INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

VERCARA, LLC (FORMERLY SECURITY SERVICES, LLC, FORMERLY NEUSTAR, INC.)

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/20/7)

CLAIMANT'S POST-HEARING BRIEF
9 JUNE 2023

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GLOSSARY OF TERMS

Term	Definition
Bill of Sale	Assignment and Assumption and Bill of Sale (1 December 2021) [**CONFIDENTIAL**], **Exh. C-0143**
CCAP	Colombian Code of Administrative Procedure, **Exh. C-0113**
CD-1	Claimant's Opening Presentation at the Hearing (27 March 2023)
CD-2	Claimant's Closing Presentation at the Hearing (29 March 2023)
Cl.	Claimant
Counter-Mem.	Respondent's Counter-Memorial on Jurisdiction and the Merits (25 February 2022)
GoDaddy UPA	Unit Purchase Agreement between Neustar, Inc. as Seller, and GoDaddy Inc. as Buyer dated as of April 3, 2020, **Exh. C-0126**
Hearing	Hearing on Jurisdiction and the Merits, held 27-29 March 2023
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Mem.	Claimant's Memorial on Jurisdiction and the Merits (22 October 2021)
Neustar UPA	Agreement among Neustar, Inc., Aerial Security Intermediate, LLC, Aerial Blocker Corp., and Security Services LLC, dated 1 December 2021, **Exhs. C-0136** and **C-0140**
NOI	Notice of Intent
RD-1	Respondent's Opening Presentation at the Hearing (27 March 2023)
RD-2	Respondent's Closing Presentation at the Hearing (29 March 2023)
Rej.	Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022)
Rep.	Claimant's Reply Memorial on Jurisdiction and the Merits (29 July 2022)
Resp.	Respondent
RFA	Claimant's Request for Arbitration (23 December 2019)
SCC	Stockholm Chamber of Commerce

SFC App.	Respondent's Application for Security for Costs (19 April 2023)
SFC Resp.	Claimant's Response to the Respondent's Application for Security for Costs and Comments on Applicable Law (10 May 2023)
SFC Rep.	Respondent's Reply on Security for Costs and Comments Relating to Applicable Law on Jurisdiction (26 May 2023)
SFC Rej.	Claimant's Rejoinder to Respondent's Reply on its Application for Security for Costs and Comments Relating to Applicable Law on Jurisdiction (2 June 2023)
Swiss-Colombia BIT	Colombia-Swiss Agreement on the Promotion and Reciprocal Protection of Investments, **CL-0083**
TOR	Terms of Reference
TPA	Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America
Tr.	Transcript. All transcript references are to the final English transcripts, circulated on 7 May 2023. "Day 1" refers to 27 March 2023; "Day 2" refers to 28 March 2023; and "Day 3" refers to 29 March 2023
Tribunal Question No. X	Individual questions posed by the Tribunal on 28 March 2023, where "X" indicates the question number
Trigger Letter	Letter from .CO Internet to Ministry of Commerce and MINTIC (7 June 2019), **Exh. R-0006**
UNCITRAL	United Nations Commission on International Trade Law
US-NDP	Non-Disputing Party Submission of the United States of America (13 May 2022)

I. INTRODUCTION AND OVERARCHING ISSUES

1. The Respondent's approach to this arbitration has been one of bluster. It has continually sought to sow confusion as to the facts, the merits of the claim, and this Tribunal's jurisdiction, often in needlessly inflammatory terms. This post-hearing brief provides a framework for the Tribunal to navigate through the Respondent's hyperbole, to resolve this dispute on an issue-by-issue basis, in light of the evidence on the record, with extensive citations to that evidence. Part II addresses the Respondent's jurisdictional objections, while Part III addresses the Respondent's breaches of the TPA.

2. As an initial matter, however, the Claimant makes three general observations.

3. *First*, the Respondent has repeatedly asserted that the Claimant has "no evidence" in support of its case.[1] It is wrong. The Claimant has submitted 158 factual exhibits in support of its claims, including: communications with the Respondent; examples of comparator concessions; government legislation; government-drafted reports and meeting minutes; third-party reports as to the actions taken by the Respondent; and documents evidencing the Claimant's business operations. (By contrast, the Respondent has submitted just over 90 factual exhibits, many of which are repetitive of the Claimant's submissions.[2]) On this basis alone, the Respondent's broad assertion that the Claimant has not submitted evidence in support of its case is false.

4. *Second*, and related, the Respondent has continuously criticized the Claimant for not putting forward witnesses of fact prior to its SFC Resp.[3] That criticism is unfounded. To repeat, the Claimant has submitted a significant volume of contemporaneous documents reflecting the facts as they occurred. The best evidence rule supports this approach; the original documents are superior to the recollections, years later, of the Respondent's witnesses, particularly because they are inherently biased given their government positions, hold very limited background information as to the issues in question, were not in their government positions during much of the relevant time period, are not supported by documentary evidence of the factual allegations made,[4] and have been drafted long after

[1] *See* **RD-1**, Slides 46, 51, 56, 58, 65, 70, 80.
[2] *See*, *e.g.*, and not limited to: **Exhs. C-11** and **R-1**; **C-8** and **R-20**; **C-10** and **R-25**; **C-35** and **R-34**; **C-41** and **R-39**.
[3] *See*, *e.g.*, Tr. Day 1, pp. 128: 12-13; 129: 11-14; 136: 12-15; 137: 16-17; 155: 24-25; 159: 23 to 160: 13, 162: 11-19 (Resp. Opening).
[4] *See*, *e.g.*, **RWS-1**, paras. 9, 10, 13-15, 18-19, 23-25, 31-33; **RWS-2**, paras. 5-7, 9-10, 13-15, 19-25, 33-36; **RWS-3**, paras. 8-9, 11-18, 21.

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the event and in order to support the Respondent's defence.[5] In circumstances where the contemporaneous documents suffice to prove its case, the Claimant cannot be criticized for submitting such evidence instead of witness statements.

5. *Third*, the Claimant notes that there is no disagreement as to the significance of the Claimant's investment in Colombia, or its substantial efforts to grow the .CO domain.[6] Nor is there any dispute that these efforts resulted in the enormous success of the .CO domain under the Claimant's tenure, jumping from under 28,000 domains to nearly 2.3 million domains in nearly 200 countries.[7] While the Respondent repeatedly refers to the Claimant "gorging" on "scandalous" profits,[8] the Respondent itself put the relevant financial model in place through its legislation as well as the terms of the Concession.[9] By its own account, the Respondent received over USD 12 million during the course of the 2009 Concession,[10] simply for having the good fortune of being allocated the .CO domain by IANA. The Respondent did not contribute—financially or otherwise—to the development of the .CO domain, and happily profited from the Claimant's efforts, all the while praising the Claimant for providing a "trustworthy, secure and stable" domain.[11] It is only once a new political party came into power in Colombia that the Respondent departed from its ordinary processes, in favour of politically motivated actions against the Claimant, calculated to deprive the Claimant of the fruits of its endeavours.

II. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

Issue 1. Has the Respondent demonstrated that the Claimant made a "definitive forum selection" in requesting interim measures under Article 10.18 of the TPA?

