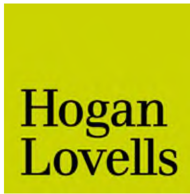

Agencia Nacional de Defensa
Jurídica del Estado

ICSID CASE NO. ARB/20/7

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

NEUSTAR, INC.

CLAIMANT

AND

REPUBLIC OF COLOMBIA

RESPONDENT

RESPONDENT'S COUNTER-MEMORIAL ON JURISDICTION AND MERITS

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25 February 2022

Hogan Lovells

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1. The Republic of Colombia ("**Colombia**" or "**Respondent**") respectfully submits this Counter-Memorial on Jurisdiction and the Merits ("**Counter-Memorial**") in accordance with the Revised Annex B to Procedural Order No. 1 of 9 July 2021, and in response to the Memorial on Jurisdiction and the Merits ("**Memorial**") filed by Neustar, Inc. ("**Neustar**" or "**Claimant**") on 22 October 2021.

2. Colombia's Counter-Memorial is accompanied by:

   - Factual Exhibits **R-0001** to **R-0087**; and

   - Legal Exhibits **RL-001** to **RL-116**.

3. Contrary to Neustar, which does not submit any witness evidence in support of its Memorial, Colombia also relies on the testimony of three fact witnesses who were directly in charge of the definition and/or implementation of Colombia's telecommunications policy at the time of the dispute:

   - Ms. Sylvia Constaín, Minister of Telecommunications from August 2018 to May 2019, who was in office both when the decision not to renew contract 019 of 3 September 2009 for the administration of the .co domain (the "**2009 Contract**") was taken and when the tender process for a new contract was structured and carried out ("**First Witness Statement of Sylvia Constaín**");

   - Mr. Iván Castaño, Director of the Telecommunications Industry Development at Colombia's Ministry of Telecommunications' ("**MinTIC**") from August 2018 to September 2019, who was in charge of both the supervision of the 2009 Contract concluded with .CO Internet S.A.S. ("**.CO Internet**") and the coordination of the technical aspects of MinTIC's decision-making process on whether to renew .CO Internet's contract or carry out a new tender process ("**First Witness Statement of Iván Darío Castaño Pérez**"); and,

   - Ms. Luisa Trujillo, General Secretary of MinTIC from September 2018 to May 2020, who was in charge of the supervision of the tender process which resulted in the award of Contract 16 of 5 May 2020 to .CO Internet ("**First Witness Statement of Luisa Fernanda Trujillo Bernal**").

4. After a brief executive summary (**1**), this Counter-Memorial describes the relevant factual background for the purposes of assessing the merits of Neustar's claims (**2**) and demonstrates that the claims submitted by Claimant do not fall within the Tribunal's jurisdiction (**3**). It then shows that, in any event, these claims are deprived of any factual and legal basis (**4**). Accordingly, Respondent requests that those claims be dismissed (**5**).

1. EXECUTIVE SUMMARY

5. Against the backdrop of the development and global expansion of the Internet in the early 1990s, the country-code Top Level Domain of Colombia (the "**.co domain**") was created in 1991. In line with the academic origins of the internet, the .co domain was initially delegated to the *Universidad de los Andes* ("**Andes University**"), an institution which was then at the forefront of the nascent Colombian internet community. Over the next fifteen years, this university would continue to manage the .co domain as an informal trustee for Colombia, and with the low internet penetration rate in Colombia, the .co domain remained extremely small – with only 27,000 registered domains by 2009.

6. Nevertheless, beginning in the early 2000s, the Colombian State progressively started to identify the .co domain as a public interest asset and sought to establish a regulatory framework governing its management and use. To this end, Colombia carried out wide-ranging public consultations and liaised with the domain name regulatory organization, the Internet Corporation for Assigned Numbers and Names ("**ICANN**"). These early efforts evidenced *inter alia* that at that stage, the State did not possess the necessary in-house expertise to manage the .co domain in an autonomous manner, but it understood that this domain represented an important, albeit yet untapped economic asset, as it could be marketed as an alternative to the .com domain.[1]

7. Colombia therefore decided to externalize the administration and operation of the .co domain and launched a tender process in 2009. This process resulted in the award of the 2009 Contract to .CO Internet, a co-enterprise between a Colombian company (Arcelandia, which held 99% of the shares but had no previous experience in the domain name industry) and Neustar (which at first held only a 1% interest).

