incentives to an individual investor through a contract, there would be no obligation under the MFN treatment clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract. In this case, "freedom of contract prevails over the MFN clause" (UNCTAD 1999a). Furthermore, the foreign investor that did not enter into a contract is not in "like circumstances" with the third foreign investor that did conclude the contractual arrangement with the host State.*"); *See also* Counter-Memorial, para. 409.

637 *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 79 **[CL-033]** (emphasis added).

638 *See* para. 295 *infra*.

639 Reply, para. 321.

(b) Claimant's attempts to portray itself as "in like circumstances" with a variety of different operators are untenable

279. Even assuming (*quod non*) that Claimant's discrimination allegations could fall within the scope of Articles 10.3 and 10.4 of the TPA, these are in any event bound to fail. It is widely accepted that it is incumbent upon a claimant to identify domestic – or foreign – investors or investments which are placed "*in like circumstances*" and that the assessment of the "*in like circumstances*" requirement is a fact-specific enquiry.[640]

280. The most evident approach in this case would have been to refer to the companies that were interested in the operation of the .co domain, for example those which participated to the 2020 Tender Process – such as Consorcio Dotco (a consortium composed of local companies as well as CentralNIC, a UK company) and Nominet UK (a UK company) – and which by definition were competing with Neustar and .CO Internet for the same services. Yet, it is clear that Claimant could not have seriously argued that it was the victim of a discrimination vis-à-vis these comparators. From the outset, .CO Internet was invited to participate in the tender by the MinTIC and it did so on equal footing with all interested parties.[641] In fact, not only did .CO Internet engage into this process and submit numerous comments to the contractual documents,[642] but it was ultimately awarded the 2020 Contract and Neustar representatives expressed their satisfaction regarding the carrying out of the process.[643] These facts categorically rule out any possibility of discrimination against Neustar.

281. Being well aware of this, Claimant's strategy has therefore been to try to fabricate a discrimination claim by referring to different kinds of other businesses which allegedly had their concession renewed.[644] However, these attempts are fatally flawed.

282. *First*, it is actually unclear from Claimant's submissions with which type or group of investments or investors it is trying to be compared with. Claimant simply sets out a list of contracts and documents which do not appear to have any association between each other. As already highlighted in the Counter-Memorial:[645]

---

640 Counter-Memorial, paras. 413-416. *See also* Submission of the United States of America as Non-Disputing Party, 13 May 2022, para.16.

641 Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**.

642 First observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0045]**; Second observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0046]**; Third observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0047]**; Attendance list of the public hearing on the 2020 Tender Process of 18 December 2019 **[R-0054]**; Observations of .CO Internet to the final 2020 Terms of Reference of 3 January 2020 **[R-0055]**.

643 Video Recording of Public Tender Hearing of 3 April 2020, No. 2, min. 104 **[R-0067]**.

644 Memorial, paras. 88-93.

645 Counter-Memorial, para. 418.

- The contracts have different objects: some of them concern concessions of the national television channels[646] while others concern commercial radio broadcasting services[647] or concessions in the mining[648] or port[649] sectors.

- The public entities involved in these documents and contracts are different: they vary from the National Television Commission,[650] to MinTIC's Information and Technology Fund,[651] MinTIC,[652] CARBOCOL (a national mining company),[653] the National Mining Agency,[654] and the National Infrastructure Agency[655].

- The contracts are asymmetrical in terms of their dimension: some of them have a national coverage,[656] while others concern specific rural areas,[657] or even specific regions of Colombia.[658]

283. In order to circumvent this lack of coherence, as per its usual technique, Claimant tries to find a way out by referring to Respondent's submissions. It notably argues that it is "*astounding*" that Respondent raises the comparator issue when it has acknowledged that the 2009 Contract could

---

646 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997 **[C-0045]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997 **[C-0048]**.

647 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 5 November 2010 **[C-0052]**.

648 Claimant did not provide any exhibits concerning the Concessions themselves, but only the addendums through which they were purportedly extended: Addendum No. 15 to Concession No. 78-88 between CARBOCOL and Drummond, 22 January 2019 **[C-0058]**; Addendum No. 9 to Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 11 July 2016 **[C-0059]**; Amendment No. 4 to Concession No. 051-96M between the National Mining Agency and Cerro Matoso S.A., 27 December 2012 **[C-0060]**; Amendment No. 3 to Concession No. 070-89 between the National Mining Agency and Minas Paz del Río, 27 December 2012 **[C-0061]**; Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 7 June 1993 **[C-0062]**.

649 Addendum No. 1 to Concession No. 009 to Sociedad Portuaria Puerto Brisa S.A, 7 May 2014 **[C-0063]**; Addendum No. 4 to Concession No. 002 to Sociedad Portuaria American Port Company INC., 5 December 2013 **[C-0064]**.

650 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997 **[C-0045]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997 **[C-0048]**.

651 Concession No. 618 between MinTIC's Information Technology Fund and Comunicaciones and Red de Ingenierías S.A.S ("INRED"), 18 June 2019 **[C-0054]**; Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar, 23 January 2019 **[C-0056]**.

652 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 5 November 2010 **[C-0052]**.

653 Addendum No. 15 to Concession No. 78-88 between CARBOCOL and Drummond, 22 January 2019 **[C-0058]**; Addendum No. 9 to Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 11 July 2016 **[C-0059]**; Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 7 June 1993 **[C-0062]**.

654 Amendment No. 4 to Concession No. 051-96M between the National Mining Agency and Cerro Matoso S.A., 27 December 2012 **[C-0060]**; Amendment No. 3 to Concession No. 070-89 between the National Mining Agency and Minas Paz del Río, 27 December 2012 **[C-0061].**

655 Addendum No. 1 to Concession No. 009 to Sociedad Portuaria Puerto Brisa S.A, 7 May 2014 **[C-0063]**; Addendum No. 4 to Concession No. 002 to Sociedad Portuaria American Port Company INC., 5 December 2013 **[C-0064]**.

656 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997 **[C-0045]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997 **[C-0048]**.

657 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 5 november 2010 **[C-0052]**.