6. No.[12] Both the TPA and the ICSID Convention expressly permit domestic actions aimed at obtaining interim relief to preserve a parties' rights and interests.[13]

7. There is no dispute that the nature of the available relief, and the standard for granting such relief, is determined by the domestic law of the Respondent.[14] The CCAP is the relevant

[5] *See*, *e.g.*, Tr. Day 1, p. 16: 19-14 (Cl. Opening), p. 212: 22-25 (Castaño); Day 2, pp. 315: 11-14, 328-329, 357: 10-12 (Constaín), p. 359: 7-21, p. 373: 1-25 (Trujillo).
[6] *See* Mem., paras. 54-64; Counter-Mem., paras. 5, 10; **CD-1**, Slides 20-26.
[7] *See* Mem., paras. 4, 60; Counter-Mem., para. 64; **Exhs. C-24**, **C-120**.
[8] *See*, *e.g.*, Counter-Mem., para. 29; Tr. Day 1, p. 103: 5-6; 110: 21-25 to 111:1-3, 115: 23-25 (Resp. Opening).
[9] *See*, *e.g.*, Counter-Mem., paras. 42-63; **Exhs. R-1**, **R-23**, **R-25**, **R-36**, **C-9**, **C-13**, **C-14**.
[10] *See*, *e.g.*, Counter-Mem., para. 158.
[11] Mem., para. 64, **Exh. C-25**.
[12] *See* Rep., Sec. II.A; **CD-1**, Slides 83-102; Tr. Day 1, pp. 56-63 (Cl. Opening).
[13] *See* **CD-1**, Slides 84-85.
[14] *See* TPA, Art. 10.18(3); US-NDP, n. 17; **CD-1**, Slide 86; Tr. Day 1, p. 57: 5-10 (Cl. Opening).

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domestic law here, and sets out the content and scope of permissible precautionary measures.[15] The Claimant requested "urgent precautionary measures" pursuant to this Code "while the arbitration under the FTA is pending and until a decision is taken on the merits", including to "preserve the concession until the end of the international investment dispute, so as not to render meaningless the enforcement of a favourable award."[16]

8. The Respondent has asserted that one of the requests—to formalize the extension of the Concession—means that it was not truly a request for "interim measures".[17] This is wrong.[18] *First*, all of the requested measures fell within the scope of Article 230 of the CCAP ("Precautionary Measures"). This provision expressly allows the court to order the adoption of an administrative decision or impose obligations to take certain action (*i.e.*, the type of relief now disputed by the Respondent for purposes of this arbitration).[19] *Second*, interim measures ordered under the CCAP are not permanent, and may be revoked or modified at any time.[20] As such, it would not make sense for the Claimant to elect to use *interim* measures under the CCAP as a *final* means of relief. Not only is such claim inherently contradictory, but it is also defeated by the very nature of the CCAP. *Third*, the Claimant's rights would not have been effectively preserved if the Respondent were able to tender the Concession to a new entity during the pendency of the proceeding. Indeed, Ms. Trujillo herself confirmed the complexity of the tender process in Colombia.[21] Unwinding a concession tendered to another entity would be extremely difficult, perhaps impossible, once the merits of this dispute had been addressed.[22] *Fourth*, the Council of State's denial of the Claimant's request for provisional measures was based on procedural grounds,[23] not an independent review of the merits of the claims before this Tribunal.[24]

9. In any event, the request to formalize the Concession is separate from the claims in issue in these proceedings, which are for damages arising from a breach of Section A of the TPA.[25] Even if there had been recourse to local courts for a contract claim based on the

[15] *See* Rep., paras. 25-27; **Exh. C-113**, Arts. 230-231; **CD-1**, Slides 87-89.
[16] *See* **Exh. R-9**; **CD-1**, Slide 91.
[17] *See* **RD-1**, Slide 30; Tr. Day 1, p. 146: 3-16 (Resp. Opening).
[18] *See* **CD-2**, Slides 21-26; Tr. Day 3, p. 429: 6 to p. 432:17 (Cl. response to Tribunal Question No. 4).
[19] *See* Tr. Day 1, p. 58: 1-25 to p. 59: 1-18 (Cl. Opening); **CD-1**, Slides 87-93.
[20] *See* **Exh. C-113**, Art. 235; Tr. Day 3, p. 430: 16-19 (Cl. response to Tribunal Question No. 4); **CD-2**, Slide 25.
[21] *See* **RWS-2**, para. 17.
[22] *See* Rep., para. 77.
[23] *See* **Exhs. R-9**, pp. 9-11; **R-80**, p. 3, paras. 13-15; **CD-1**, Slides 94-97; Tr. Day 1, p. 60: 5-25 to 61: 1-17 (Cl. Opening).
[24] *See* **Exh. R-80**, paras. 40.1-40.4, 41; **CD-1**, Slide 98; **CD-2**, Slide 26.
[25] *See* TPA, Art. 10.16.1(a); Mem., para. 178; Rep., paras. 78-79; **CD-1**, Slides 99-100; **Exh. R-9**.

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Concession (*quod non*), this would not prevent the submission of treaty claims to arbitration under the TPA to seek relief for the Respondent's violation of international law.[26]

Issue 2. Has the Respondent demonstrated that the Claimant's waiver under Article 10.18 of the TPA was improperly formulated and executed?

10. No.[27] *First*, the Claimant's separate written waiver contained no formal defects, and was not limited or conditional in any way.[28] The waiver operated, as required under Article 10.18.2(b) of the TPA, to renounce the Claimant's rights to initiate claims before any tribunal or court in a domestic forum with respect to any proceeding concerning measures alleged to constitute a breach of the TPA.[29] In any event, the re-iterated waiver in the RFA was itself compliant with the formal waiver requirements under the TPA;[30] according to the Respondent's own legal authority, this alone is sufficient.[31]

11. *Second*, there are no material defects arising from the execution of the Claimant's written waiver. Requests for interim measures are permissible under Article 10.18.3 of the TPA, which provides a "carve-out" from the waiver requirement.[32] As with respect to Issue 1, the Council of State proceedings arose as a result of the Claimant's request for interim measures under the CCAP, and thus do not amount to a breach of the Claimant's waiver.[33]

Issue 3. Has the Respondent demonstrated that the Claimant failed to satisfy any preliminary requirements stipulated by the TPA?

12. No.[34] *First*, the Claimant's 36-page NOI complied with the requirements under Article 10.16(2) of the TPA.[35] The NOI was detailed, and provided Colombia with a sufficient framework for negotiation to enable settlement of the dispute (by its own account, the purpose of an NOI).[36] It is not appropriate to judge an NOI by a formalistic standard appropriate to later pleadings,[37] as the Respondent attempts to do.

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[26] *See* Mem., para. 271; Rep., para. 78-79; **CD-1**, Slides 101, 149-156.
[27] *See* Rep., Sec. II.B; **CD-1**, Slides 103-108; Tr. Day 1, pp. 63-66 (Cl. Opening).
[28] *Cf* **RL-21**, para. 58; **RL-133**, para. 230. *See* **CD-1**, Slides 106-107; Tr. Day 1, pp. 64: 21 to 65: 8 (Cl. Opening).
[29] *See* **Exh. C-7**; **CD-1**, Slides 104-105; Rep., paras. 54-57.
[30] *See* RFA, para. 118; Rep., paras. 58-59; **CD-1**, Slide 106.
[31] *See* **RL-133**, para. 224; **CD-1**, Slide 106; Tr. Day 1, p. 64: 4-20 (Cl. Opening).
[32] *See* US-NDP, para. 12, n. 17; **CD-1**, Slide 108.
[33] *See* Tr. Day 1, p. 65: 9-22 (Cl. Opening).
[34] *See* Rep., Sec. II.C; **CD-1**, Slides 109-125; Tr. Day 1, pp. 66-71 (Cl. Opening).
[35] *See* **Exh. C-4**; **CD-1**, Slide 112; Rep., paras. 102-113.
[36] *See* **RL-12**, para. 99; Counter-Mem., para. 211-212; **CD-1**, Slide 111.
[37] *See* **CL-23**, para. 325; **CD-1**, Slide 111.