8. From a financial perspective, this ten-year contract was extremely favourable to .CO Internet, which effectively retained at least 93% of the proceeds from the operation of the .co domain.[2] Moreover, under the 2009 Contract, .CO Internet not only reaped the lion's share of the proceeds, but also enjoyed considerable leeway regarding the administration and operation of the .co domain.

9. Further, the 2009 Contract had a ten year term, which was set to expire on 6 February 2020. The contract however provided that it "*may be renewed*" for an identical term,[3] in line with the regulatory framework of the .co domain and Colombian law, which prohibits the automatic renewal of public contracts.[4] From the outset, it was therefore clear from both the wording of the contract and the

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[1] IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 2 **[C-0123]**; Resolution 284 of 21 February 2008 (original version), Art. 1 **[R-0001]**.

[2] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 5 **[C-0017]**; *see also*, MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 6 **[C-0027]**.

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

[4] Decree Law 222 of 2 February 1983, Art. 58 **[R-0002]**; Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01), para. 12.1 **[R-0003]**.

accompanying legal framework that renewal was only a *contractual* possibility open to the parties to the contract, and certainly not an obligation imposed on Colombia.

10. The administration and operation of the .co domain proved to be such a profitable business endeavour that in 2014, Neustar decided to acquire the 99% interest held by its Colombian partner, Arcelandia, in .CO Internet. Until then, Neustar had acted as the backend technical provider for .CO Internet, but was now seeking to expand its registry business in search of new revenue streams. In addition, it appears that Neustar agreed to make a multimillion contingent payment to Arcelandia in 2020 should the 2009 Contract be renewed, showing that Neustar understood that renewal of the contract was only a possibility and not a certainty.[5] Over the next few years, the performance of the 2009 Contract carried on without any major issues and the number of domains continued to grow, from 27,000 in 2009 to nearly 1.5 million in 2014, and eventually to 2.3 million live domains in 2018.

11. By mid-2018, the question of the future of the .co domain gradually became a pressing issue for MinTIC in light of the impending expiration of the 2009 Contract.[6] In fact, soon after assuming the office as Minister of Telecommunications in August 2018, Ms Sylvia Constain promptly and personally spearheaded the decision making process regarding the future of the .co domain.

12. As early as September 2018, .CO Internet and Neustar started to approach MinTIC in order to express their interest in a renewal of the 2009 Contract. By that time, however, .CO Internet and Neustar were well-aware that the domain name industry (and the .co domain itself) had evolved significantly over the past decade, and that the 2009 Contract was far from aligned with market conditions and usual practices in the field. So evident was the change of circumstances, that they immediately expressed their willingness to renegotiate the main terms of the 2009 Contract, including first and foremost Colombia's compensation.[7]

13. From the outset of this request, MinTIC indicated to .CO Internet that the renewal was only a possibility, and would only be discussed "*if deemed appropriate*", in line with the Colombian public procurement framework.[8] Colombia, however, was conscious of the need to both reinforce MinTIC's internal know-how and obtain external advice prior to taking any decision on such an important public asset as the .co domain.

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[5] Neustar, *Annual Report for the fiscal year ended December 31, 2014*, 2015, p. 58 **[R-0004]**; H. Zamora, 'The more than USD 350 million fight for the .co domain', *El Tiempo*, 25 November 2019 **[R-0005]**.

[6] In early 2018, in light of the upcoming presidential election, the previous administration had decided to focus on the preparation of an initial report setting out the different options for the future of the .co domain. This report clearly set out that Colombia had the possibility to engage in negotiations for the renewal of the 2009 Contract ***or*** launch a new tender process. *See* MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, pp. 8, 16 **[C-0027]**.

[7] Letter from .CO Internet to MinTIC of 20 September 2018, p. 2 **[C-0028]**.

[8] Letter from MinTIC to .CO Internet of 22 November 2018, para. 2 **[C-0029]**; *See also*, Letter from MinTIC to .CO Internet of 15 February 2019, p. 1 **[C-0031]**; First Witness Statement of Iván Darío Castaño Pérez, paras. 19-20, 22 **[RWS-03]**.

