ICSID CASE NO. ARB/20/7

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

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

CLAIMANT

AND

REPUBLIC OF COLOMBIA

RESPONDENT

RESPONDENT'S POST-HEARING BRIEF

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9 June 2023

CONTENTS

1. The Republic of Colombia ("**Respondent**" or "**Colombia**") respectfully submits this Post-Hearing Brief (the "**PHB**") further to the hearing on jurisdiction and the merits held in London on 27 – 29 March 2023 (the "**Hearing**") and in accordance with the Tribunal's instructions.[1]

2. After a brief executive summary (**1**), Respondent explains how the evidence presented at the Hearing upheld all core elements of its position (**2**), confirming the Tribunal's lack of jurisdiction over this case (**3**) and, in any event, the unfounded and unsubstantiated nature of Claimant's claims on the merits (**4**). Lastly, Respondent sets out its requested relief (**5**).[2]

1. EXECUTIVE SUMMARY

3. The Hearing confirmed that these proceedings are unwarranted and abusive, with a Claimant putting forward claims which, in addition to being affected by multiple jurisdictional defects, are entirely unsubstantiated and meritless.

4. In keeping with its usual narrative, Claimant continued to air allegations of deficient decision-making, favouritism and even corruption at the Hearing. However, these contentions were proven patently speculative and baseless. There is no evidence, either documentary or testimonial, supporting such claims. Neustar and .CO Internet's main representatives during the relevant time period, respectively Messrs. Bezsonoff and Santoyo, have not appeared as witnesses. And similarly, Claimant elected not to offer Mr Hughes, General Counsel of Neustar, as witness despite him being present at the Hearing.

5. Claimant also asserted in its Opening Presentation that it would show that Article 4 of the 2009 Contract required the renewal of such contract. However, this explanation never came. Indeed, Claimant cannot escape the unambiguous language of the 2009 Contract which only states that it "*may be renewed*", nor the fact that it could not (and did not) ignore that a renewal was only a possibility in light of Colombia's Constitutional Court well established jurisprudence on the matter (according to which automatic renewals of concessions are unconstitutional).[3]

6. In contrast with Claimant's total failure to substantiate its claims, the Hearing confirmed that Colombia fully complied with its international obligations. There was no wrongdoing. The record shows that Colombia merely exercised its legitimate contractual right not to renew the

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[1] As summarized in ICSID's letter to the Parties of 17 April 2023. This submission supplements Respondent's Counter-Memorial on Jurisdiction and the Merits filed on 25 February 2022 ("**Counter-Memorial**) and Rejoinder on Jurisdiction and the Merits filed on 4 November 2022 ("**Rejoinder**")

[2] As set out in Respondent's Application for Security for Costs, Respondent's use of the term 'Claimant' in this application refers solely to ***the party having performed the procedural acts of claimant in this proceeding*** (filing of memorials, communications to ICSID, et al.). Use of this capitalized term does not constitute, and should not be construed as, acceptance of the status of any particular entity as claimant party in the proceedings.

[3] Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01), p. 14 **[R-0003]**; Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**.

2009 Contract for another 10 years, and acted diligently and transparently throughout the process (which in fact resulted in the attribution of the new contract to .CO Internet itself):

- From the outset, MinTIC identified that the renewal was only a possibility, and that it would be necessary to obtain better financial terms for the Colombian State, irrespective of the preferred scenario. As early as the July 2018 Report, MinTIC opined on a preliminary basis that the best option would be a tender.[4]

- .CO Internet itself proposed a renegotiation of the financial terms when it requested a renewal on 20 September 2018.[5] While MinTIC answered to each of .CO Internet's communications, it indicated at all times that the renewal was only one of the options it was considering and did not represent that it would negotiate such renewal.

- From the fall of 2018, MinTIC put in place a detailed decision-making process involving the recruitment of consultants and ITU international experts, as well as internal capacity-building through the reorganization of the Advisory Committee. This process quickly confirmed the appropriateness of initiating a new tender, following which the decision was formalized by Minister Constaín.

- The ensuing tender was prepared on the basis of the ITU recommendations and carried out in an open and transparent manner: interested parties had several opportunities to comment on the tender documents, with .CO Internet making full use of this possibility and submitting extensive comments.[6] These comments were answered in detail and taken into account by MinTIC to adapt the tender (including .CO Internet's). As Ms Trujillo confirmed at the Hearing, .CO Internet was treated on an equal footing with all other tender participants.[7]

- The tender resulted in the attribution of the 2020 Contract to .CO Internet itself.

7. Claimant has been unable to rebut this large amount of documentary evidence. Nor was it able to cast doubt on Colombia's conduct during the cross-examinations of the three witnesses presented by Colombia – Sylvia Constaín, Luisa Trujillo and Iván Castaño. Each of these three high-ranking officials, who played key roles with respect to the .co domain process, consistently confirmed that Colombia acted diligently, transparently, and in keeping with its stated public policy objectives throughout the .co domain process.

8. In addition, the Hearing confirmed the many jurisdictional flaws affecting Claimant's claims, which are contractual in nature and were filed in total disregard of numerous consent

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4 July 2018 Report, pp. 5-6, 16 **[C-0027]**.
5 Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.
6 Counter-Memorial, para. 119-135. *See*, for the observations of .CO Internet: **[R-0045]**; **[R-0046]**; **[R-0047]**; **[R-0054]**; **[R-0055]**.
7 Transcript, Day 2 [Trujillo], 387:14-388:4.

jurisdictional requirements under the TPA, as well as in an abusive manner at a time when the 2009 Contract was still in force. In fact, as the Tribunal is aware, this total disregard for the TPA consent requirements continued after the initiation of this arbitration, with Claimant attempting to change the original Claimant party without ever obtaining Respondent's consent.

9. In view of the multiple issues affecting its jurisdiction, the complete lack of substantiation of Claimant's claims and their frivolous nature, the Tribunal should fully dismiss them. As Colombia explained at the Hearing, it was forced to incur in substantial costs in the preparation of its defence in spite of Claimant's abusive approach to these proceedings and failure to substantiate its claims.[8] These costs should be awarded in full to the Respondent.

2. RELEVANT FACTS CONFIRMED AT THE HEARING

10. For efficiency, Respondent does not restate all of the facts set out in detail in prior submissions, but instead focuses on the three critical points upheld at the Hearing which confirm that these proceedings have no valid *raison d'être*.

2.1 Colombia made a sound exercise of its contractual prerogative not to renew the 2009 Contract

(a) There was no obligation of renewal under the 2009 Contract

11. As the Hearing confirmed, Claimant's case is flawed because there was no obligation for Colombia to renew the 2009 Contract under both the very terms thereof and the accompanying legal framework.