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13. *Second*, the Respondent has no basis upon which to assert that the Claimant improperly excluded claims from its NOI. Article 10.16(4) of the TPA makes clear that the RFA is the relevant document for determining claims under the TPA, not the NOI. The RFA expressly included claims under the Swiss-Colombia BIT,[38] and provided the factual basis for claims under Article 10.14 of the TPA.[39] In any event, not only may additional claims be added after the filing of an RFA under Article 10.16(4) of the TPA,[40] but also ICSID Rule 40 would apply to subsequent claims relating to the same subject matter, as here.[41]

14. *Third*, the Respondent's position that no investment dispute had "crystallized" at the time the Claimant filed its NOI is unfounded. The Parties appear to agree that a "dispute" is a disagreement on a point of law and/or facts.[42] The Claimant communicated such a disagreement on 9 June 2019 in the Trigger Letter,[43] 13 September 2019 in its NOI,[44] and then again in its RFA on 23 December 2019. The Respondent initially ignored, and then—in a written response provided on 2 December 2019, just days before the expiry of the cooling-off period—contested the claims of, and position taken by, the Claimant.[45] This opposition (implicit and explicit) confirmed the existence of a dispute as early as June and September 2019, but certainly by the time the RFA was filed on 23 December 2019.

Issue 4. Has the Respondent demonstrated that the Claimant lacks standing to bring claims before the Tribunal due to the sale of .CO Internet to GoDaddy post-RFA?

15. No.[46] The Respondent's position that standing should be determined as of the date of the Claimant's Memorial on 21 October 2021 is unfounded. The Respondent has been unable to point to any legal authority in support of its position.[47] Further, it does not dispute that the Claimant was a protected investor under the TPA, with a protected investment, at the time it filed its RFA.[48] The Respondent's argument should thus be dismissed.

16. Moreover, events subsequent to the filing of an RFA—such as the sale of the Claimant's investment to GoDaddy months later—do not affect a tribunal's jurisdiction.[49] The

[38] *See* **Exh. C-4**, paras. 84-87 (via the TPA's MFN clause).
[39] *See* RFA, paras. 77-81; **CD-1**, Slide 118.
[40] *See* **CL-86**, paras. 194-195; **CD-1**, Slide 116. *See also* **CL-23**, para. 328; **CD-1**, Slide 119.
[41] *See* **CL-23**, para. 328; **CD-1**, Slide 119.
[42] *See* **CD-1**, Slide 121; **RL-3**, p. 5; **RL-7**, para. 96; **RL-83**, para. 239; **RL-9**, para. 6.
[43] *See* **Exh. R-6**; **CD-1**, Slide 122.
[44] *See* **Exh. C-4**; **CD-1**, Slide 123.
[45] *See* **Exh. R-81**; **CD-1**, Slide 124.
[46] *See* Rep., Sec. II.D; **CD-1**, Slides 126-132; Tr. Day 1, pp. 71-73 (Cl. Opening).
[47] This approach is consistent across international courts and tribunals, *see*: **CD-1**, Slide 128 (for ICSID: **RL-37**; **RL-41**, **RL-42**, **RL-43**, **RL-46**; for UNCITRAL: **RL-11**, **RL-36**; for SCC: **RL-45**; and for the ICJ: **RL-39**, **RL-40**, **RL-43**.
[48] *See* Rep., para. 128.
[49] *See* **CD-1**, Slide 130, citing **RL-41**, para. 31; **RL-44**, paras. 36-38; Tr. Day 1, p. 72: 9-25, p. 73: 1-12 (Cl. Opening).

Respondent has no answer to this point as a matter of law, but instead tries to assert that a dispute had not crystallized pre-RFA, that the RFA "excluded" claims, and that the Claimant subsequently modified its claims and arguments. As discussed at paragraphs 13 and 14 above, these arguments have no factual or legal basis.

Issue 5. Has the Respondent demonstrated that the Claimant engaged in an "abuse of process" in bringing these proceedings?

17. No.[50] The Respondent bears, and has not met, the high burden of proof to demonstrate an abuse of process,[51] giving rise to "very exceptional circumstances".[52]

18. *First*, the Respondent's assertion that the Claimant was trying to "gain jurisdiction"[53] under the TPA by perpetuating an alleged abuse of process is incoherent. Each of the Respondent's legal authorities in support of its proposition address circumstances where a claimant has restructured its corporate holdings to *gain* access to jurisdiction for an existing dispute.[54] By contrast, at the time the Claimant filed its RFA, it already held jurisdiction as a protected U.S. investor which had made significant investments in Colombia since 2009, and had been treated wrongfully by the Respondent. Put simply, there was no reason for the Claimant to "gain" a jurisdiction it already held.[55]

19. Even if there were any legal basis for the Respondent's position (*quod non*), the Respondent has also failed to provide any factual support for its accusations. Instead, its arguments rest on a series of propositions which are either contrary to the evidence on the record or based on nothing but the Respondent's speculation. For example, the Respondent's assertion that there was "no proof" that Registry Services LLC (and therefore, .CO Internet) was owned by the Claimant prior to its sale is disproved by the written terms of the GoDaddy UPA, which the Respondent has had since 10 June 2022.[56] Moreover, the Respondent's speculations as to the negotiations of the GoDaddy UPA, and the non-disclosure of the sale to the public until the deal was finalized, are also unsupported by evidence and are nonsensical from a commercial standpoint. It is common for large international transactions to be negotiated over lengthy periods of time, and such deals are signed

[50] *See* Rep., Sec. II.E; **CD-1**, Slides 139-148; Tr. Day 1, pp. 76-80 (Cl. Opening).
[51] *See* **CD-1**, Slide 144, citing **CL-115**, para. 6.9, **RL-139**, paras. 139, 143, **CL-116**, para. 395; **CL-117**, para. 115.
[52] *See* **RL-139**, paras. 139, 143.
[53] *See* Counter-Mem., paras. 273-274; **RD-1**, Slides 35-37.
[54] *See* **CD-1**, Slide 141, citing **RL-58**, **RL-63**, **RL-64**, **RL-65**, **CL-12**.
[55] *See* Tr. Day 1, p. 77: 2-16 (Cl. Opening).
[56] *See* Letter from Claimant to Respondent (10 June 2022), p. 2 (produced as PROD_0202 to PROD_0357). The Claimant also subsequently included the GoDaddy UPA as **Exh. C-126**, accompanying its Reply filed 29 July 2022.

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immediately once agreement is reached for fear of one party backing out.[57] The early disclosure of a potential transaction would place the sale in jeopardy, breach commercial confidentiality, and violate SEC rules.[58] The Respondent's commercial naivety on these matters cannot equate to a finding of an abuse of process, and it is insufficient for the Respondent to rely on its own speculation alone.

20. *Second*, the Respondent's novel claim that the Claimant has interfered with "genuine dispute resolution" has no basis. The sole authority for the Respondent's position is an academic article, providing three examples which are inapposite to the circumstances in dispute: where arbitrations were brought to gain media attention, evade criminal investigations, or bring multiple disputes at various levels of the corporate chain.[59] Contrary to the Respondent's assertions, merely bringing claims and continuing proceedings against Colombia does not evidence an abuse of process; the Claimant is seeking to remedy the Respondent's international wrongs, and has a right to do so under the protections negotiated by Colombia with the United States.[60]

Issue 6. Has the Respondent demonstrated that this dispute is a "contract" dispute?

21. No.[61] Both Parties appear to agree that an investment based on a contract may give rise to treaty claims, when a State has acted in its sovereign capacity.[62] Both Parties also agree that the .CO domain is a public asset, which is extensively regulated by the Respondent.[63]

22. Yet, the Respondent asserts that it was acting in its commercial, rather than sovereign, capacity. That assertion is contradicted by the evidence on record. For example, the Respondent does not dispute that: the consideration of the Concession was dependent on the presidential elections;[64] incoming President Duque was regularly updated and involved in the direction of the .CO domain, despite his office not being a party to the Concession;[65] the President's advisor publicly tweeted on 17 March 2019 that a public tender process would take place in the second half of the year (ostensibly before the decision had been

[57] *See* **CD-1**, Slides 145-146; Tr. Day 1, p. 78: 2 to p. 81: 1 (Cl. Opening).
[58] *See* **CD-1**, Slides 145-146; Tr. Day 1, p. 80: 11 to p. 81: 1, p. 90: 15-25 (Cl. Opening).
[59] *See* **CD-1**, Slide 147; **RL-56**, pp. 10-11; Tr. Day 1, p. 81: 7-25, p. 82: 1-9 (Cl. Opening).
[60] *See* **CD-1**, Slide 148; Tr. Day 1, p. 82: 4 to p. 84: 8 (Cl. Opening).
[61] *See* Rep., Sec. II.F; **CD-1**, Slides 149-156; Tr. Day 1, pp. 84-89 (Cl. Opening).
[62] *See* Rep., paras. 177-179; Rej., para. 151.
[63] *See* Tr. Day 1, p. 85: 9-13 (Cl. Opening); **CD-1**, Slide 151; **Exhs. C-8**, **C-9**, **C-11**, **C-13**; Counter-Mem., paras. 13, 40-54; Rej., para. 156.
[64] *See* Counter-Mem., para. 79; Rep., paras. 180-184, 231-233.
[65] *See* Counter-Mem., para. 108; Rep., para. 180.