658 Addendum No. 15 to Concession No. 78-88 between CARBOCOL and Drummond, 22 January 2019 **[C-0058]**; Addendum No. 9 to Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 11 July 2016 **[C-0059]**; Amendment No. 4 to Concession No. 051-96M between the National Mining Agency and Cerro Matoso S.A., 27 December 2012 **[C-0060]**; Amendment No. 3 to Concession No. 070-89 between the National Mining Agency and Minas Paz del Río, 27 December 2012 **[C-0061]**; Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 7 June 1993 **[C-0062]**.

not be subject to an automatic renewal in line with the jurisprudence of the Colombian Constitutional Court which prohibits the inclusion of such clauses in public contracts.[659] However, Claimant's argument is devoid of any merit: the fact that there is a general prohibition on automatic renewals in public contracts does not mean that all such contracts are equivalent to each other and that all of the different private parties to these contracts are in the same circumstances and compete with each other. Claimant has to undertake a factual demonstration that the comparators to which it cites are "*in like circumstances*", which as explained in Respondent's Counter-Memorial is a fact-specific enquiry depending on a number of criteria.[660] Claimant's attempts to avoid substantiating its case should be disregarded.

284. *Second*, Claimant fails to establish that any of the alleged comparators to which it refers were "*in like circumstances*" with Neustar or its investments. While Claimant argues that its purported comparators (i) operate in the same business sector; (ii) produce competing goods and services and (iii) are subject to comparable legal regime or requirements,[661] this does not correspond to reality.

285. *As an initial point*, Neustar cannot reasonably contend that its alleged comparators operate in the same business sector. While Claimant appears to have (rightly) abandoned its attempts to draw a comparison between the 2009 Contract for the administration and operation of the .co domain and mining and port concessions, it persists in relying on a few contracts regarding television radio broadcasting services,[662] television broadcasting services,[663] the provision of universal access in remote areas of the country,[664] and an *inter-administrative* agreement relating to a digital accessibility strategy.[665] Adopting an overexpansive approach of the "*in like circumstances*" requirement, it goes on to argue that Neustar was in like circumstances with these six comparators because the .co domain forms part of the telecommunication sector. However, not only it is highly questionable how only six contracts could constitute a valid basis of comparison sufficient to discharge Claimant's burden of proof, but Claimant's argumentative efforts about the .co domain forming part of the telecommunication sector completely miss the point. As per its own submissions, the factor that the comparators operate in the same business sector focuses on the

---

659 Reply, para. 326.

660 Counter-Memorial, para. 415.

661 Reply, para. 323.

662 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021 **[C-0051]**; Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo **[C-0052]**; Amendment No. 1 to Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 4 May 2021, Art. 2 **[C-0053]**.

663 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 8 **[C-0045]**; Amendment No. 4 to Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 21 January 2009 **[C-0047]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Art. 8 **[C-0048]**; Amendment No. 8 to Concession No. 140 between the National Television Commission and RCN Televisión S.A., 29 October 2009 **[C-0049]**.

664 Concession No. 618 between MinTIC's Information Technology Fund and Comunicaciones and Red de Ingenierías S.A.S ("INRED"), 18 June 2019, pp. 1-2 **[C-0054]**.

665 Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar **[C-0056]**.

commercial operations of the investors and the services offered.[666] Claimant cannot therefore overlook these elements and conclude that the *"in like circumstances requirement is met*" by simply saying that the same economic sector (in this case the telecommunication sector) is at stake. In fact several tribunals have rejected overly broad attempts of comparison and emphasized the importance of considering the specific market segments within a determined economic sector in order to determine whether an investor and the alleged comparators are in like circumstances.[667] In the present case, as Respondent had already explained in the Counter-Memorial:[668]

- The .co domain, on the one hand, and radio and television broadcasting on the other hand, are not for the same type of services: while television or radio services entail the provision of content to passive customers, the .co domain is a technical infrastructure enabling end users to register domain names.[669] Further, the business model of television or radio broadcasting is based upon the sale of advertising to companies, while the .co domain derives its income from the sale of domain spaces to wholesalers (registrars) or directly to end users.[670] In line with this, while the radio or television concessions provide for the payment of a fixed fee by the concessionaire who is in charge of the "*public service of television*",[671] the 2009 and 2020 Contracts for the operation of the .co domain both provide

---

666 Memorial, para. 247; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008 **[CL-074]** ("*When it came to supplying sweeteners to the soft drinks industry, their products were in direct competition with one another, treated both by customers and by Mexican law as being interchangeable.*"); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 373 **[RL-185]** ("*With regard to the second condition (ii [Pinus Proprius and Parkerings must be in the same economic or business sector]: BP and Pinus Proprius are engaged in similar activities. Both Pinus Proprius and BP are companies acting in the construction and management of parking garages*").

667 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, paras. 396-397 **[RL-164]** ("*In light of the parties' agreement on the need to first identify the domestic entities that were in similar circumstances with BNM, the Arbitral Tribunal considers, as noted by other arbitral tribunals, that discrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on case-by-case basis, the relevant circumstances.* ***The banks cited by the Claimant are in the same sector (banking) and are regulated by a common entity, the SBS. Notwithstanding this common denominator, the Tribunal considers that, as the banking sector is a sensitive area for any country, there are marked differences between the various banks operating in it****. For example, there are banks primarily engaged in asset management and investment, others in corporate and consumer banking, such as BNM.* ***The market segment in which a bank is primarily engaged shows how different it is from other banks and determines whether or not they are competitors****. In order to consider the consequences of a bank's failure****, one has to consider the segment and the number of individuals affected, its market share, and other similar factors****.*" (emphasis added)); *see also*, *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 415 **[RL-109]** ("*The Tribunal is not satisfied that Union Banka was in a situation comparable to that of any other Czech bank,. let alone to all the other members of an identified class of Czech banks. The question of whether Union Banka was similarly situated to other banks requires more than an identification of single points of similarity, such as size, origin or private ownership. There must be a broad coincidence of similarities covering a range of factors. The comparators must be similarly placed in the market ai1.d the circumstances of the request for state aid must be similar. Therefore, the Tribunal concludes that Invesmart has not demonstrated that Union Banka was subject to discrimination by the Czech Republic*.").