12. *First*, it is undisputed that Article 4 of the 2009 Contract provides, in its original version, that the agreed 10-year term "*podrá ser prorrogado*", which translates to "*may be renewed*".[9]

13. As explained at length in previous submissions,[10] the use of the word "*may*" confirms that Article 4 provides only for a possibility of renewal, and not an obligation. The optional nature of the renewal is further apparent from the fact that, should the parties opt for a renewal, the article provides that a "*document […] in which the circumstances that motivated [the renewal] must be stated*" must be produced: had the renewal been automatic, a motivation of the renewal decision would not have been needed.

14. At the Hearing, Claimant was unable to refute these elements and in fact ultimately conceded in its Closing Statement that Article 4 "*doesn't promise an automatic extension*".[11]

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8 Transcript, Day 1 [Ordoñez], 99:21-25; Day 3 [Ordoñez], 461:19-463:3.

9 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]**.

10 *See* Rejoinder, paras. 5, 255-260.

11 Transcript, Day 3 [Baldwin], 422:8-14.

15. *Second*, as also explained at the Hearing in response to the Tribunal's questions, the Colombian legal framework at the time of the contract and of the renewal requests confirms that the renewal was only a possibility. As early as 2001, the Colombian Constitutional Court specifically held that the automatic renewal of public contracts in the telecommunications sector was "*clearly unconstitutional*" as this "*unjustifiably limits the free competition*".[12] Tellingly, Claimant failed to address this crucial point at the Hearing, even though the evidence shows that Neustar was aware of this decision when it requested a renewal.[13]

16. Similarly, Article 2 of Law 1065 of 2006 provided that the duration of a contract for the administration of the .co domain "*may be for up to 10 years, renewable on one occasion only, for a term equal to the original term.*"[14] As Claimant admitted, "*the language of article 2 of Law 1065 provides for the possibility of renewal*",[15] thus not an obligation, in line with the above caselaw of the Constitutional Court which well predated Law 1065 of 2006.

17. In this context, Ms Trujillo confirmed at the Hearing that there could be "*no promise of an automatic extension, nor there were any preferential entitlements [so] there was no commitment to give [.CO Internet] any preferential treatment, or to give them an extension.*"[16]

18. Claimant's inability to overcome this major flaw to its claims is evidenced by its shifting position on the correct interpretation of the contract:

- Ever since its first communication of 20 September 2018, .CO Internet acknowledged that the renewal was not automatic.[17] In its 27 December 2018 letter, .CO Internet acknowledged that the renewal was only a possibility and argued that its request should "***reasonably have a positive response from the administration****, since […] a revision of the [State's] consideration is proposed in the [request for renewal].*"[18] In later communications to MinTIC, .CO Internet only referred to an unparticularized "*right to negotiate*".[19]

- As explained in the Rejoinder, Claimant modified its translation of Article 4 of the 2009 Contract in an attempt to read-in an obligation of renewal, only to later be forced to revert to its original (and correct) translation that the contract "*may be renewed.*"[20] At the Hearing, Claimant also put emphasis on an alleged entitlement to "*good faith negotiations*" for the

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

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

14 Law 1065 of 29 July 2006, Art. 2 **[C-0009]** (emphasis added).

15 Transcript, Day 3 [Baldwin], 423:12-22.

16 Transcript, Day 2 [Trujillo], 387:24-388:4.

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

18 Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), Section 5, para. (vi) (p. 15 of the PDF) **[R-0035]**.

19 Letter from .CO Internet to MinTIC of 25 September 2019, p. 22 **[C-0079]**: .CO Internet self-servingly argued that MinTIC should "*accept […] the offer due to its appropriateness for the State.*"

20 *See* Rejoinder, para. 8; Claimant's Opening Presentation, slide 18; Claimant's Closing Presentation, slide 8.

extension. However, it failed to particularize such right or explain how Colombia would have breached it.[21]

19. The Hearing has therefore confirmed that the 2009 Contract did not impose any obligation or commitment of renewal on Colombia, which was free to consider its other options.

(b) Colombia made an informed decision to launch a new tender

20. The Hearing further confirmed that Colombia put in place a robust decision-making process and made a sound use of its contractual prerogative not to renew the 2009 Contract, thereby debunking Claimant's misleading contentions to the contrary.

21. *First*, Claimant's attempts to sow confusion regarding the contents of the July 2018 Report were entirely disproved. It is uncontested that the July 2018 Report is the first document on the record mentioning the necessity to take a decision on the future of the .co domain.[22] It is further uncontested that this report was intended to be a transition document following the mid-2018 presidential elections in Colombia.[23] However, contrary to Claimant's misleading assertions throughout this arbitration including at the Hearing,[24] this report did not recommend a renewal but instead expressly identified (i) the change in market conditions, (ii) the need to obtain better proceeds for Colombia, (iii) the legal risks associated with a renewal, and (iv) concluded that it would be more advisable to launch a new tender process.[25] This internal MinTIC document was however just a preliminary analysis, insufficient to take an informed decision. As Ms Constaín explained at the Hearing:

> *MS CONSTAIN. […] we were very much in the information-gathering phase and in the understanding about the different elements of the .CO in particular, so I did not have any preconceived idea […]. I did have the recommendation that the July 18 document does have very specifically where it suggests that an open fresh bid would be the best alternative.*[26]

22. Indeed, as Mr Castaño also confirmed, MinTIC had limited knowledge of the domain industry, and the role of the two MinTIC contractors tasked with assisting the supervision of the contract were "*mostly technical [and] operational as regards the implementation of the contract.*"[27]

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21 Transcript, Day 1 [Baldwin], 35:18-36:2; to the contrary, and as confirmed by Mr Castaño, MinTIC maintained contact with .CO Internet and acceded to their requests for information/meetings. *See* First WS of Iván Castaño, paras. 19, 29 **[RWS-02]**.

22 July 2018 Report **[C-0027]**. At the Hearing, Claimant explained that "*well before Minister Constaín and the other witnesses here were involved at all there had been discussions about this extension but the formal notification happened on 20 September 2018.*" (Transcript, Day 1, 31:19-23). Just as with many other allegations by Claimant, this is entirely unsupported by any evidence and no more than speculative statement by counsel.

23 Transcript, Day 1 [Gouiffès], 114:1-117:2, *see* Counter-Memorial, paras. 79-83; Rejoinder paras. 105, 202, 311.

24 Transcript, Day 1 [Baldwin], 31:24-32:4.

25 *See* Counter-Memorial, paras. 82, 327; Rejoinder paras. 8, 10, 105, 202, 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]**.

26 Transcript, Day 2 [Constaín], 331:8-21.

27 Transcript, Day 1 [Castaño], 220:15-221:16; 226:10-228:7.

This explains why Colombia went even beyond the 2018 July Report and took further steps from the fall of 2018 to take an informed decision.