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made by MINTIC on 19 March 2019);[66] and the President—not MINTIC—ultimately announced the decision to a public forum in late March 2019.[67] Meanwhile, the actual concessionaire, .CO Internet, was not informed by MINTIC—the other party to the Concession—for several more weeks.[68] Moreover, Advisory Committee meeting minutes show that the future of the administration of the .CO domain was to be determined "according to the considerations of the National Government" as a "public interest for the Nation",[69] and that Minister Constaín publicly confirmed that it was "Colombia [that] made the decision";[70] *i.e.* not MINTIC in its commercial capacity.

23. Faced with these insurmountable hurdles, the Respondent seeks to misrepresent the Claimant's claims of breach under the TPA as being predicated on a question of contractual interpretation.[71] These arguments belie the reality of the Claimant's claims, which have been briefed extensively and which all relate to Colombia's exercise of sovereign State power in intervening to deprive the Claimant of its rights under the TPA. The Claimant has not claimed that the Respondent breached a term of the Concession, has not requested damages based on an alleged breach of the Concession, has not asked the Tribunal to settle issues of contractual application, or even invoked the TPA's umbrella clause.[72] The mere fact that the Respondent's wrongful acts relate to the Concession does not transform those acts into ordinary commercial behaviour outside the scope of the Tribunal's jurisdiction.

Issue 7. Has the Respondent demonstrated that the Tribunal lacks jurisdiction by virtue of the assignment of the claim from Neustar, Inc. to Vercara, LLC?

24. No.[73] The Claimant's Ultimate Owners sold Neustar, Inc. to TransUnion on 1 December 2021.[74] Prior to the sale, the Ultimate Owners spun out Neustar's legacy cloud-oriented security services business, by virtue of the Bill of Sale and the Neustar UPA. The Bill of Sale "assign[ed], transfer[ed], convey[ed] and deliver[ed]" specified assets from Neustar to its 100 percent owned then-subsidiary, Security Services, LLC (now Vercara), including the rights to the present arbitration.[75] The Neustar UPA then confirmed the re-organisation

[66] *See* **Exh. C-40**; **CD-1**, Slide 38; Tr. Day 1, p. 86: 21 to p. 87: 7 (Cl. Opening); Mem., paras. 11, 81; Rep., n. 474.
[67] *See* **Exh. C-41 CD-1**, Slide 36; Tr. Day 1, p. 87: 7-9 (Cl. Opening); Mem., paras. 81-85; Rep., paras. 164-166.
[68] *See* **Exh. C-44**; **CD-1**, Slide 39; Tr. Day 1, p. 87: 7-12 (Cl. Opening); Mem., para. 87; Rep., para. 180.
[69] *See* **Exh. C-37**; **CD-1**, Slide 152; Tr. Day 1, p. 85: 17-25, p. 86: 1-2 (Cl. Opening).
[70] *See* **Exh. C-39**; **CD-1**, Slides 39, 152; Tr. Day 1, p. 86: 2-5 (Cl. Opening).
[71] *See* **RD-1**, Slides 38-41; Tr. Day 1, p. 157: 6-8 (Resp. Opening); Counter-Mem., para. 299.
[72] *See* **CD-1**, Slide 154; Rep., para. 185.
[73] *See* **CD-1**, Slides 133-138; Tr. Day 1, p. 87: 13 to p. 88: 6 (Cl. Opening); SFC Resp., Sec. IV; SFC Rej., Sec. IV.
[74] *See* SFC Resp., Sec. II.D and II.F.
[75] *See* **Exh. C-143**; SFC Resp., para. 22.

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of assets, and specifically confirmed that the claims in this arbitration were a "Transferred Security Asset and Security Liability" to be retained by the Claimant's Ultimate Owners (via Vercara).[76] At all material times, the MINTIC Claim remained in U.S. hands, and even under the same ultimate ownership.

25. Both Delaware law[77] and international law[78] permit assignments of claims. Further, international law authorities confirm that an investment treaty claim is capable of assignment mid-proceeding,[79] even without the consent of the Respondent.[80] However, even if the substitution of Vercara as claimant to these proceedings did require the Respondent's consent, sufficient consent was given by the Respondent's letter dated 12 August 2022 and the Respondent's Application for Security for Costs.[81]

Conclusion on Issues 1 to 7

26. The Respondent has thus failed in its burden to demonstrate that *any* of its jurisdictional objections should be upheld.[82]

III. THE HEARING CONFIRMED THE FACTS AS PRESENTED BY THE CLAIMANT, AND THUS THE RESPONDENT'S VIOLATIONS OF THE TPA

Issue 8. Why are we here?

27. The Respondent has repeatedly questioned why the Claimant initiated and maintained this dispute, because the Claimant "got the 2020 contract",[83] labelling this arbitration as an abuse of process.[84] These arguments are misguided.

28. *First*, it is undisputed that the Claimant invested a significant amount to ensure the success of the .CO domain. Unlike a natural resource such as a gold mine, which is inherently valuable in itself, the .CO domain was not; rather, it had to be developed, using specialist expertise. The Respondent has confirmed that it lacked such expertise,[85] devoted nothing

[76] *See* **Exhs. C-136** and **140**; SFC Resp., para. 24.
[77] *See* SFC Resp., paras. 124-125, citing **Exhs. C-155**, **C-156**, **C-157**, **C-158**; SFC Rej., paras. 45-54.
[78] *See* SFC Resp., paras. 126-144, citing **CL-163**, **CL-164**, **RL-164**, **CL-8**, **RL-131**, **RL-123**, **RL-44**, **RL-121**, **CL-165**, **CL-166**, **RL-42**, **CL-167**, **RL-42**, **CL-124**, **RL-113**; SFC Rej., paras. 55-69.
[79] *See* SFC Resp., paras. 145-167; SFC Rej., paras. 57-63.
[80] *See* SFC Resp., paras. 161-167; SFC Rej., paras. 57-63.
[81] *See* SFC Resp., paras. 173-181; SFC Rej., paras. 65-68.
[82] *See* Tr. Day 3 (29 March 2023), p. 419:4-25 (Cl. response to Tribunal Question No. 1, confirming that the objections raised by the Respondent are not cumulative).
[83] *See* Tr., Day 1, p. 150: 6 (Resp. Opening); Day 3, p. 450: 2-4 (Resp. Closing).
[84] *See* Tr. Day 1, p. 158: 21-24 (Resp. Opening).
[85] *See* Tr. Day 2, p. 317: 12-13 (Constaín: "frankly we didn't have the internal expertise"); Tr. Day 1, p. 233: 19-20 (Castaño); Tr. Day 2, p. 367 (Trujillo).