668 Counter-Memorial, para. 418.

669 *See* OECD, *Working Party on Telecommunications and Information Services: Evolution in the Management of Country Code Top Level Domain names*, 17 November 2006, p. 15 **[R-0086]**.

670 *See* OECD, *Working Party on Telecommunications and Information Services: Evolution in the Management of Country Code Top Level Domain names*, 17 November 2006, p. 15 **[R-0086]**.

671 Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Art. 8 **[C-0048]**; Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 8 **[C-0045]**, Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, Art. 7 **[C-0052]**; Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A, Art. 6 **[C-0050]**.

that the State and the concessionaire shall split the income generated by the sale of domain names.[672]

- With respect to the two other contracts cited by Claimant, these are for the provision of access to internet in remote rural areas and an inter-administrative agreement for the implementation of digital transformation projects.[673] It is clear on the face of these contracts that they do not relate to the same business sector than the 2009 or 2020 Contracts, and Claimant has not even tried to explain how they could be compared.

286. It bears noting that Claimant has entirely failed to address the above in its Reply, instead relying solely on the fact that the .co domain and radio or television broadcasting are both regulated by MinTIC in Colombia. This is however utterly irrelevant to showing that two comparators operate in the same "*economic sector*", in addition to being misleading as Respondent explains below in relation to the requirement that the businesses operate within the same regulatory framework.

287. *Similarly*, there is evidently no competitive relationship between the alleged comparators and .CO Internet. In its Reply, Neustar only speculates (without any substantiation) on how the .co domain might indirectly contribute to the development of online services which in turn might compete with other telecommunications competitors.[674] However, beyond this unconvincing argumentation, it is incapable of determining how .co and the other alleged comparators (i.e. primarily radio or television broadcasting services) are in fact in competition. The reason for this failure is simple: there is no competition. This is evidenced by the fact that none of the alleged comparators even tried to compete for the award of the .co domain (despite these being major players in the Colombian television or radio market). Even on Claimant's own case (which is denied) that successful domain administration "*creates the market place in which online services compete with traditional media*", Claimant fails to prove that the .co domain was in a potential state of competition with television or radio broadcasting services: notably, while it is uncontested that the immense majority of the users of the .co domain are not located in Colombia and have no link to this country (due to the .co domain being able to compete with other TLDs and even gTLDs such as '.com'),[675] it is similarly uncontested that virtually all of the users of the radio or television broadcasting services cited to by Claimant are located in Colombia. It even appears from a cursory examination of the concessions at hand that some of the broadcasting services to which Claimant refers only

---

672 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 5 **[C-0017]**; 2009 Terms of Reference (final version), Art. 5.2.3. **[C-0009]**.

673 Concession No. 618 between MinTIC's Information Technology Fund and Comunicaciones and Red de Ingenierías S.A.S ("INRED"), 18 June 2019, pp. 1-2 **[C-0054]**; Amendment No. 2 and Extension No. 1 to Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar, 20 December 2019, Arts. 1-3 **[C-0056]**.

674 Reply, para. 331.

675 *See* Memorial, para. 60; Counter-Memorial, paras. 71, 418-423; Reply, para. 331.

operate on a *regional* level.[676] It follows that both services are nowhere near being in a potential state of competition, and Claimant's unconvincing allegations on this point should be disregarded.

288. Being well aware of this, Claimant tries to create confusion by referring to the award in *Occidental v. Ecuador* and claiming that, according to the *Occidental* tribunal, "*the purpose of discrimination provisions in investment treaties (compared with, for example, trade treaties) is to ensure that investors are not placed in disadvantage in foreign markets*" and that "*the phrase 'in like circumstances' should not be interpreted narrowly*".[677] However, Claimant's remarks on *Occidental* are completely inaccurate and manipulative. The Tribunal did not make such general statements. Moreover if this tribunal actually held that the developments of the GATT/WTO on "*like products*" were not pertinent in the case, taking into account that, in the specific dispute, the purpose of the national treatment was "*to avoid **exporters** being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in the GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination*".[678] As it can be appreciated, the tribunal's conclusions where clearly framed in a importers/exporters tax context and did not refer to discrimination provisions in investment treaties.

289. In any case, tribunals have frequently declined that competitiveness is met when the underlying circumstances of the case present differences. For instance, some tribunals have taken into account the difference of the respective activities and material conditions, even when the comparators had competing interests in the same industry, to refuse to qualify the similar circumstances.[679] Other tribunals have rejected to consider that investors are competitors in the same business sector, when the scale and scope of their operations differed.[680] It follows that even under Claimant's farfetched theory that radio and television broadcasting services can potentially compete with domain name administration services, the entirely different scale of the operations

---

676 *See* Concesion No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, Art. 1 **[C-0052]**; Amendment No. 1 to Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 4 May 2021, Art. 2 **[C-0053]**.

677 Reply, para. 330.

678 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 175 **[CL-067]**.

679 *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, paras. 529 – 532 **[RL-186]** ("*The Tribunal finds that the comparator is not in a situation similar to that of Claimant: - Hill is a consultancy, which was owed moneys by an agency of the Libyan Government, and which eventually managed to collect roughly 10% of the balance, while - Cengiz is a construction company (not a consultancy), and its case is that HIB is delaying or obstructing resumption of two construction Projects (while Hill's situation relates to its inability to collect a debt owed by the Libyan Government). Third, Claimant also refers to TML, a Turkish company that was able to complete its project with the port authorities in Libya worth LYD 100 M. The Tribunal is unconvinced, for two reasons: - First, the evidence marshalled by Claimant is shaky; - But even if arguendo Claimant's case is accepted, the situation of a company constructing a port is materially different from that in charge of urban development in certain villages and towns of the Southern Region - TML is not a valid comparator*.").

680 *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 153 **[CL-060]** ("*According to Claimant, both are competitors in the same economic sector since they have been competing to invest and operate the railroad and in leasing and developing the railroad's assets. Claimant supports this statement by citing the fact that Mr. Campollo has certain interests in the sugar industry in the Dominican Republic, and operates a railroad there purely for the transportation of the produce of his estate. In the Tribunal's view, the obvious difference in scale between the railroad for the exclusive exploitation of the sugar plantation of Mr. Campollo in the Dominican Republic and the railway operation of Claimant in Guatemala defeats the "like circumstances" argument.*").