23. *Second*, the Hearing confirmed the soundness of these subsequent steps:

- The first step was to reorganize the .co domain Advisory Committee in order for Minister Constaín to have a "*centre of knowledge*" within MinTIC capable of advising the Minister on the best options for the future of the .co domain.[28] As Mr Castaño explained, prior to his arrival "*what this committee did was to review the operations report and it was a committee dedicated to doing contract supervision*", which is why .CO Internet participated in its sessions.[29] The role and composition of this committee were therefore modified through Resolution 3278 of 3 December 2018, with the Committee being tasked with making recommendations on the future of the .co domain and .CO Internet no longer permanently invited to its sessions.[30] As both Ms Trujillo and Mr Castaño confirmed at the Hearing, this was done to "*ensure candour and transparency, and to avoid that maybe a potential participant in a new tendering process would be given some privilege.*"[31] In fact, had .CO Internet continued participating in the sessions, "*it would have been quite likely that there would have been a conflict of interest and that would have prevented them from taking part in the whole contractual process*" for the attribution of the new .co domain contract.[32] Claimant's allegations that CO. Internet's exclusion from the Committee was somehow inappropriate were therefore entirely debunked at the Hearing.

- Colombia also recruited both international and local consultants to integrate the team it was putting in place with respect to the .co domain, including ITU experts with specific knowledge of ccTLDs and Adriana Arcila, an experienced systems engineer.[33] Claimant failed entirely to mention these experts' involvement in the .co domain process during its Opening Presentation. However, Mr Castaño testified as to the close cooperation that MinTIC's Advisory Committee and Direction of IT Industry Development developed with these experts, and the importance of this joint work for MinTIC.[34] These experts quickly confirmed that the best option would be to initiate a new tender process in light of numerous market changes.[35] As Mr Castaño explained at the Hearing, it also became clear that it was

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28 Transcript, Day 2 [Constaín], 320:25 – 321:14.

29 Transcript, Day 1 [Castaño], 246:20-247:21. *See also*, Minutes of the Advisory Committee session of 13 June 2018 **[C-0026]**; First Witness Statement of Iván Darío Castaño Pérez, para. 6 **[RWS-02]**.

30 Resolution 1250 of 16 June 2008, Art. 3 **[C-0036]**.

31 Transcript, Day 1 [Castaño], 244:5-23.

32 Transcript, Day 2 [Trujillo], 382-383.

33 Transcript, Day 1 [Castaño], 238:14-17.

34 Transcript, Day 1 [Castaño], 237:23-238:3: "*There was a preliminary report, I believe, and in fact we had some working sessions, some in-person sessions working with the ITU experts in Bogotá, and also as I mentioned before we had an in-house team that was also doing its own analysis of how the industry was evolving.*"

35 *See* Counter-Memorial, para. 117, 118; Rejoinder para. 214.

"*necessary to have a national policy for the management of that resource, [including] the modification of that model of the exclusive outsourcing*".[36]

24. *Third*, as explained at the Hearing, the record thoroughly demonstrates that MinTIC maintained contact with .CO Internet throughout and repeatedly explained that the renewal was "*only one of the alternatives that this Ministry is in the process of analysing with the goal of securing the Nation's best interest.*"[37] Claimant's unsubstantiated allegations at the Hearing that Colombia would have represented that it would somehow negotiate a renewal therefore lack any credibility and should be given no weight.

25. *Finally*, the Hearing also confirmed that the decision to launch a new tender came from MinTIC (rather than resulting from some sort of Presidential plot). It was formally recommended by MinTIC's Advisory Committee on 17-18 March 2019, after MinTIC's analysis had sufficiently progressed. These minutes recap the investigations undertaken by MinTIC and the considerations that led to the decision to launch a tender (market conditions and legal risk).[38]

26. Mr Castaño confirmed at the Hearing that during this 17-18 March meeting, "*the decision was in fact taken to move forward with a new bidding process in light of studies, the analyses that we had received.*"[39] This was communicated to .CO Internet on 10 April 2019.[40] However, it bears noting that from a legal standpoint, the decision was only officially adopted with the issuance of the resolution initiating the 2020 Tender Process. In the words of Ms Constaín:

> *Well, the official decision was made on the date that I actually signed the measure, but this, as I guess most decision-making processes are exactly that, it is a process where you find information, you have recommendations, you bring in experts, you create a core team, and so I would say that it was a process. The official date upon which that decision was executed, I would call it that, was the day that we signed the initial resolution.*[41]

27. The evidence as upheld at the Hearing therefore confirms that Colombia's decision to launch a new tender was the result of a robust decision-making process.

2.2 Colombia conducted the 2020 Tender Process in a fair, open and transparent manner

28. That the present proceedings have no valid *raison d'être* was further confirmed by the fact that the 2020 Tender Process was conducted in a fair, open, and transparent manner, and that Claimant's dramatic corruption/favouritism allegations were proven to be false and meritless.

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36 Transcript, Day 2 [Castaño], 284:21-285:10.

37 Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007]**. *See also*, Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**; Letter from MinTIC to .CO Internet of 22 November 2018 **[C-0029]**.

38 Minutes of the Advisory Committee session of 18 March 2019 **[C-0039]**; CM, paras. 329, 358; Rejoinder paras. 239, 309.

39 Transcript, Day 2 [Castaño], 284:24-285:10.

40 Letter from MinTIC to .CO dated 10 April 2019 **[C-0044]**.

41 Transcript, Day 2 [Constaín], 332:6-15.

29. *First*, it is telling that Claimant has not produced any substantial evidence of its corruption allegations nor put forward any witnesses to support them. At the Hearing, Claimant's only recourse was, for the very first time, to hide behind unsubstantiated allegations of fear of reprisals, in order to explain its lack of witnesses. However, as Respondent explained in its Closing Statement, these are nothing but a smokescreen: Claimant could have put forward Charlie Gottdiener (then CEO of Neustar), Nicolai Bezsonoff (then Registry VP of Neustar), or Kevin Hughes (then GC of Neustar), who was present at the Hearing; but they did not. They could have questioned Respondent's witnesses on this topic; but they did not.[42]

30. *Second*, the record actually shows that there was no favouritism towards Afilias. As explained already in Respondent's Counter-Memorial (and summarized in the table below), each of the specific terms of the 2020 Tender that Claimant complains of as being "*tailormade*" for Afilias were in fact expressly based on ITU recommendations and reviewed by local experts. Claimant has failed to address this evidence throughout the proceedings.[43]

Requirement	ITU recommendation	Draft 2020 ToRs	Final 2020 ToRs
Maximum level of indebtedness (Section 5.2.2)	70%	70%	Set at 75% at .CO Internet's request
Number of distributors ('*registrars*') (Section 5.4(c))	1,500	1,500	Requirement removed
Experience in the management of DNS databases (Section 5.4(b))	25 million transactions per day	25 million transactions per day	25 million transactions per ***month***

See Counter-Memorial, para. 129

Respondent's Opening Presentation, slide 19[44]

31. In the words of Ms Trujillo at the Hearing, "*it was the ITU experts who recommended what the technical conditions that had to be met should be. The operator of one of the world's biggest domains had to have very high qualifications in order to guarantee they could provide the service and manage the .co domain*",[45] and MinTIC's goal was "*to attract the largest number of companies that had the legal, financial and technical expertise in order to operate .co.*"[46]

32. *Third*, the 2020 Tender Process was characterized by a high level of openness and interaction between MinTIC and the interested parties, with the latter having the opportunity to submit

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42 Instead, Claimant relied on a couple of speculative press articles by one author to make far-reaching allegations that Colombia's corruption scheme was halted by "*the pressure from the press reporting and the public outcry.*" (Memorial, para. 139).