(continued)

to developing the .CO domain[86] (and let it languish for 8 years[87]), and yet continued to earn millions of dollars simply by virtue of having been gifted the .CO domain by IANA.[88]

29. After the Claimant had invested significantly in Colombia,[89] based on its legitimate expectations arising from *inter alia* the Respondent's long-held practice of renewing concessions similar to the .CO Concession,[90] the Respondent arbitrarily, discriminatorily, and without due process, refused to engage with the Claimant on its right to negotiate a renewed Concession, in violation of the TPA. Instead, the Claimant was forced to enter into negotiations to preserve its rights.[91] Although the Claimant had performed exceptionally under the Concession,[92] the award of the tender to another entity would have been seen in the market as indicating dissatisfaction with the Claimant's performance, meaning that it would face significant reputational damage if it did not retain the Concession.[93] Consequently, the Claimant had no choice but to participate in the new tender, which was severely disadvantageous. Indeed, the Claimant was forced to accept a new concession for half the intended period (5 years versus the original 10 years), at radically different economic terms.[94] That fact may ultimately be relevant in the assessment of damages,[95] but does not negate the existence of the Respondent's internationally wrongful conduct.

30. *Second*, the Claimant is a U.S. investor protected by the TPA (this is undisputed). The Respondent acted in a manner violating its international obligations with respect to the Claimant's investment, as it is accused of doing in no less than 13 pending ICSID cases.[96] Just because the Respondent disagrees that it has breached the TPA, or dislikes the Claimant's position, that does not render this claim abusive. In fact, and as set out in the

[86] In effect, the only cost to the Respondent was two Colombian contractors supervising the Concession. *See* Tr. Day 1, p. 221: 4-15, p. 227: 20-25 (Castaño).
[87] *See* **CD-1**, Slides 14-15, **Exhs. C-123**, **C-13**, **C-14**.; Tr. Day 1, p. 22: 9-22 (Cl. Opening).
[88] *See* Tr. Day 1, p. 18: 22 to p. 19 (Cl. Opening); p. 107: 25 to 108: 10 (Resp. Opening).
[89] *See* **CD-1**, Slides 19-26; **Exhs. C-18**, **C-19**, **C-21**, **C-23**, **C-24**. *See also* Mem., paras. 54-64.
[90] *See* Tr. Day 1, p. 14: 19-24, p. 26: 10-16 (Cl. Opening); **CD-1**, Slides 42-47; **Exhs. C-45 to C-61**; Mem., paras. 88-100.
[91] *See* Tr. Day 1, pp. 13-14 (Cl. Opening); Day 3, p. 433: 14 to 435: 16 (Cl. Closing); Rep., paras. 199-205.
[92] Indeed, the Respondent repeatedly expressed its satisfaction in this respect: *see* **Exh. C-25** (concluding the .CO Domain was "trustworthy, secure and stable"); Mem., para. 64; Rep., para. 234.
[93] *See* **CD-2**, Slide 29; Tr. Day 3, p. 435: 6-16 (Cl. Closing).
[94] *See* **CD-2**, Slides 29-30; Tr. Day 1, p. 45: 1-20 (Cl. Opening); Day 3, p. 432: 21 to p. 435: 16 (Cl. Closing). **Exhs. C-17**, **C-105** to **C-109**, **C-125, R-51** (demonstrating change in terms from 2009 to 2020); Mem., para. 142; Rep., paras. 198-205.
[95] *See* **CD-2**, Slides 27-30; Tr. Day 3, p. 434: 10 to p. 435: 5 (Cl. response to Tribunal Question No. 5).
[96] *See* **CD-1**, Slide 6.

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remainder of this Part, the Claimant's claims are supported by the evidence on the record and as presented during the Hearing.[97]

Issue 9. Did the Respondent breach Article 10.5 of the TPA in failing to provide fair and equitable treatment to the Claimant?

31. Yes.[98] The Respondent's measures were arbitrary, discriminatory, lacking in good faith, were based on pretext rather than reason, failed to provide due process, and violated the Claimant's legitimate expectations.

9.1. What was the purpose of Article 4 of the Concession (re: renewal)?

32. At the time the 2009 Concession was executed, Law 1065 of 2006 applied; it provided that "the duration of the agreement may be for up to 10 years, renewable on one occasion only, for a term equal to the original term."[99] Meanwhile, the 2009 tender documents made clear that the operator would be allowed to extend the term of the Concession,[100] and this is mirrored in Article 4 of the Concession.[101] Article 4 does not promise an automatic extension. As acknowledged by Ms. Trujillo,[102] the Claimant has never suggested that it did. However, Article 4 does promise a concrete assurance of the ability to *seek* a renewal, should the concessionaire so choose.[103] It is not a meaningless promise, as the Respondent would suggest, but a provision designed to ensure that MINTIC negotiate in good faith with respect to a possible extension. This is consistent with long-held Colombian practice: see paragraphs 35-36.[104]

9.2. Did the Respondent act arbitrarily?

33. Yes.[105] The Respondent had no legitimate purpose for refusing to negotiate with the Claimant, so has sought to create *post-hoc* rationales for its wrongful actions once this

[97] The Claimant focusses herein on the factual issues in dispute, and does not address the legal arguments in relation to the Respondent's breaches of the TPA, which have already been briefed extensively. The Claimant incorporates its prior submissions in this regard by reference. *See* Mem., Sec. IV; Rep., Sec. III.
[98] *See* Mem, Sec. IV.A; Rep., Sec. III.A; **CD-1**, Slides 58-72; Tr. Day 1, p. 45: 23 to 53: 9 (Cl. Opening).
[99] *See* **Exh. C-9**; **CD-1**, Slides 12-13; **CD-2**, Slide 7; Mem., paras. 29-41; Rep., paras. 294-295.
[100] *See* **Exh. C-14**, Articles 2.2 and 6.6.1.
[101] *See* **Exh. C-17**; **CD-2**, Slides 8-9; Mem, paras. 29-34, 47; Rep., paras. 296-303.
[102] *See* Tr. Day 2, p. 370: 19-22 (Trujillo); **CD-2**, Slides 11-12.
[103] *See* Tr. Day 1, p. 24: 14-22 (Cl. Opening), Day 3, p. 420: 11 to p. 425: 4 (Cl. response to Tribunal Question No. 2); Rep, paras. 296-303.
[104] *See* **CD-1**, Slides 42-47; **CD-2**, Slide 10; **Exhs. C-45 to C-61**; Mem., paras. 88-100. *See also* para. 42 below.
[105] *See* Mem, paras. 65-144, 191-209; Rep., paras. 223-259; **CD-1**, Slides 29-35, 62-65; Tr. Day 1, p. 15: 2-25, p. 30: 7-21, p. 32: 15-23, p. 34: 2-17, p. 35: 12-25, p. 38: 5-17, p. 48: 13-20 (Cl. Opening).

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claim was initiated. However, the evidence undermines these late attempts to legitimize the Respondent's conduct. In particular:

34. *First*, the Respondent has argued in these proceedings that renewing the Concession and modifying the economic conditions would "breach fundamental principles of Colombian administrative law."[106] However, this alleged rationale was **never** communicated to .CO Internet, as demonstrated by the documents contemporary to events in question (as opposed to subsequent legal pleadings or recollections).[107] This is true even with respect to the May 2022 Offer, which the Respondent instead chose to ignore altogether.[108] Likewise, the Respondent's new rationale does not appear in the July 2018 report, which in fact specifically **recommended re-negotiation** of the **economic** terms of the Concession,[109] flatly contradicting the Respondent's assertions in this arbitration.