(television and radio broadcasting being at a national or regional level as seen above, while the domain name's reach is global) excludes the possibility that Claimant and its alleged comparators be considered as competitors, and therefore in like circumstances.

290. *Additionally*, as already explained in the Counter-Memorial, the regulatory framework of the .co domain in which .CO Internet operates is substantially different from that of the alleged comparators. In particular:

- On the one hand, the .co domain is subject to a specific regulatory framework which is distinct from that of other telecommunications services due to its uniqueness: this is why a specific law was passed with respect to the .co domain, Law 1065 of 2006,[681] completed by a series of resolutions which also specifically govern the .co domain;[682]

- On the other hand, while television and radio broadcasting services are also under the ultimate responsibility of MinTIC, they are regulated by other specific sectorial laws and regulations including for instance Law 182 of 2005 for the television sector.[683] A cursory examination of this regulatory framework reveals significant differences with that of the .co domain: for instance, television and radio broadcasting activities take place through the use of the 'electromagnetic spectrum' (which is the ultimate telecommunications network and infrastructure for these services), while the .co domain is both a self-standing infrastructure and communication medium.[684] It should also be noted that television broadcasting services are subject to the control and administration of a specific entity, namely the National Television Commission (which is the counterparty of the concessionaires under the contracts cited by Claimant, not MinTIC as is the case with the 2009 Contract).[685]

291. In an attempt to circumvent this reality, and rather than addressing the above differences which were already set out in Respondent's Counter-Memorial,[686] Claimant argues that Respondent's argument that the renewal of the 2009 Concession would have "*created unnecessary risk regarding the compliance with the legal framework for the administrative function and contractual activity of the State*" places the .co domain legal regime in the same framework as that of the alleged comparators.[687]

---

681 Law 1065 of 29 July 2006 **[C-0009]**.

682 *See, inter alia*, Resolution 284 of 21 February 2008 (original version) **[R-0001]**; Resolution 1652 of 30 July 2008 (original version) **[R-0025]**. *See also*, Law 1341 of 30 July 2009, Art. 18, para. 20 **[C-0013]**.

683 Law 182 of 20 January 1995, Arts. 48, 50 **[R-0087]**. For radio broadcasting, it should be noted that Law 1341 of 2009, which was a framework law for MinTIC, provided for a specific regime. *See* Law 1341 of 30 July 2009, Arts. 2, 57, Title VIII **[C-0013]**.

684 Law 1341 of 30 July 2009 **[C-0013]**.

685 *See* Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Preamble **[C-0045]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Preamble **[C-0048]**.

686 Counter-Memorial, para. 420.

687 Reply, para. 333

292. This statement is absurd. The Colombian Constitution and its principles, referenced by Respondent, do not only apply to the .co domain and to the alleged competitors only, but to every person, entity, activity in Colombian territory, and the Colombian Constitutional Court and Council of State's rulings concerning the prohibition of automatic renewals apply in general to all public contracts.

293. Accepting Claimant's assertions would amount to admit that, because all of the public contracts are subject to general principles of constitutional and administrative law, including the aforementioned prohibition of automatic renewals, all these contracts are comparable to the 2009 Contract. This further attempt from Claimant to create confusion and avoid addressing the above differences in regime is clearly untenable.

294. *Finally*, it is important to note that prior tribunals have dismissed national treatment claims when, even if operating in the same business sector, contractual terms are too different to consider them similar or when the type of the investments between comparators is divergent.

295. For example, in the *Bayindir* case, on which Claimant relies, the claimant argued that the local contractor which had replaced the claimant in a contract for the construction of a motorway had received better terms and that, therefore, Pakistan had breached the national treatment standard under the treaty. The tribunal, after examining the terms and circumstances of both contracts, held that the two contractual relationships were too different to justify claimant being in "like circumstances" as the alleged local comparator, even when the project and its business sector were the same.[688]

296. In this case, Claimant has not even attempted to consider the contractual terms of the few contracts on which it relies. Yet, a cursory examination of these reveal important differences: for example, both the television and radio broadcasting concession contracts were for a fixed sum, while the 2009 Contract provides that a percentage of the proceeds from the administration and operation of the .co domain shall be paid to MinTIC.[689]

---

688 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 402, 411 **[CL-104]** ("*As a result, the Tribunal comes to the conclusion that the two contractual relationships are too different for Bayindir and the local contractors to be deemed in "similar situations." Consequently, the first requirement for a breach of the national treatment clause embodied in Article II(2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements*"). *See also*, B. Sabahi, N. Rubins and D. Wallace, *Investor-State Arbitration*, 'XVII. Discrimination: National Treatment, Most-Favoured Nation Treatment, and Discriminatory Impairment', Oxford University Press, 2nd ed. (2019), para. 17.19 **[RL-187]**.

689 *See* Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Art. 8 **[C-0048]**; Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 8 **[C-0045]**, Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, Art. 7 **[C-0052]**; Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A, Art. 6 **[C-0050]**; Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 5 **[C-0017]**; 2009 Terms of Reference (final version), Art. 5.2.3. **[C-0009]**.

297. In conclusion, Claimant has failed to demonstrate that any of the single factors relevant for assessing the existence of in like circumstances is met. Accordingly, its claims of discriminatory treatment under Articles 10.3 and 10.4 of the TPA should be rejected.

(c) Neustar was not afforded a "*less favorable treatment*" than its alleged comparators

298. Claimant's discrimination allegations are so frivolous that even if the operators cited by Neustar were considered valid comparators (which they should not be), the allegations would still fail. This is because Claimant has not even attempted to demonstrate that Neustar was treated differently based on its nationality (**i**), or that Neustar was afforded a less favorable treatment than that afforded to the alleged comparators (**ii**).