43 *See* Counter-Memorial, para.129 and associated references.

44 At the Hearing, Claimant suggested that the maximum level of indebtedness of 70% was not recommended by the ITU but instead set by reference to a Colombian decree (Decree 1082 of 2015) (*see* Transcript, Day 1 [Baldwin], 199:12-200:8). This is not only voluntarily misleading but plainly incorrect: the relevant extract of the ITU Report (Section 4.3.4, page 110) states "*Financial Indicators requested by Decree 1082/2015*", and lists amongst these financial indicators the 'maximum level of indebtedness'. It is therefore clear on the face of this document that Decree 1082/2015 *requires* that one of the financial indicators be the maximum level of indebtedness. However, the *value* of this indicator (70%) is not set by decree but was rather recommended by the ITU.

45 Transcript, Day 2 [Trujillo], 378:24-379:5.

46 Transcript, Day 2 [Trujillo], 381:19-22.

several rounds of comments to the tender documents which were answered in detail. All of the components of the tender documents Claimant complains of in the present proceeding were in fact adapted or removed, in some instances at the request of none other than .CO Internet itself.[47] .CO Internet was therefore treated on the same terms than other interested parties to the 2020 Tender Process, as Ms Trujillo confirmed at the Hearing:

> *MS TRUJILLO: Well, the bidding process was open, transparent, it was a public process. Both the bidders, Neustar, .CO Internet, all of the interested parties had the opportunity to review all of the documents and they presented a number of observations, many of which were taken into account and incorporated into the final documents, so I believe that the treatment was equal, respectful […].*[48]

33. *Finally*, Claimant's allegations are decisively put to lie by the fact that Afilias did not even participate in the tender process. Instead, it was .CO Internet which was awarded the 2020 Contract, with .CO Internet and Neustar representatives (respectively Mr Santoyo and Mr Bezsonoff) expressing their satisfaction with the results of the 2020 Tender Process.[49]

2.3 Colombia pursued a legitimate public policy throughout the .co domain process

34. At the Hearing, Claimant was also unable to counter the fact that Respondent pursued legitimate public policy objectives throughout the .co domain process, from the decision not to renew the 2009 Contract to the adjudication of the 2020 Contract.

35. *First*, the need to increase Colombia's share of proceeds was already identified in the preliminary July 2018 Report,[50] acknowledged by Claimant itself when it first expressed interest in the renewal,[51] and confirmed by all of MinTIC's subsequent investigations – including during the 18/19 March 2019 Advisory Committee session.[52] As noted at the Hearing by Ms Constaín:

> *[W]ith all the information – overwhelming, I would say, information that we had in front of us, we made the decision that the best thing for the Colombian government and people would be for us to basically open it up to anybody that would be interested in the management of the asset.*[53]

36. It is undisputable that such policy objective was achieved through the 2020 Tender Process, which saw an increase of MinTIC's share of proceeds from 7% under the 2009 Contract to 81% under the 2020 Contract, thereby clearly fulfilling Colombia's public policy objectives. In fact,

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47 *See* Counter-Memorial, Sections 2.5(b) and (c).

48 Transcript, Day 2 [Trujillo], 356:4-20.

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

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

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

52 Counter-Memorial, Sections 2.5(a), (c) and (e). *See* **[R-0088]** (disclosed as HLI01**[R-0089]** (disclosed as HLI07); **[R-0090]** (disclosed as HLI08); **[R-0091]**.

53 Transcript, Day 2 [Constaín], 318:16-21.

the proceeds received by Colombia during the first year of the 2020 Contract were nearly twice as important as the proceeds received during the entire term of the previous contract.[54]

37. In the words of Ms Constaín, the 2020 Tender Process was therefore "*the best possible course of action to defend the Colombian public's interests and ensure the adequate operation of the .co domain*."[55]

38. *Second*, from a technical point of view, MinTIC's investigations evidenced the necessity to adapt the administration and operation model adopted in 2008 to international best practices, which had drastically evolved. As Mr Castaño explained, the total outsourcing model that had been adopted in 2008 was no longer fit to Colombia's necessities:

> *MR CASTAÑO: […] it was more and more clear that it was necessary for Colombia, as a sovereign country, it was necessary to have a national policy for the management of that resource, and that policy should have been more proactive and more direct concerning state management of the resource. And that of course included the modification of that model of the exclusive outsourcing of the administration and management of the domain.*[56]

39. These preliminary insights of MinTIC were also confirmed by the external consultants, including the ITU experts who recommended in their final report that Colombia increase its participation in the different ICANN bodies. As Ms Trujillo testified, the ITU experts and MinTIC task force then "*started to define the technical conditions*" for the new tender and noticed that the 2009 Contract's conditions were "*outdated […] so it was important to adjust them to the new circumstances of the domain .co.*"[57] Such adaptation was achieved through the 2020 Contract.

40. *Third*, Claimant's self-serving allegation that Colombia's public interest would have been best served by renewing the 2009 Contract on .CO Internet's proposed terms is meritless:

- Claimant itself has not even attempted to explain why this would have been the case, or to address the impact of .CO Internet being granted the 2020 Contract on its claims (although it acknowledged at the Hearing that in other cases this "*might erase damages*").[58]
- As previously explained, renewing the 2009 Contract while modifying the financial terms (which all the parties acknowledged was necessary[59]) would have breached fundamental

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54 *See* Respondent's Opening Presentation, slide 22.
55 First Witness Statement of Sylvia Constaín, para. 32, **[RWS-1]**
56 Transcript, Day 2 [Castaño], 283:17-284:10.
57 Transcript, Day 2 [Trujillo], 267:21-368:10.
58 Transcript, Day 3 [Baldwin], 434:10-25.
59 Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.

principles of Colombian law (transparency and equal opportunity). Such risk was identified by MinTIC,[60] and further confirmed by Ms Trujillo at the Hearing:

> *[…] any time you have the possibility of renewing a contract, there may be always legal risks concerning upholding constitutional principles. So if we have to change something as essential, as fundamental, as the fees, as a share of the fees, so there was a very major modification in the tendering, that was a major modification to introduce, and there could be some kind of infringement of the principle, of the planning principles, and also of the free competition and competitiveness principle.*[61]

- As seen immediately above, the 2020 Tender Process resulted in an increase of MinTIC's share of proceeds from 7 to 81%, which were used to fund digital connectivity programs.