35. Indeed, and in any event, the Respondent's new rationale is unfounded. The Claimant has provided multiple examples of concessionaires in the telecommunications sector and others, all of which had their concessions extended.[110] Importantly, this evidence also shows that the Respondent made material changes to nearly all other contracts in these sectors, including the financial terms of telecommunications concessions in particular.[111]

36. The Respondent has no answer to these facts. At the Hearing, Ms. Trujillo confirmed that she did not review other renewals and extensions that the Ministry had granted to other contracting parties or concessionaires, because "it would make no sense to do that, nor would it make sense to compare them or undertake such an analysis."[112] Indeed, in her witness statement, Ms. Trujillo had stated that although the .CO domain is "part of the telecommunications sector", it is "not a means of communication or a telecommunications

[106] *See*, *e.g.*, Counter-Mem., paras. paras. 17, 106, 327 (bullet 5), 448 (bullet 1); Rej., para. 8 (bullet 1), n. 9, para. 201, n. 402, p. 80, paras. 202, 259, 302; Tr. Day 1, p. 116: 2-17 (Resp. Opening); **RD-1**, Slide 15.
[107] *See* **Exhs. C-29**, **C-31**, **C-33**, **C-44**, **C-71**, **C-72**, **C-76**, **C-77**, **C-80**, **C-83**, **C-84**, **C-85**, **C-86**, **C-88**, **C-98**, **R-62**, **R-63**.
[108] *See* **Exhs. C-69**, **C-70**, **C-71**, **C-72**; Mem., paras. 106-111; Rep., paras. 227-228.
[109] *See* **C-27**, p. 3.
[110] *See* **CD-1**, Slides 42-47; **Exhs. C-45 to C-61**; Mem., paras. 88-100.
[111] *See* **Exhs. C-47** (extending a concession in the telecommunications sector for the same time period while changing the value of the concession as well as other variations, including the obligations of the concessionaire: compare Clauses 5, 7, 11, 15-16, 25-27 of the original concession (**C-45**), with Clauses 6-7, 10-11, 14-15, 25, 27-28, 30 of the renewed concession (**C-47**)); **C-49** (same: compare Clauses 5 and 7 of the original concession (**C-48**) with Clauses 6-7 of the renewed concession (**C-49**)); **C-51** (extending a concession in the telecommunications sector for the same time period while changing the value of the concession: compare Clauses 3, 5 of the original concession (**C-50**) with Clauses 1-2 of the renewed concession (**C-51**)); **C-53** (same: compare Clauses 3, 5 of the original concession (**C-52**) with Clauses 1, 2 of the renewed concession (**C-53**)); **C-64** (same, in the port sector: where Clause 7 of the renewed concession modified contractual consideration); **C-55** (extending a concession in the telecommunications sector while changing the value of the concession: compare Clause 4 of the original concession (**C-54**) with Clause 3 of the renewed concession (**C-55**)).
[112] *See* Tr. Day 2, p. 388: 10-16 (Trujillo).

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service" and therefore was not comparable with other telecommunications concessions.[113] This is wrong. First, the Respondent, by way of its regulations, has specifically placed the .CO domain within the telecommunications sector.[114] Indeed, contrary to what Ms. Trujillo says, the internet is a mechanism for communication; as are connected services, including domain management. The reason that Ms. Trujillo made this basic error is apparent from her testimony at the Hearing: despite having sought to address comparability, this is a matter outside of her knowledge or expertise.[115] In any event, her assertion is misplaced: given that the issue in dispute is the renewability of a concession, including in circumstances where there is to be a change to the financial terms, the relevant comparators include all companies with concessions that provide for renewal, regardless of sector. Ultimately, by ignoring its regular practice of concession renewals (including the telecommunications sector), the Respondent acted in an arbitrary and discriminatory manner, and without regard to due process.

37. *Second*, the Respondent has also argued that ".CO Internet even was responsible for managing the relationship with ICANN on behalf of Colombia",[116] and therefore that it needed a new tender to "increase its participation at ICANN" because it had "not been able to defend its interests for the past ten years properly".[117] This is untrue. MINTIC specifically retained responsibility for such participation by way of Resolution 1652,[118] and .CO Internet in fact *encouraged* governmental presence at ICANN meetings.[119] Moreover, at the Hearing, Mr. Castaño confirmed that his understanding was that there was nothing in the Concession prohibiting the government from participating in the ICANN meetings,[120] and that he actually attended ICANN events on behalf of Colombia in 2019 (while the Concession was still in force).[121] Thus, while the Respondent may now wish

[113] *See* **RWS-3**, para. 15.
[114] *See* Rep., para. 328; **Exh. R-20** (recognizing the .CO domain as a "public asset in the telecommunications sector" (emphasis added)). *See also* Counter-Mem., para. 3 and **RWS-01** (the administration of the .CO domain fell under the purview of the "Minister of Telecommunications", who was "directly in charge of the definition and/or implementation of Colombia's telecommunications policy" (emphasis added)); **Exh. R-34** (confirming the Advisory Committee was comprised of the Vice Minister of Digital Economy and "Director of Telecommunications Industry Development", as well as MinTIC officials (emphasis added)); **RWS-02** (witness statement of the Director of Telecommunications Industry Development).
[115] *See* Tr. Day 2, p. 375: 6-19, where Ms. Trujillo admitted to having no knowledge of, or responsibility for, "radio or TV or broadcasting or any other telecom services" and that none of the concessions exhibited by the Claimant went through the General Secretariat (which she headed).
[116] *See* Tr., Day 1, p. 111: 12-16 (Resp. Opening).
[117] *See* Tr., Day 1, p. 122: 11-18 (Resp. Opening).
[118] *See* **Exh. R-25**, Article 7.
[119] *See* **Exh. C-25**.
[120] *See* Tr. Day 2, p. 271: 6-25 (Castaño).
[121] *See* Tr. Day 1, p. 228: 19 to p. 228: 7 (Castaño).

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that it had participated more, it alone is responsible for not having done so. In any event, increased engagement with ICANN did not require an amendment to the terms of the Concession itself.[122] Further, even if amendment was required, this could have been done within the renewal process, and did not require a new tender for the same reasons as above.

38. *Third*, the Respondent also argued that it lacked technical oversight of the administration of the .CO domain, such that a new tender was warranted.[123] Again, this is untrue. Under the terms of the Concession, MINTIC could require any information "necessary to verify the compliance of the obligations" under the Concession, to be provided within five days by .CO Internet.[124] MINTIC had two full time employees supervising the contract,[125] and representatives of Colombia went to Neustar's headquarters in the United States to conduct technical inspections.[126] Clearly, there was nothing in the Concession to prevent technical oversight. In any event, once again, this matter did not require a new tender.

39. *Fourth*, the Respondent denies that its actions were politically motivated. However, as confirmed at the Hearing, all three of the Respondent's witnesses were recruited as a result of President Duque's appointment of Minister Constaín from his campaign team to the Minister of Telecommunications.[127] Minister Constaín denied the involvement of President Duque in directing a new tender for the .CO domain, but was unable to provide any specificity with respect to a decision she allegedly made alone. At the Hearing, Minister Constaín repeatedly sought to evade answering the question of when she made the decision not to renew the 2009 Concession, and ultimately was unable to do so.[128] The reason she could not do so is simple: President Duque made the decision. This is particularly clear from the fact that his Presidential Advisor tweeted the decision the day *before* the Advisory Committee allegedly even recommended a new tender process to Minister Constaín (as confirmed by the testimony of Mr. Castaño).[129]

40. Thus, the Respondent's measures were not based on legal standards, were taken for reasons different than those put forward by the decision-maker after the event and in disregard of

[122] *See* **RD-1**, Slide 10; **Exh. R-25**, Article 11.1.
[123] *See* Tr. Day 1, p. 209: 6-25 (Castaño), p. 226: 21 to p. 227: 19 (Castaño).
[124] *See* **Exh. C-17**, Article 16.
[125] *See* Tr. Day 1, p. 227: 21 (Castaño).
[126] *See* **Exh. C-25**, Sec. 3 ("Supervision Report"); Tr. Day 2, p. 280: 22 to p. 281: 12 (Castaño).
[127] *See* **CD-2**, Slide 39; Tr. Day 2, p. 315: 11-14, p. 329: 15 to p. 330: 15 (Constaín); Day 2, p. 358: 12-18 (Trujillo); Day 1, p. 212: 25 to p. 213: 8 (Castaño).
[128] *See*, *e.g.*, Tr. Day 2, p. 332: 6-15, p. 333: 6-16; p. 334: 5-8, 14-25; p. 335: 14-25; 336: 1-11; 337: 8-20 (Constaín).
[129] *See* **Exhs. C-39**, **C-40**; Tr. Day 2, p. 285: 1-5 (Castaño) ("18 March 2019 more specifically, which was the moment when the decision was in fact taken...").