(i) *There was no nationality-based discrimination*

299. In response to Respondent's claim that that Neustar has failed to state a valid cause of action for discriminatory treatment, Claimant argues that Respondent is requiring Neustar to prove "*the mental state with which Colombia acted*" when purportedly discriminating against .co domain and Neustar.[690] This statement is however another example of Claimant's mischaracterization of Respondent's submissions and clearly diverges from what Respondent explained in its Counter-Memorial. What Respondent established is that the national and most-favored nation treatment obligations prohibit discrimination based on nationality and that Claimant has to demonstrate that the alleged differential treatment had something to do with nationality. This has been acknowledged by numerous authorities and awards which Claimant has conveniently preferred to ignore.[691] In fact, various Tribunals have rejected claims based on the MFN or national treatment standards in cases were nationality was not the cause of the alleged differential treatment. For example:

- In *Al Tamimi v. Oman*, the tribunal noted that ""*the **Claimant was targeted not because of his nationality** but because, rather than adhering to the terms of his permits, he 'decided to embark on a materially different operation outside the Jebel Wasa*";[692]

- In *Abed El Jaouni v. Lebanese Republic*, the Tribunal held that "*the underlying principle behind National or MFN Treatment is nationality based discrimination. […] In the Tribunal's view, if the host State provides satisfactory evidence that the alleged discrimination was*

---

690 Reply, para. 337.

691 Counter-Memorial, para. 425-435. *See also* A. Reinisch, *Standards of Investment Protection*, Oxford University Press (2008) pp. 29-30 **[RL-160]**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 16 June 2003, para. 139 **[CL-047]** ("*We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial*.").

692 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 , para. 467 **[RL-097]** (emphasis added).

> ***not due to nationality reasons, then a claim for breach of the National or MFN Treatment Standard will not be maintainable***."[693]

- In *Total v. Argentina*, in a passage carefully omitted by the Claimant, the tribunal concluded that "*as to the differential treatment of different sectors of Argentina's economy (even if an inter-sector comparison would be admissible),* ***Total failed to prove that such differential treatment was nationality-based***."[694]

300. Contrary to the Claimants insinuations, this is also the view of the United States according to which the TPA at stake in the present proceedings was only intended to protect against differentiated treatment when the differences are based on nationality:

> *Article 10.3 is intended to prevent discrimination* ***on the basis of nationality*** *between domestic investors (or investments) and investors (or investments) of the other Party, that are in "like circumstances".* ***It is not entitled to prohibit all differential treatment among investors or investments.*** *Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently* ***based on nationality****.*[695]

301. Accordingly, and as already demonstrated in the Counter-Memorial, while a claimant might not be required to establish a specific discriminatory intent, it must prove that the alleged discriminatory treatment had a nexus to its nationality, whether "*on the face*" of the measure or because of its "*practical effect*", as put by the tribunal in *S.D Myers* v. *Canada*.[696]

302. As of today, Respondent has not even attempted to demonstrate that it suffered a differential treatment based on its nationality nor how it would have received another treatment had it been Colombian or from a different nationality to its own. In fact, Claimant has failed to establish that any of the telecoms sector comparators to which it refers are foreign investors or companies. Rather, it would appear that all of the parties to these concessions were Colombian nationals or companies,[697] thereby depriving entirely Claimant's claim under the Most-Favored Nation standard of any substance. This blatant failure is unsurprising as the record shows that Neustar's nationality had nothing to do with Colombia's decision not to renew the 2009 Contract, which as per the Advisory Committee's recommendation of 18 March 2019 was entirely based on the change of conditions on the domain name market and the potential legal risks associated stemming from a renewal with a modification the financial terms of the 2009 Contract.[698] Moreover, as explained at

---

693 *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018, para. 926 **[RL-188]** (emphasis added).

694 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 215 **[RL-111]** (emphasis added).

695 Submission of the United States of America as Non-Disputing Party, 13 May 2022, para. 15.

696 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 252 **[CL-032]**.

697 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Preamble **[C-0045]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Preamble **[C-0048]**; Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., Preamble **[C-0050]**; Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, Preamble **[C-0052]**.

698 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

length in the Counter-Memorial and above, Claimant has entirely failed to prove its extraordinary theory that MinTIC's decision was due to an attempt to 'install' another registry operator, Afilias. The record in fact evidences that .CO Internet and Neustar were invited to participate in the 2020 Tender process, they won this tender and were awarded the 2020 Contract thereby showing that there was absolutely not discrimination against Neustar, based on its nationality or otherwise. Claimant's allegations can therefore be rejected on this ground alone.

(ii) *Claimant has failed to prove a detrimental difference in treatment between Neustar and its alleged comparators*

303. In any event, Claimant has failed entirely to prove a detrimental difference in treatment with its alleged comparators.

304. *First*, Respondent has explained in the Counter-Memorial that the concessions cited by Neustar as comparators in fact included vastly different contractual language, in particular regarding the possibility of renewal.[699] In its Reply, Claimant simply omits this point, parroting that "*[o]ther companies in .CO Internet's and Neustar's position with the same underlying contract received such better treatment*" as MinTIC negotiated with them for a renewal and ultimately concluded such renewal.[700] However, as seen above, this was certainly not the case: the radio and television broadcasting concessions cited to by Claimant all were for a fixed sum, and included different language regarding renewal, and the renewals were concluded in a very different context to that of the .co domain decision.

305. In order to overcome its failure to address these clear differences, Claimant falls back on familiar refrain that Respondent's actions were "*pretextual*", that its concerns about (i) compliance with its own constitutional and administrative law principles and (ii) obtaining better economic terms for MinTIC cannot have been the real reason for its decision.[701] Respondent has addressed these allegations at length above: the evidentiary record plainly contradicts Claimant's assertions, and instead confirms that these concerns were front and centre of Colombia's considerations when deciding on whether to renew the 2009 Contract.[702] Claimant's allegations should, here again, be dismissed.