41. Accordingly, the Hearing confirmed that throughout the .co domain process Colombia pursued legitimate public policy objectives.

3. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S CLAIMS

42. Claimant's opportunistic claims were also confirmed to be defective for a number of reasons at the Hearing, all of which affect the Tribunal's jurisdiction.

3.1 The Tribunal has no jurisdiction over the intended new Claimant

43. For efficiency, Respondent incorporates herein by reference its previous submissions.[62] In a nutshell, this is a unique case, with the Claimant intending to unilaterally substitute *midway* the proceedings the original claimant party with a new entity following an alleged assignment of its ICSID claim. However, Claimant failed to establish that the assignment was valid/effective under Delaware law. And even if this was the case, the intended substitution would not be permissible under applicable international law because once consent is given under the TPA and the ICSID Convention, it cannot be unilaterally altered.[63] The Tribunal therefore lacks jurisdiction over the intended new claimant Security Services/Vercara, while it retains jurisdiction over Neustar (at least for purposes of cost allocation).

3.2 The Tribunal lacks jurisdiction due to the Council of State proceedings

44. It is uncontested that Art. 10.18(3) of the TPA carves out actions for interim relief provided that they meet three conditions: such action must (i) seek interim injunctive relief, (ii) not involve

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60 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.

61 Transcript, Day 2 [Trujillo], 372-373.

62 *See* Rejoinder, Section 2.1; Application for Security for Costs, Section 3; Reply on Security for Costs, Section

63 In its Rejoinder on Security for Costs, Claimant continues to rely on *Quasar* **[RL-205]** to argue that a unilateral substitution would be permissible. As explained in the Reply on Security for Costs however (*see* para. 53), in *Quasar* the tribunal expressly noted that the substitution was permissible because there was a universal succession between the entities (with the former claimant ceasing to exist). This is certainly not the situation here and Claimant has not argued otherwise. In any event, Claimant also overlooks the numerous differences between the Russia-Spain BIT applicable in *Quasar* (**[RL-208]**) and the TPA: while the Russia-Spain BIT does not impose any specific conditions on the State's consent, the TPA specifically provides at Article 10.17 that the procedures set out in Section B of Chapter 10 of the TPA are "*conditions of consent*" of the State.

the payment of monetary damages, and (iii) be brought for the sole purpose of preserving the investor's rights during the pendency of the arbitration.[64] It is also uncontested that before the Council of State, Neustar and .CO Internet requested that MinTIC be ordered to "*formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .CO Internet*".[65]

45. As explained in response to the Tribunal's questions at the Hearing, this request clearly exceeds the permitted scope of Article 10.18(3) because (i) its purpose goes far beyond the sole purpose of preserving rights "*during the pendency of the arbitration*", and (ii) if granted it would have been virtually impossible to unwind and therefore akin to a decision on the merits.[66]

46. Accordingly, the Council of State proceedings do not fall within the purview of Article 10.18(3), which in turn affects the Tribunal's jurisdiction over Claimant's claims for two reasons:

- First, such proceedings constituted a definitive forum selection under Annex 10-G of the TPA (with Neustar alleging breaches of the TPA before the Council of State).[67]
- Second, Claimant also breached the waiver requirement at Article 10.18(2) of the TPA by improperly seeking to carve-out the Council of State proceedings from its waiver and continuing these proceedings after the RFA.[68] Contrary to Claimant's misrepresentation in its Rejoinder on Security for Costs, failure to comply with waiver requirements cannot be remedied and affects the Tribunal's jurisdiction *ab initio.*[69]

3.3 The Tribunal lacks jurisdiction due to Claimant's breaches of the TPA's preliminary consent requirements

47. In the words of Mr Bigge for the United States at the Hearing, "*the parties to the US-Colombia TPA did not provide unconditional consent to arbitration under any and all circumstances. Rather, the parties have only consented to arbitrate investor-state disputes under Chapter 10, Section B, where an investor submits a "claim to arbitration under this section in accordance with this agreement*."[70]

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64 In the words of the United States, such carve-out is "*narrow*" and the requested relief must not "*go beyond that which is necessary to preserve the status quo ante during the pendency of the arbitral proceedings.*" *See* US NDPS, 13 May 2022, para. 12.

65 Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), p. 3 **[R-0009]**; Council of State, Decision on .CO Internet's request for interim measures of 9 October 2019 (case No. 64831), para. 6 **[R-0008]**.

66 *See* Rejoinder, paras. 36,38, 40,43, 47,90-91;

67 *See* Rejoinder, Section 2.2(b); Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), p. 3 **[R-0009]**; Council of State, Decision on .CO Internet's request for interim measures of 9 October 2019 (case No. 64831), para. 6 **[R-0008]**: "*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*."

68 *See* Rejoinder, Section 2.3.

69 Rejoinder on Security for Costs, para. 63(d); *See Amorrortu*, para. 233 **[RL-133]** (emphasis added). *See also*, *Commerce Group*, para. 115 **[RL-027]**; *RDC*, para. 61 **[RL-028]**; *Renco*, para. 142 **[RL-021]**; *Corona*, para. 191 **[RL-095]**.

70 Transcript, Day 1 [Bigge], 188:15-22.

48. It is uncontested that for arbitration proceedings to be validly instituted, the TPA requires that (i) an "*investment dispute*" be in existence,[71] (ii) several preliminary steps (termed "*conditions of consent*") be complied with, including the submission of a valid Notice of Intent,[72] and (iii) that the investor have incurred "*loss or damage*".[73] Claimant however failed to comply with these consent requirements, as there was no dispute and Claimant had not incurred in any loss by the time of the Notice of Intent or RFA (with the 2009 Contract still in force, the 2020 Tender Process ongoing and the Council of State Proceedings pending).

49. As summarized in Respondent's Opening Presentation, this is also apparent from the numerous changes to Claimant's allegations and claims as well as Claimant's procedural behaviour (with Claimant being required to make substantial amendments to its RFA between filing and registration, and remaining inactive for several months following its registration).[74] These requirements being mandatory, the Tribunal lacks jurisdiction over Claimant's claims.[75]

3.4 Claimant fails to establish its standing to bring claims

50. As explained immediately above, the TPA requires the existence of a "*dispute*" for proceedings to be validly initiated. For a Claimant to have standing under the TPA it must thus own the relevant investment at the time the dispute is effectively submitted to arbitration.[76] Yet, no dispute had crystallized by the time Claimant submitted its RFA, or when this RFA was registered by ICSID on 9 March 2020. It is only with its Memorial, filed on 22 October 2021, that Claimant set out its actual claims and supporting allegations.