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due process. The actions were not for any legitimate purpose, but were based on political considerations. This is the very definition of arbitrary measures in violation of Article 10.5.

9.3. Did the Respondent act in a discriminatory manner targeting the Claimant?

41. Yes.[130] The Respondent targeted the Claimant and was discriminatory in its conduct.

42. *First*, the Respondent's position that Colombian law prevented it from re-negotiating the financial terms of the Concession is unfounded. Paragraphs 35-36 are repeated.

43. *Second*, the Claimant demonstrated (using documentary evidence from an independent third party) that the TOR for the 2020 tender process was designed to exclude the Claimant and to allow the Respondent to award the .CO domain to Afilias.[131] The Respondent maintains that the TOR was in fact created by the ITU,[132] and that it was merely a coincidence that Afilias was the only company meeting those requirements. This is also untrue. The ITU Report clearly states that the quantitative aspects of the tender comprised of "[f]inancial indicators *requested by Decree 1082/2015*".[133] Moreover, the table refers to "*requested* margin" in relation to key requirements, such as the level of indebtedness, liquidity, interest coverage ratios *etc*.[134] As the Respondent admits, Decree 1082/2015 is not the work of the ITU, but of the Colombian government.[135] It is thus clear from the face of the ITU Report that the requirements favouring Afilias were specifically requested and dictated by the Respondent (notwithstanding the fact that the Respondent's counsel sought to inappropriately, and inaccurately, testify otherwise on the last day of Hearing).[136] This fact aligns with reports from a third-party investigative journalist that: Minister Constaín held private meetings with Afilias in September 2019;[137] Afilias itself made public comments about issues it could only have known from discussions with the Respondent;[138] and the Technical Appendix of the Respondent's TOR was an exact transcript of another tender that Afilias had won.[139] Ultimately, the question for the Tribunal is whether, on the balance of probabilities, it was the Respondent or the ITU which set the tender requirements

[130] *See* Mem., paras. 65-144, 201-209; Rep, paras. 239-259; **CD-1**, Slides 42-55, 73-76; Tr. Day 1, p. 50: 21 to p. 51: 4 (Cl. Opening).
[131] *See* **Exhs. C-96**, **C-97**, **C-101**, **C-117**. *See also* Mem., paras. 128-140; Rep., paras. 243, 260-263; **CD-1**, Slides 50-55.
[132] *See* **RD-1**, Slide 19.
[133] *See* **Exh. C-67**, Table 4 (emphasis added).
[134] *See* **Exh. C-67**, Table 4 (emphasis added).
[135] *See* Tr. Day 3, p. 475: 3-7 (Resp. Argument).
[136] *See* Tr. Day 3, p. 479: 21-25, p. 480: 1-17 (Cl. Argument).
[137] *See* **Exh. C-117**; **CD-1**, Slide 50.
[138] *See* **Exh. C-100**. *See also* Mem., para. 135; **CD-1**, Slide 51.
[139] *See* Tr. Day 1, p. 42: 5-14 (Cl. Opening); **CD-1**, Slide 52; Mem., paras. 129-130.

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in a manner such that just one company could succeed. It is highly unlikely to have been the ITU, a disinterested international body; the Respondent is by far the more likely culprit, for the reasons set out above.

9.4. Did the Respondent provide due process to the Claimant?

44. No.[140] The Respondent acted in wilful disregard of the Claimant's due process rights. Paragraphs 34, 35-36, and 43 are repeated. Further:

45. *First*, the Respondent failed to afford due process to the Claimant by its constant refusal to respond to correspondence from the Claimant,[141] and by its lack of any consideration of the offers made by .CO Internet to re-negotiate the Concession as recommended by the July 2018 Report from the Vice Minister.[142] In particular, the Respondent ignored the Claimant's "May Offer", which provided significant benefits to the Respondent and was intended to serve as a basis to negotiate the extension of the Concession.[143] In its written pleadings, the Respondent insisted that the May Offer was "discuss[ed]" by the Advisory Committee.[144] In fact, the minutes of that meeting show that the May Offer was merely raised by the Director of Development of the IT Industry (Mr. Castaño),[145] and then ignored, with the Committee simply concluding that it "recommends the hiring of an expert firm in project structuring to accompany the Ministry in all stages of the bidding process and up to the signing of the concession contract."[146] At the Hearing, and despite being present at that meeting, Mr. Castaño was unable to articulate who was actually responsible for evaluating the offer, stating that it would be "those responsible for IT industry development as supervisors of the contract",[147] "the general secretariat's responsibility",[148] and "as a public policy it was the Minister's responsibility".[149] Yet, none of these persons ever evaluated the May Offer, and the Respondent has failed to demonstrate any semblance of due process afforded to the consideration of the May Offer or of the Claimant's correspondence seeking in good faith to negotiate a renewal. In fact, the Respondent has gone so far as to criticize the Claimant for making an "unsolicited" offer.[150] That is plainly

[140] *See* Mem, paras. 65-144, 210-224; Rep., paras. 260-288; **CD-1**, Slide 70; Tr. Day 1, p. 52: 3-13 (Cl. Opening).
[141] *See* Tr. Day 1, p. 15: 15 to p. 16: 1, p. 31: 14 to p. 34: 17 (Cl. Opening); **CD-1**, Slides 29-33; Mem., paras. 65-73.
[142] *See* **Exh. C-27**, p. 8; Tr. Day 1, p. 31: 14 to p. 34: 17, p. 38: 18 to p. 39: 4, p. 49: 10 to p. 50: 10 (Cl. Opening).
[143] *See* **Exh. C-69**; Mem., paras. 107-108; Rep., para. 227.
[144] *See* Counter-Mem., para. 111; Rej., para. 201, bullet 4 (pp. 79-80) (both referring to **Exh. C-70**).
[145] *See* **Exh. C-70**, "Attendance Record".
[146] *See* **Exh. C-70**, Part 2.2.
[147] *See* Tr. Day 2, p. 288: 1-2 (Castaño).
[148] *See* Tr. Day 2, p. 288: 4-5 (Castaño).
[149] *See* Tr. Day 2, p. 289: 3-4 (Castaño).
[150] *See* Tr. Day 1, p. 121: 11-16 (Resp. Opening).

unjustified. The Claimant merely sought to protect its investment and to negotiate in good faith under the terms of the Concession; it cannot be faulted for that.

46. *Second*, in its written pleadings, the Respondent asserted that .CO Internet was removed from the Advisory Committee because the Committee was "tasked with recommending the best course of action on whether to renew the 2009 Contract or conduct a new tender process", and that .CO Internet's attendance would have created "an obvious conflict of interest."[151] The evidence presented at the Hearing, however, fundamentally undermines that rationale. In her testimony, Minister Constaín confirmed that a separate "task force" "was created specifically to bring a recommendation with regard to whether a tender process or an extension would be the most optimal choice".[152] By contrast, she explained, the Advisory Committee was "a technical team created within the Ministry".[153] This evidence confirms that there was no reason for .CO Internet to have been removed from the Advisory Committee at all, let alone in the secret and unceremonious manner that it was. If the Advisory Committee was a "technical team", then it would make no sense for the technical operator of the .CO domain to be excluded from these discussions. In fact, Mr. Castaño stated during his testimony that he did not recall who made the decision to exclude .CO from the Advisory Committee meetings,[154] and that he was not aware that .CO had a right to be there as the technical operator of the domain until after he left MINTIC.[155]

47. The Respondent originally stipulated in the Concession documents that .CO Internet was to be a permanent guest at Advisory Committee meetings,[156] in order to fulfil the technical obligations of the operation of the .CO domain and the requirements set out in the Concession. When it was no longer politically expedient, the new government deliberately excluded .CO Internet from these meetings in order to use its administrative body for an improper purpose. It was wrong to do so.