306. *Second*, as explained above, apt comparators for Neustar in the present case would have been other companies interested in the operation of the .co domain. If we refer to these more apt comparators, it is hard to understand how such differential treatment could have taken place when Neustar and .CO Internet were in fact given the full opportunity to participate in the transparent 2020 Tender Process, which they ultimately won. This is all the more where Neustar and .CO Internet had accepted from the outset of the communications with MinTIC regarding renewal that

---

699 Counter-Memorial, para. 439.
700 Reply, para. 344. *See also*, para. 347.
701 Reply, para. 347.
702 *See* paras. 208-222 *supra*.

a renegotiation of the economic terms of the 2009 Contract would be necessary.[703] Against this backdrop, Claimant cannot claim that it was discriminated against with respect to the rightful comparators it should have referred to, i.e. other companies seeking to operate the .co domain (both Colombian and international, such as Consorcio Dotco and Nominet UK), when it actually prevailed over these in the 2020 Tender Process.

307. Here again, Claimant fails to provide an adequate answer in its Reply and instead points to the fact that "*Respondent lacked a good faith basis to ask for more compensation in July 2018 when it first raised its request.*"[704] As also explained above, this is contradicted by the facts:

- A cursory examination of the July 2018 Report reveals that it was already supported with robust (albeit incomplete) analysis and insights as to the inadequacy of the economic terms of the 2009 Contract;[705]

- Claimant entirely fails to prove that it was aware of the July 2018 Report and/or that it was "*coerced*" when it first contacted MinTIC in September 2018 to request a renewal of the 2009 Contract and acknowledged that it was "*conscious of the dynamism of the industry and that a renewal of the contract would entail working on a restructuration of the compensation package, where in addition to revising the formula and calculation value of the same, it would also be possible to discuss other mechanisms that, taken together, would improve the contribution of the .co ccTLD to the digital transformation efforts in Colombia.*"[706]

- In any event, Claimant's allegations of a lack of good faith by Respondent, which are raised for the first time in its Reply, are entirely unsubstantiated and disregard the fact that bad faith cannot be presumed. They are no more than a last minute attempt which should be given no weight by the Tribunal.

308. In light of the above, Claimant's assertion (raised for the first time) that "*.CO Internet never should have been subjected to a material alteration of financial terms as the July 2018 Report demanded. That the July 2018 Report so demanded is outright discriminatory*" is not only nonsensical (it is unclear how a confidential MinTIC report meant for internal purposes could be "*outright discriminatory*") but also untrue. Claimant accordingly entirely fails to prove that it was treated in a less favourable manner than its alleged comparators.

---

703 Counter-Memorial, para. 441.
704 Reply, para. 350.
705 *See* paras. 202-207 *supra*.
706 Communication from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.

(d) **If any, the alleged less favorable treatment was justified by public policy objectives**

309. Claimant's allegations are so frivolous that even if there had been a discriminatory treatment (*quod non*), they would still fail as the MinTIC's decision not to renew the 2009 Contract was justified by public policy objectives. As explained in the Counter-Memorial and confirmed by Respondent's witnesses, including chiefly Ms. Constaín who was in charge of steering Respondent's policy in the telecommunications sector during the relevant time-period, MinTIC's objectives were threefold:[707]

- Obtaining an increase in MinTIC's share of proceeds from the operation of the .co domain, in order to foster Colombia's digital policies and increase connectivity in remote areas. As explained in the Counter-Memorial, it was apparent since at least the July 2018 Report that the share of proceeds received by Colombia under the 2009 Contract was particularly low and that an increase of this share was necessary .[708] While the July 2018 Report indicated that such an increase in Colombia's share of proceeds could be achieved through either a renegotiation of the 2009 Contract or a new tender process at the expiry of such contract's 10-year term, it recommended proceeding with a new tender process. This was confirmed by Colombia's ulterior investigations.[709] As part of the document production phase, Colombia notably disclosed additional documents prepared by MinTIC's external assessors (in cooperation with both MinTIC's internal team and the ITU experts) that it has been able to locate.[710] These evidence that Colombia's .co domain team was carrying detailed investigations in the months leading up to the Advisory Committee's ultimate recommendation not to renew the 2009 Contract on 18 March 2019.[711]

- Ensuring that the conditions of operation of the .co domain would be in line with international best practices. As explained at length in the Counter-Memorial and as confirmed by numerous insights Colombia obtained in the context of the decision-making on the 2009 Contract (including the ITU Report[712]), the domain name industry had evolved significantly over the 10-year term of the 2009 Contract, and .co domain itself had evolved and grown in importance since 2009.[713] As such, it was necessary to adapt the conditions of operation

---

707 Counter-Memorial, paras. 447-453; First Witness Statement of Sylvia Constaín, paras. 8-11 **[RWS-01]**.

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

709 Counter-Memorial, Sections 2.5(a), (c) and (e).

710 *See* Viveka Consultors, Lucas Quevedo Barrero, Orlando Garcés (GACOF), *Final Report Valuation of .co Domain*, September 2018 **[R-0088]** (disclosed as HLI01); A. Arcila, *Market analysis to ascertain the opportunity of either initiating a new tender process or renew the current concession contract for the .co domain*, March 2019 **[R-0089]** (disclosed as HLI07); A. Arcila, *Presentation to the Advisory Committee on the .co ccTLD policy*, March 2019 **[R-0090]** (disclosed as HLI08); Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]**.

711 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

712 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**. *See* Counter-Memorial, Section 2.5(a).

713 For instance, the ITU recommended that Colombia increase its participation in the different ICANN bodies, "*not only in order to make sure that* [MinTIC] *is aware of what is happening in the industry, but also so that* [MinTIC] *be able to take an active role when necessary to defend its interests or prevent undesirable events.*" *See* ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Sections 1-3 **[C-0067]**.

of the .co domain to align these with international best practices, as the ITU later confirmed.[714] These conclusions are also memorialized in *inter alia* the Advisory Committee's ultimate recommendation not to renew the 2009 Contract of 18 March 2019.[715]

- Ensuring that the decision on the .co domain would be compliant with fundamental Colombian constitutional and administrative law principles. As explained at length in the Counter-Memorial and at paragraphs 201-207 *supra.*,[716] it was clear to both MinTIC and .CO Internet from the outset that any renewal of the 2009 Contract would entail a substantial modification of its financial terms no longer in line with market conditions.[717] However, a direct renewal (without public tender) with such a modification of the financial terms would have vulnerated principles of equal opportunity and transparency. This risk was similarly memorialized in *inter alia* the Advisory Committee's ultimate recommendation not to renew the 2009 Contract of 18 March 2019..[718]

310. In face of this indisputable evidence, Claimant does not appear to dispute that there could have been a legitimate public policy reason for MinTIC's objective to increase the State's share of proceeds or ensure compliance with the rule of law.[719] Rather, Claimant argues that the true reasons for MinTIC's decision were unrelated to these objectives.