51. However, by that time Claimant had long disposed of its investment, with Neustar formalizing the sale of .CO Internet to GoDaddy on 6 April 2020 (and the evidence on the record pointing to the fact that GoDaddy and Neustar had agreed the terms of the sale before the filing or registration of the RFA).[77] Considering that, in the words of the *Aven* tribunal, an investor "*who disposes of ownership of the investment in question before the arbitral proceedings should not be eligible to seek the Treaty's protection*",[78] Claimant lacks standing.

3.5 Claimant committed an abuse of process

52. As explained previously, Claimant committed an abuse of process for two reasons:

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71 Article 10.16(1) of the TPA. This is turn requires the "*the factual and legal framework on which the disagreement is based*" to be in existence (*see EuroGas*, Dissenting Opinion by Arbitrator Emmanuel Gaillard, 18 August 2017, para. 6 **[RL-009]**).

72 TPA, Article 10.16(2).

73 TPA, Article 10.16(1)(ii).

74 Transcript, Day 1 [Gouiffès], 135:14-20.

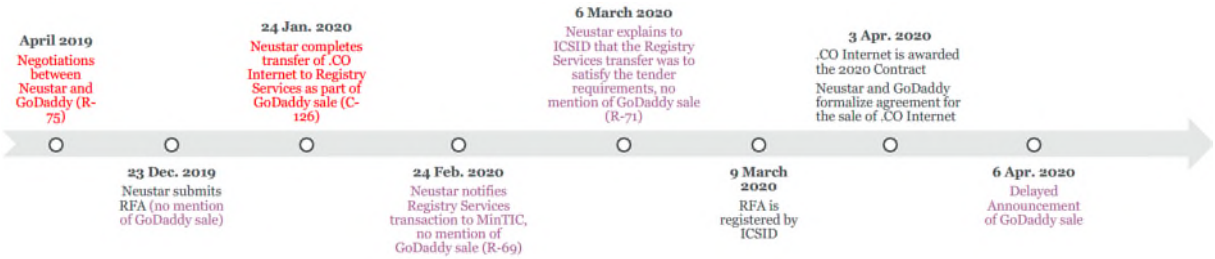
75 As explained in Respondent's previous submissions, the Tribunal also lacks jurisdiction due to the defective nature of Neustar's Notice of Intent: *see* Counter-Memorial, Section 3.2(b), Rejoinder, Section 2.4(b).

76 *See* Transcript, Day 1 [Ordoñez], 150:25-152:1.

77 *See* Counter-Memorial, para. 277, Rejoinder paras. 122-135.

78 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 301 **[RL-011]**.

- First, it tried to fabricate the appearance of standing by having recourse to arbitration at a time when the dispute had not crystallized in light of its impending sale of .CO Internet to GoDaddy, and keeping deliberately silent on this sale. As explained in Respondent's Opening Presentation, this is apparent from the timeline of the negotiations and Claimant's refusal to provide documents:



Respondent's Opening Presentation, slide 36

- Second, Claimant sought to use the present proceedings (and the related Council of State proceedings) to exert undue pressure on Colombia not to launch a tender process and obtain a renewal in spite of the clear contractual language to the contrary.

53. Respondent has therefore established that Claimant committed an abuse of process by initiating these proceedings, and the Tribunal should decline jurisdiction.

3.6 Claimant's claims are purely contractual in nature

54. Finally, in line with its earlier submissions, Claimant has been unable to identify any sovereign act by Colombia at the Hearing: to the contrary, Claimant's insistence on the correct interpretation of Article 4 throughout confirmed the contractual premise of its claims.[79] It follows that these should have been litigated before the proper contractually-agreed forum (Bogotá-seated arbitration under Article 19), and the Tribunal therefore lacks jurisdiction.

4. CLAIMANT'S CLAIMS LACK ANY MERIT

55. Claimant's case on the merits is also untenable. Should the Tribunal reach this stage, which Respondent disputes entirely, Claimant's unfounded claims should be categorically dismissed. As stressed at the Hearing, Claimant has utterly failed to meet its burden of proof while Colombia has produced ample evidence that it abided by the TPA.

[79] In an attempt to create the appearance of a sovereign act, Claimant referred in its submissions to the change of administration following presidential elections as improper (*see* Reply, para. 13). As Ms Trujillo however testified, such changes are completely usual and standard during any governmental transition, and specifically provided for under Colombian law (principle of free appointment). In any event, Claimant has not explained how this would have impacted Colombia's decision-making with respect to the 2009 Contract. *See* Transcript, Day 2 [Trujillo], 363:9-364:22.

4.1 Colombia complied with Article 10.5 of the TPA by treating Claimant fair and equitably

56. At the Hearing, Claimant attempted to continue to widen the scope of the minimum standard of treatment under Article 10.5 of the TPA, to no avail (**a**). In any event, Claimant has fallen far short of proving any breach of this provision, with Respondent instead adducing substantial evidence that it fully complied with this standard (**b**).

(a) Claimant's attempt to broaden the scope of Article 10.5 is baseless

57. It is uncontested that Article 10.5 of the TPA expressly links the FET standard under the treaty to the customary international law minimum standard of treatment of aliens ("**MST**").[80] Despite acknowledging at the Hearing that it is "*not suggesting that other substantive protections be added to the MST*",[81] Claimant continued to try widening the MST by referring to a handful of cases allegedly proving that it expanded.[82] However, these cases do not help Claimant as Article 10.5 of the TPA expressly memorializes the Parties' intention to limit the scope of the standard, and Claimant fails to establish that this alleged "widened" MST is *opinio juris* and constitutes State practice.[83] In any event, numerous previous tribunals have considered that "*the threshold for finding a violation of the [MST] remains high.*"[84]

58. Accordingly, Claimant has failed to prove that the MST includes self-standing obligations not to discriminate, transparency, a broad conception of due process (as opposed to denial of justice) and legitimate expectations. These claims should be dismissed for this reason alone.

(b) Respondent complied with Article 10.5 of the TPA at all times

59. As explained at the Hearing, Claimant has fallen far short of meeting the high burden required for a showing of a breach of the MST enshrined in Article 10.5. To the contrary, the record shows that Colombia complied with this standard and in fact went much beyond.

60. *First*, Colombia's conduct was not arbitrary, and certainly does not meet the required threshold of "*manifest arbitrariness*".[85] At the Hearing, Claimant attempted to rely on *Teco v. Guatemala* in order to argue that "*when there is a process that is supposed to happen, if that process is opaque or that process doesn't happen, or there is a lack of candour with regard to that process […], those actions violate the MST.*"[86] However, Claimant was unable to explain at the Hearing

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80 *See* Memorial paras. 181, Counter-Memorial paras. 311-312. As such, any reliance by Claimant on cases where the treaty at issue did not link the FET provision to the MST is entirely inapposite, and these cases should be disregarded entirely.