48. *Third*, Minister Constaín's testimony about the role of the Advisory Committee is directly contradicted by the evidence provided by Ms. Trujillo, which is in turn directly contradicted by the evidence provided by Mr. Castaño. At the Hearing, Ms. Trujillo stated that she was

[151] *See* Counter-Mem., para. 14.
[152] *See* Tr. Day 2, p. 338: 15-19 (Constaín).
[153] *See* Tr. Day 2, p. 342: 12-18 (Constaín).
[154] *See* Tr. Day 1, p. 244: 2-8 (Castaño).
[155] *See* Tr. Day 1, p. 245: 3-16 (Castaño).
[156] *See* Mem., n. 91; **Exh. C-14**.

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part of the Advisory Committee,[157] and that its purpose was "to review and examine and *take a decision* about the new operation of the domain, or general operation of the domain."[158] On the other hand, Mr. Castaño stated (in line with Minister Constaín) that "[w]hat the advisory committee would do is to advise on a course of action, a path to follow, but *its function was not to take decisions*…".[159] These contradictory accounts of the Committee's role further underscore the complete lack of transparency and due process with regard to Colombia's dealings with the Claimant. Even now, the Respondent's officials are unclear as to what the procedures were.

9.5. Did the Respondent violate the Claimant's legitimate expectations?

49. Yes.[160] The Respondent violated the Claimant's legitimate expectations regarding the extension of the Concession, and regarding the negotiation of the Concession in good faith.

50. *First*, the Respondent has repeatedly made allegations relating to a "contingency payment" of USD 6 million in case of "Qualified Renewal" of the 2009 Concession in the agreement between Neustar and Arcelandia for the sale of .CO Internet on 14 May 2014.[161] The Respondent asserts that the contingent payment shows that Neustar "understood the renewal of the contract was only a possibility and not a certainty."[162] But the math does not work. The Claimant purchased Arcelandia for USD 113.7 million, halfway through the Concession period. If the value of a company is USD 113.7 million for the remaining part of a 5-year concession, it cannot possibly be the case that a 10-year renewal would be worth just USD 6 million. If the Claimant did not expect the Concession to be renewed, it would have priced this risk in in a much more significant way. In fact, the Claimant paid USD 113.7 million for what it expected to be a 15-year concession period. The contingent payment was set so low precisely because a renewal assumption was baked into the headline price; the assumption was that the contingent event (renewal) would occur. Certainly, the Respondent has no basis for seeking to infer the contrary.

51. *Second*, in any event, the fact that the Claimant expected its rights to be respected is also evidenced by its continued performance. The Respondent asserts that .CO Internet's

[157] *See* Tr. Day 2, p. 365: 3, 16-17 (Trujillo).
[158] *See* Tr. Day 2, p. 365: 8-10 (Trujillo) (emphasis added).
[159] *See* Tr. Day 1, p. 242: 23-25 to p. 243: 1 (Castaño) (emphasis added).
[160] *See* Mem, paras. 65-144, 225-237; Rep., paras. 289-315; **CD-1**, Slides 71-72; Tr. Day 1, p. 52: 14 to p. 53: 9 (Cl. Opening).
[161] *See* **RD-1**, Slides 11, 74; Tr. Day 1, p. 112: 8 to p. 113: 25 (Resp. Opening). "Qualified Renewal" is defined in the Agreement to mean, effectively, renewal of the Concession. **Exh. C-133**, Sec. 5.19.
[162] *See* Counter-Mem., para. 10.

(continued)

performance had stagnated, and that under the new contract, performance and related proceeds increased in 2020.[163] But the new Concession did not start until October 2020, and the growth for 75 percent of the year was due to efforts made by the Claimant under the 2009 Concession in the years leading up to the Respondent's wrongful conduct.[164] At that time, the Claimant had a reasonable belief that the Concession would be renewed, or that the Claimant would—at the very least—have the chance to negotiate the extension of the Concession in good faith. That belief was founded on the relevant Colombian law, the terms of the Concession, and awareness of the Respondent's past practice regarding renewals.[165] In consequence of this belief, the Claimant continued to make significant capital investments by building up the .CO domain and its reputation, which resulted in significant growth of the .CO domain throughout the 2009 Concession. Despite recognizing that growth, the Respondent took this windfall by coercing a new tender and new terms that did not account for the Claimant's investment-backed expectations.

52. *Third*, the Claimant rightly expected that the Respondent would adhere to its international obligations, including under the TPA. During the Hearing, Minister Constaín confirmed her specialized familiarity with these protections, as Director of Foreign Investment for the Colombian government,[166] negotiator for bilateral investment treaties,[167] running training sessions at UNCTAD for investment negotiators,[168] and in her role in the U.S. embassy promoting Colombia "as an investment and trade destination."[169] In light of this significant expertise, one would expect Minister Constaín to take special care when assessing investments made by U.S. investors in Colombia, and the treatment by her Ministry with respect to that investment. Yet there is no evidence that this occurred, and Minister Constaín confirmed in her testimony that the task force only considered "[t]he legal framework that rules Colombia."[170] The TPA was disregarded.

53. Likewise, when presented with a letter Ms. Trujillo wrote confirming that "the new selection process is in line with Colombia's commitments under the United States Trade and Promotion Agreement", Ms. Trujillo was unable to answer when or what she did to

[163] *See* **RD-1**, Slide 22; Tr. Day 1, p. 133: 12-21 (Resp. Opening).
[164] *See* Tr. Day 1, p. 198: 1-6 (Cl. Argument).
[165] *See*, *e.g.*, paras. 35-36 above. *See also* Mem., paras. 91-97.
[166] *See* Tr. Day 2, p. 326: 4-8 (Constaín).
[167] *See* Tr. Day 2, p. 327: 12-13 (Constaín).
[168] *See* Tr. Day 2, p. 327: 16-17 (Constaín).
[169] *See* Tr. Day 2, p. 329: 11-12 (Constaín).
[170] *See* Tr. Day 2, p. 340: 15 to p. 341: 1 (Constaín).

(continued)

confirm this position.[171] Instead, she sought to obfuscate the question by repeatedly attempting to read the entire letter into the record.[172] Finally, Ms. Trujillo admitted that she has no background in international law,[173] and stated that "I am not an expert on the Treaty … when I say that it is in line with the commitments undertaken, I am referring to the fact that everyone is treated equally" in the tender process and that the bidding process was "open".[174] That is neither true (see paragraphs 42-43), nor sufficient. Thus, the testimony of Minister Constaín and Ms. Trujillo establishes that the Respondent acted in wilful ignorance of its international obligations.

Issue 10. Did the Respondent act in a discriminatory manner, in violation of Articles 10.3 and 10.4 of the TPA?

54. Yes.[175] The Respondent ignored the comparators provided by the Claimant, and simply parroted its written pleadings during the Hearing. Paragraphs 35-36 are repeated.

Issue 11. Did the Respondent violate Article 10.14 of the TPA or Article 4 of the Swiss-Colombia BIT (via the TPA's MFN clause)?

55. Yes.[176] The Respondent did not address these claims in any detail in the Hearing, so the Claimant's written pleadings on these issues stand untouched.

Conclusion on Issues 8 to 11

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

Dated: 9 June 2023
London, UK

Respectfully submitted,

[Signed]

Steptoe & Johnson UK LLP
Thomas Innes

[171] *See* Tr. Day 2, pp. 385-387 (Trujillo).
[172] *See* Tr. Day 2, pp. 385-387 (Trujillo).
[173] *See* Tr. Day 2, p. 362: 4-6 (Trujillo).
[174] *See* Tr. Day 2, p. 387: 14-20 (Trujillo).
[175] *See* Mem, paras. 238-265; Rep., paras. 316-358; **CD-1**, Slides 73-76; Tr. Day 1, p. 53: 10 to p. 54: 1 (Cl. Opening).
[176] *See* Mem, paras. 266-270; Rep., paras. 359-364; **CD-1**, Slides 77-78; Tr. Day 1, p. 54: 2-8 (Cl. Opening).