311. As such, and while this is unclear from Claimant's Reply which does not address the applicable legal standards, it would seem that Claimant submits that Respondent's decision did not bear an appropriate correlation to the targeted objectives.[720] As explained time and time again, it bears noting that Respondent simply had a *contractual right* not to renew the 2009 Contract. In any event, Claimant's baseless speculations nevertheless do nothing to disprove the clear nexus between Respondent's objectives, rationale, and decision with respect to the .co domain:

- As explained at length at paragraphs 201-202 *supra*, Claimant's contention that the legal risks identified by MinTIC are nothing more than a "*post-hoc rationalization*" of its decision is disproved by the evidence on the record, which shows that MinTIC considered these risks since July 2018;

- As explained at length at paragraphs 203-204 *supra*, Claimant's reliance on MinTIC's alleged delay in taking a decision on the .co domain due to the 2018 presidential elections

---

714 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

715 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

716 First Witness Statement of Mr. Iván Darío Castaño Pérez, paras. 16-24 **[RWS-02]**; First Witness Statement of Ms. Luisa Fernanda Trujillo Bernal, para. 10 **[RWS-03]**.

717 Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.

718 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

719 Reply, paras. 353-354.

720 As recognized by several tribunals, this is the criterion by which a State's claims to be acting in support of a public policy objective should be assessed. *See, for instance*: *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 78 **[RL-113]**.

is nothing more than a red herring which relies on an utter mischaracterization of Respondent's submissions: Respondent has not contended that it stayed a decision in late 2017 or early 2018 due to elections. It should be noted that at the time MinTIC prepared the July 2018 Report, there were more than 18 months outstanding under the initial term of the 2009 Contract (which was set to expire on 6 February 2020).[721] Further, as can be seen from the text of the July 2018 Report itself, the goal of that report was to provide the new government with as complete of a picture of the .co domain situation as possible, to ensure that no useful information (and past work) would be lost during the transition between governments. This goal, far from 'revealed' in Respondent's Counter-Memorial, is set out plainly in the introduction to the July 2018 Report:

> *El presente documento ha sido construido con la finalidad de servir como* ***documento de recomendación para el nuevo Gobierno****, de tal manera que podrá ver en el mismo un panorama completo de la situación actual y proyecciones a futuro del dominio .co, tanto a nivel financiero como legal y operativo. Lo anterior con el ánimo que pueda* ***tomar sus propias decisiones en cuanto al futuro del dominio colombiano de manera informada y partir del análisis de datos reales y contrastados.***[722]

312. Claimant's allegations that Respondent could not truly have wished to increase its share of proceeds because it took the decision not to renew only weeks after receiving research on the issue is nonsensical:

- Respondent has documented in detail each of the steps it took towards reaching a decision on the .co domain and then implementing the ensuing 2020 Tender Process. Despite the irrelevance of Claimant's arguments in light of the clear language of Article 4 of the 2009 Contract, Respondent has nonetheless responded and clearly demonstrated that its decision was in fact based on the informative results of the analysis which it had undertaken;

- As explained above, Respondent has produced additional documentation during the document production phase responsive to Claimant's requests and further evidencing that it did carry out all necessary research in the lead up to its decision not to renew the 2009 Contract (which Claimant conveniently did not produce). Notably, Respondent exhibits with its Rejoinder additional research memorandums prepared by MinTIC's external advisors in the lead up to this decision which confirm the account of events of Respondent's witnesses.[723]

---

721 Contract 19 of 3 September 2009, Art. 4 **[C-0017]**; Counter-Memorial, para. 70.

722 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]**.

723 *See* A. Arcila, *Market analysis to ascertain the opportunity of either initiating a new tender process or renew the current concession contract for the .co domain*, March 2019 **[R-0089]** (disclosed as HLI07); A. Arcila, *Presentation to the Advisory Committee on the .co ccTLD policy*, March 2019 **[R-0090]** (disclosed as HLI08); Respondent's Privilege Log with respect to Claimant's Requests No. 11 and 12 of 10 June 2022 **[R-0091]** (while Respondent does not waive

313. The speculative nature of Claimant's arguments throughout this case is highlighted in its very Reply, when it states that "*[h]ad Respondent held such a desire [to increase its share of proceeds from the operation of the .co domain], it would have put in place the structures to receive advice on [the .co domain] in 2017 or 2018 at the latest. Respondent refused to do so.*"[724] Whilst Claimant has failed entirely to offer any proof of its fanciful allegations of corruption and schemes by MinTIC to exclude it while installing Afilias, Respondent has submitted an abundance of evidence putting Claimant's speculations to lie. It is therefore abundantly clear that Colombia's decision not to renew the 2009 Contract (which as a reminder ultimately resulted in the execution of the 2020 Contract under which MinTIC increased its share of proceeds from 7% to *81%*) was taken for a legitimate public policy objective.