81 Transcript, Day 1 [Baldwin], 46:8-12.

82 *See* Claimant's Opening Presentation, slides 59-61.

83 *See* Rejoinder, para. 177.

84 *International Thunderbird* , para. 194 **[CL-059]**. *See also Glamis Gold*, paras. 600-615 **[CL-017**], *Delimitation Maritime Boundary (Canada v. United States of America)*, para. 111 **[RL-082]**, holding that the fundamentals of the *Neer* standard remain relevant.

85 *International Thunderbird* , para. 194 **[CL-059]**; *Glamis Gold, Ltd.*, para. 626 **[CL-017]**; *TECO Guatemala Holdings*, paras. 492 and 642 **[CL-030]**; *Eli Lilly*, paras. 222 and 223 **[RL-085]**.

86 Transcript, Day 1 [Baldwin], 48:21-49:2.

how the simple exercise of a contractual prerogative by Colombia, which did not require the institution of any specific "*process*" by law or in practice,[87] could possibly amount to arbitrariness. Claimant has not shown that Colombia was under any obligation to negotiate the terms of a renewal and/or renew the 2009 Contract: its claims under Article 10.5 fail for this reason alone.

61. In any event, the Hearing decisively confirmed that Colombia's conduct was far from arbitrary, irrational, or in bad faith:

- While Claimant alleges that Colombia's decision and subsequent tender served "*no apparent legitimate purpose*",[88] it has failed to adduce any concrete evidence to support this. In contrast, Respondent has put forward a substantial body of evidence confirming MinTIC pursued (and achieved) the double objective of obtaining increased proceeds from the .co domain for the Colombian people and adapting the administration/operation model.[89]

- With respect to Claimant's speculative discrimination allegations, as seen above the MST does not include such a self-standing obligation,[90] and even if it did so (*quod non*) only "*evident discrimination*" could potentially lead to liability.[91] At the Hearing, Claimant failed to present any evidence and even failed to question Respondent's witnesses on its allegations that Colombia tried to favour Afilias. To the contrary, the evidence on the record confirms that (i) the tender conditions were based on the ITU recommendations, (ii) adapted throughout the process, and (iii) ultimately .CO Internet was awarded the 2020 Contract. As Ms Trujillo testified, "*there was equal treatment given to all of the bidders, as far as I understand. I am referring to the fact that everyone is treated equally, it is an open process, […] a level playing field was guaranteed.*"[92]

- Claimant has also entirely failed to establish its bad faith allegations. Irrespective of the high threshold required,[93] Claimant simply alleges without any support that there was "*no rational reason*" for MinTIC not to renew the contract or to conduct the tender in the way it did. Here again, Claimant has not put forward any concrete evidence of its claims nor even questioned

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87 At the Hearing, Claimant referred to the *Teco v Guatemala* case to argue that "*when there is a process that is supposed to happen, if that process is opaque or that process doesn't happen, or there is a lack of candour with regard to that process […], those actions violate the MST*." (*see* Transcript, Day 1 [Baldwin], 48:21-49:2). However, Claimant has not explained which process was required in the case of the 2009 Contract renewal request.

88 *See* Reply, paras. 230-232.

89 *See* July 2018 Report, pp. 5-6 **[C-0027]**.

90 *See* 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', p. 268 **[RL-084]**; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 15 **[CL-050]**

91 *Glamis Gold*,, paras. 22, 24, 616, 627, 762, 776, 779, 788, 824 **[CL-017]**.

92 Transcript, Day 2 [Trujillo], 387:14-24.

93 *Ioan Micula*, para. 378 **[RL-089]**.

Respondent's witnesses on Colombia's alleged hidden motives, which are simply speculative and unsubstantiated.

62. *Second*, Colombia did not commit any denial of justice and respected due process. Preliminarily, it should be noted that under the TPA, only serious irregularities leading to an outcome "*which offends judicial propriety*" may lead to a breach of the MST.[94] Claimant has not even attempted to allege that Colombia's actions meet this threshold.

63. Moreover, Claimant has completely failed to substantiate its due process allegations. At the Hearing, Claimant limited itself to arguing that there was a "*lack of candour in the administrative process*",[95] without elaborating further. As for arbitrariness, Claimant is unable to identify the 'administrative process' it seeks to complain of for the simple reason that the decision not to renew the 2009 Contract was a contractual prerogative that did not require the adoption of a specific administrative act.[96] Claimant's unsubstantiated allegations that the decision came from the President's office were further debunked at the Hearing. Ms Constaín clearly confirmed that she took the decision:

> *MS CONSTAIN: I received a series of recommendations, all of which came from expert opinions, both domestic and international, and it is the sum of the recommendations that in this case happened to have been mostly in the same – all I guess -- in the same direction. It is the sum of the recommendations that I used to make the decision to open a new tender.*[97]

64. Similarly, Claimant's allegations that Colombia was not transparent or acted arbitrarily because it allegedly did not keep .CO Internet informed were proven to be utterly unfounded: as already set out in previous submissions,[98] MinTIC continuously responded to .CO Internet and Neustar's communications and acceded to their requests for meetings, keeping them informed of their decisions and the rationale behind them throughout the process.

65. *Finally*, Claimant's legitimate expectations' claim is also groundless. This is primarily because legitimate expectations are not protected independently under the MST enshrined at Article 10.5 of the TPA.[99] In any event, Claimant has failed to establish that (i) Colombia engaged in specific representations, (ii) Neustar reasonably and legitimately relied on these specific

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94 TPA, Article 10.5.2(a) **[C-0002]**. As confirmed by the *Aven* tribunal, para. 357 **[RL-011]**.

95 Transcript, Day 1 [Baldwin], 52:3-13.

96 Article 17 of the same 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* **[C-0017]**.

97 Transcript, Day 2 [Constaín], 349:3-16.

98 *See* Rejoinder, paras. 214, 239. Art. 10.5 specifies that it does "*not create additional substantive rights*" for investors.

99 *See* Counter-Memorial, paras. 370-377; Rejoinder, paras. 245-249; *MTD Equity*, para. 67 **[RL-106]**; *Eli Lilly*, Submission of the United States of America, para. 13 **[RL-104]**.

representations when acquiring .CO Internet's full share capital in 2014,[100] and (iii) Colombia breached these legitimate expectations by refusing to renew the 2009 Contract.

66. In particular, as seen above, the legal and contractual framework of the .co domain was clear at all times regarding the prohibition of automatic renewals and the fact that a renewal of the 2009 Contract was only a possibility, and therefore any expectation of renewal would not have been reasonable and legitimate.[101] Neustar itself understood the renewal to be only a possibility in the context of its acquisition of .CO Internet (by agreeing to a contingent payment).[102]

67. Claimant's allegations that Respondent breached Art. 10.5 remain entirely speculative and unsubstantiated and should accordingly be dismissed.

4.2 Claimant has no viable claim for discriminatory treatment under Articles 10.3 and 10.4 of the TPA

68. Claimant has also argued that Colombia's decision to launch a new tender process would breach the obligations to accord MFN and National Treatment under Arts. 10.4 and 10.3 of the TPA. However, as explained in previous submissions, the contractual decision not to renew does not constitute "*treatment*" susceptible to give rise to a breach of Arts. 10.3/10.4 of the TPA.[103] In any event, the Hearing confirmed that Claimant's discriminatory treatment claim is meritless.

69. *First*, Claimant has simply dispensed with undertaking a detailed analysis of the different components required for a finding of discriminatory treatment, i.e. (i) like circumstances between the investment and alleged comparators and (ii) differential treatment.

70. Claimant has not even attempted to show how or why the limited number of concessions that it has produced should be considered in "*like circumstances*" to .CO Internet in the context of the 2009 Contract. This is certainly because, as explained in Respondent's previous submissions, Claimant's alleged comparators do not operate in the same business sector, did not produce competing goods or services, and are subject to a different legal framework.[104] As Ms Trujillo testified in response to Claimant's questions, the .co domain is a unique asset:

> *MR BALDWIN: […] did you review the other renewals and extensions that the Ministry had granted to other contracting parties or concessionaires?*
>
> *MS TRUJILLO: Well, it would make no sense to do that, nor would it make sense to compare them or undertake such an analysis. Because of the very specific nature of the .co domain contract, it meant it could only be prepared*

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100 It is indeed trite that 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.*" *See Saluka*, paras. 301, 305 **[CL-049]**.

101 *See* Rejoinder, para. 266; MinTIC, Preliminary studies for the 2009 Tender, May 2009, p. 9 **[R-0093]**; Response of MinTIC to observations on draft 2009 Terms of Reference, 15 May 2009, p. 97 **[R-0094]**.

102 Stock and Asset Purchase Agreement between Neustar and Arcelandia of 14 March 2014, Section 5.19(d) **[C-0133]**.

103 *See* Rejoinder, Section 3.2(a).

104 *See* Rejoinder, paras. 284-296.

> *with another .co domain contract or a domain contract of such nature with other countries.*[105]

71. As Mr Castaño further explained at the Hearing, the internet generally and the domain name market in particular are extremely dynamic and had evolved considerably since the conclusion of the 2009 Contract.[106] In light of the specificity of this market, which is global by nature, it was therefore all the more necessary for Respondent to adapt the conditions.

72. Against this background, Claimant has failed to establish any "*less favourable treatment*" to other operators interested in the operation of the .co domain: .CO Internet was treated equally to other participants to the 2020 Tender Process, with Ms Trujillo confirming that "*a level playing field was guaranteed*",[107] and .CO Internet was ultimately granted the 2020 Contract. Claimant's only attempt at substantiating its claims under Arts. 10.3/10.4 at the Hearing was to explain during its Opening Statement that "*talking to people in Colombia, it is well known that these rights happened and these extensions happened, but they did not happen here.*"[108] Evidently, mere lawyer statements are insufficient for establishing the components required for a finding of discriminatory treatment.

73. *Second*, and in any event, there were clear and legitimate public policy objectives guiding the actions of Colombia throughout (see Section 2.3 *supra*.): these are not only supported by Respondent's witnesses' concurring accounts of the actions of MinTIC, but also by numerous documents attesting of Colombia's objectives and the adequacy of the analysis and decisions taken in furtherance of these objectives. Claimant has simply failed to dispute these reasons.

74. Accordingly, the claims under Arts. 10.3 and 10.4 are unsubstantiated and should be dismissed.

4.3 Claimant's additional claims lack any merit

75. As explained previously, Claimant has failed to explain, much less substantiate its claim for breach of the obligation to protect confidential information under Art. 10.14 of the TPA. Claimant also failed to show that Art. 4(1) of the Swiss-Colombia BIT could be imported through the operation of Art. 10.4 of the TPA, and in any event failed to provide evidence of Colombia's alleged unreasonable measures. The situation was left unchanged after the Hearing, with Claimant barely addressing these claims, which should be expeditiously dismissed.

76. In conclusion, the Hearing therefore confirmed that Claimant's claims were not only brought abusively, they are also entirely meritless. This has progressively transpired throughout the case, with Claimant failing to put forward any concrete evidence to support its far-reaching

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105 Transcript, Day 2 [Trujillo], 388:5-16.
106 Transcript, Day 1 [Castaño], 257:23-254:11.
107 Transcript, Day 2 [Trujillo], 387:14-388:3.
108 Transcript, Day 1 [Baldwin], 40:17-20.

allegations that Colombia engaged in corruption or favouritism, and relying instead on systematic misrepresentations of the record. Throughout the arbitration, including at the Hearing, Claimant also maintained a shroud of secrecy by refusing to disclose any meaningful information or documents in relation to the timing of the RFA, the transfer of its investment (to GoDaddy), and the transfer of its claim (to Security Services). To the contrary, Respondent produced abundant evidence of the legitimacy of its actions and presented three high-level witnesses which were available at the Hearing. Claimant however chose not to question them on several of its most serious allegations lying at the heart of its claims.

77. Respondent incurred in significant costs to mount its defence, while Claimant failed to engage with the evidence. In light of both the total lack of merit of its claims but also the procedural behaviour outlined above, the Tribunal should order Claimant to bear all of Respondent's costs, in accordance with Art. 61 of the ICSID Convention.[109]

5. RELIEF REQUESTED

78. For the reasons set out above, Respondent 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 Neustar, Inc. and/or Security Services/Vercara 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;[110]
- Such other and further relief as the Tribunal, in its discretion, considers appropriate.

Respectfully submitted,
9 June 2023

[Signed]

Agencia Nacional de Defensa Jurídica del Estado
Ana María Ordoñez Puentes
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Juliana De Valdenebro Garrido
Lucas Aubry

[109] Past ICSID tribunals have routinely applied the 'cost-follow-the-event" approach and taken into account the Parties' procedural behaviour towards their award on costs (a requirement which has been enshrined in Rule 52 of the 2022 ICSID Arbitration Rules, which provides that the Tribunal shall take into account *inter alia* "*the outcome of the proceeding or any part of it*" and "*the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal*"). *See also*, *El Jaouni*, Award, paras. 384-388, 405-409 **[RL-206]** (noting the "*frontloading*" of information by the claimant and its failure to engage with the Tribunal's directions); *Makae*, paras. 189-202 **[RL-207]**.

[110] Depending on the Tribunal's decision on Respondent's objection to the intended change of Claimant.