3.3 Claimant's claim that Colombia breached its obligation to protect business confidential information is unsubstantiated and untenable

314. In its Reply, Claimant further mischaracterizes the Parties' submissions by claiming that Respondent has failed to address its claim under Article 10.14 of the TPA regarding the protection of confidential of business information and has thus acquiesced to Neustar's submissions on this issue.[725] Incredibly, it also argues that to the extent Respondent would be planning to ambush it by addressing for the first time any argument in respect to these standards it should be prevented from doing so.[726]

315. A cursory review of the Parties' submissions suffices however to demonstrate that these assertions are untenable. If there is one party that has failed to bring any arguments under Article 10.14 of the TPA, it is Claimant itself. There is no dedicated section in Claimant's Memorial addressing this question. The only (brief) reference to Article 10.14 of the TPA can be found at paragraphs 264 and 265 of the Memorial where Claimant asserts, in an *ipse dixit* statement that "*Respondent violated the terms of Article 10.14*" with no explanation (let alone a substantiation) in support of this allegation. Accordingly, and contrary to Claimant's false suggestions that Respondent did not address this point, Respondent noted in its Counter-Memorial that these allegations were bound to fail due to their lack of substantiation:

> *Neustar also claims that even if Respondent has not violated this Articles, Respondent would still be in in breach of its obligation to protect confidential business information under Article 10.14 and 10.14(2) of the TPA. However, Claimant has not even attempted to demonstrate this allegation nor provided any explanation. Therefore, this is also bound to fail.*[727]

---

privilege it notes that two of the documents "*analyzing legal risks associated with renewing the 2009 Concession*" and "*recommending to initiate a new tender process*" are dated March 2019, that is before MinTIC formalized the decision not to renew the 2009 Contract.

724 Reply, para. 354.

725 Reply, para. 356.

726 Reply, para. 357.

727 Counter-Memorial, para. 454, fn. 693.

316. In the new section dedicated to this issue in its Reply, Claimant has also failed to provide any explanation as to why it considered that this standard has been breached, something which only confirms the hollowness of this claim which should be rejected expeditiously.[728]

3.4 Claimants' attempts to override the TPA and rely on Article 4(1) of the Swiss-Colombia BIT should be rejected

317. Being well aware of the multiple flaws of its claims, Claimant persists in seeking to override the TPA and rely on another treaty which "is broader". More specifically, it attempts to rely on Article 4(1) of the Swiss Colombia BIT prohibiting "unreasonable measures" on the contention that it would be applicable by operation of the MFN clause of the TPA. Claimant's allegations remain however largely unconvincing and entirely unavailing: not only is Claimant unable to import Article 4(1) of the Swiss-Colombia BIT to try and broaden the scope of Article 10.5 of the TPA, but in any event its allegations that Respondent adopted "*unreasonable measures*" in relation to its decision not to renew the 2009 Contract are entirely unsubstantiated and fare no better than Claimant's allegations of breach of Article 10.5 of the TPA.

318. *First*, as already demonstrated in the Counter-Memorial, Claimant's attempt to override the minimum standard of treatment prescribed by the TPA through the MFN clause would be contrary to the wording of the TPA. Article 10.5 of the TPA expressly provides that the Fair and Equitable treatment standard under the TPA "*does not require treatment in addition to or beyond that which is required by [the minimum standard of treatment]*." Accordingly, it would be contrary to this limitation (which the Claimant does not dispute), to apply a broader standard under another treaty. Tellingly, Claimant has been unable to refute this point.

319. *Second*, Claimant's allegation that Respondent's reliance on the intent of the Parties is contrary to the VCLT is absurd and misleading[729]. In its Counter-Memorial Respondent noted that the parties to the TPA could not have intended to expand the FET standard by operation of the MFN clause (as suggested by Claimant) in light of their explicit intention to limit the scope of the FET in Article 10.5 of the TPA.[730] This would be contrary to Article 31 of the VCLT, which prescribes that the provisions of a treaty have to be interpreted in good faith and in accordance with the text of that treaty (that interpretation being in accordance with "*the ordinary meaning to be given to the terms*") which is the authentic expression of the parties' intentions.[731] As in the present case, the parties expressly limited the scope of the FET standard under Article 10.5 of the TPA, and any attempts to override this limitation should be rejected.

---

728 As Claimant has not sought to substantiate or explain its claims up until its last scheduled submission in the written phase of the proceedings, and Respondent has not been able to consider it in any manner, it is Claimant should be prevented from developing this claim for the first time at a later stage.

729 Reply, para. 362

730 Counter-Memorial, para. 457.

731 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, para. 79 **[CL-004]** ("*[t]he common intention of the Parties is reflected in this clear text that the Tribunal has to apply.*").

320. *Third*, Claimant omits that the United States have repeatedly emphasized that the application of the Most-Favored Nation is conditioned on the existence of an identified "*treatment*", and that the sole existence of other treaty provisions is not constitutive of treatment accorded by a Party. In the words of the United States in *Latam Hydro v. Peru*:

> *If the Claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, the Claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment,* ***as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party****. Moreover,* ***a Party does not accord treatment through the mere existence of provisions in its international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards****. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.*[732]

321. It therefore appears that the Article 10.5 of the TPA is "*not a choice-of law clause*", and cannot alter the scope of the fair and equitable treatment standard.[733] The United States once more confirmed as much in *Gramercy v. Peru*:

> ***Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice.*** *As noted in the submissions on Article 10.5 above, Article 10.5.2 clarifies that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*[734]

322. The above confirms that Claimant may not rely on Article 10.4 of the TPA to seek and expand the scope of the fair and equitable treatment obligation under Article 10.5 through the importation of the prohibition against unreasonable measures at Article 4(1) of the Swiss-Colombia BIT.

323. *Fourth*, in any event Claimant's allegations that Colombia acted unreasonably have no factual basis as explained at large in Respondent's submissions and amply disproved by the record. For the sake of efficiency, Respondent also incorporates the arguments set out at Section 3.1(b) by reference. It follows that even assuming that the express limitations of Article 10.5 of the TPA could

---

732 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021, para. 42 **[RL-189]**.

733 *Legacy Vulcan LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Submission of the United States of America as Non-Disputing Party, 7 June 2021, para. 18 **[RL-190]**.

734 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America as Non-Disputing Party, 21 June 2019, para. 57 **[RL-079]**.

(*quod non*) somehow be overridden by Article 4(1) of the Swiss Colombia BIT, Claimant's allegations would still blatantly fail.

4. RELIEF REQUESTED

324. For the reasons set out above, Respondent hereby respectfully requests that the Tribunal:

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

Respectfully submitted,

4 November 2022

Hogan Lovells

Agencia Nacional de Defensa Jurídica del Estado

Ana María Ordoñez Puentes
Elizabeth Prado López

Hogan Lovells

Laurent Gouiffès
Daniel E. González
Melissa Ordoñez
Juliana De Valdenebro Garrido
Lucas Aubry