14. To this end, Colombia first reorganized the .co domain advisory committee (the "**Advisory Committee**") in late 2018. This institution, which had originally been created to advise MinTIC on the .co domain policy, had instead become focused on assisting with the supervision of the 2009 Contract, and .CO Internet itself was invited to its sessions. As the committee would now be tasked with recommending the best course of action on whether to renew the 2009 Contract or conduct a new tender process, .CO Internet could no longer be invited to these sessions and had to be recused as its attendance would have created an obvious conflict of interest.

15. Colombia also turned to the international arena and recruited experts from the International Telecommunications Union ("**ITU**"), the oldest intergovernmental technical cooperation body within the United Nations' system, who had extensive experience on domain name issues.[9] Finally, MinTIC also put in place an internal team dedicated to this issue, and recruited external consultants to assist in the process.

16. In parallel, Colombia continued to engage on a regular basis with .CO Internet, not only for the supervision of the 2009 Contract but also in relation to the latter's various requests for a renewal of the contract. In this context, MinTIC continued to remind .CO Internet that the renewal of the 2009 Contract for an additional ten-year term was only a possibility contemplated by the contract, and indicated that it was in the process of considering its options regarding the future of the domain.[10]

17. The initial investigations carried out by MinTIC and the ITU experts in early 2019 rapidly confirmed that both the administration model implemented by the 2009 Contract and its specific terms were obsolete and needed to be reformulated.[11] Further, potential legal risks associated with renewing the 2009 Contract while substantially modifying its terms were identified: such a course of action could notably breach fundamental public procurement principles of transparency, objective selection and planning, as it would have essentially amounted to concluding a new contract without granting other interested parties the opportunity to submit a bid.[12] It therefore became apparent to MinTIC that the best option would be to initiate a fresh new tender process. The Advisory Committee formalized this recommendation on 18 March 2019[13] and Ms. Sylvia Constaín, in her capacity as Minister of Telecommunications, decided not to renew the 2009 Contract and to proceed with a new tender process.[14]

18. From May 2019, MinTIC focused on the preparation of this tender process (the "**2020 Tender Process**"), on the basis of a comprehensive report prepared by ITU experts setting out the

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[9] The wide recognition of the ITU worldwide would not deter Neustar from boldly alleging that ITU experts "*completely ignored the fundamental bases of the domain name business*". *See* Notice of Dispute from .CO Internet to Ministry of Commerce and MinTIC of 7 June 2019, p. 12 **[R-0006]**.

[10] *See* Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007].**

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

[12] *See* First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 10 **[RWS-03]**; First Witness Statement of Iván Darío Castaño Pérez, para. 18 **[RWS-02]**.

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

[14] First Witness Statement of Sylvia Constaín, para. 15 **[RWS-01]**.

recommended operational, technical and financial aspects of both the selection process and the new contract to be concluded (the "**ITU Report**").[15]

19. From this point onwards, .CO Internet and Neustar adopted a particularly litigious strategy, submitting a barrage of communications to several entities of the Colombian State in the hopes of pressuring MinTIC into renewing the 2009 Contract. For example, on 7 June 2019, before MinTIC had even taken any official action towards the initiation of the tender process, Neustar and .CO Internet submitted a joint 'notice of dispute' to Colombia in which they notably alleged that Colombia was carrying out an 'expropriation' of their investment and threatened to file for arbitration under the TPA.[16] Thereafter, on 13 September 2019, Neustar and .CO Internet sent a joint notice of intent under the TPA (the "**Notice of Intent**"), essentially repeating the allegations raised in their earlier notice of dispute. A few days later, on 18 September 2019, they started proceedings before the Colombian *Consejo de Estado* ("**Council of State**"), requesting that this jurisdiction halt the preparation of the 2020 Tender Process (which at that point had not been formally opened) and "*order MinTIC-Republic of Colombia to formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .CO Internet*" (the "**Council of State proceedings**").[17]

20. For its part, MinTIC continued with the preparation of the 2020 Tender Process, and particularly with the terms of reference for the tender. To this end, MinTIC worked hand-in-hand with the ITU experts and ultimately the technical and financial requirements included in the terms of reference were based on recommendations from the ITU.

21. The 2020 Tender Process was conducted in a transparent manner and involved a high degree of interaction with the market. Notably, on 5 November 2019, MinTIC published the draft terms of reference for public comment and, upon responding in detail to these comments and accepting several of these (including from .CO Internet), MinTIC then proceeded to formally open the 2020 Tender Process by publishing the final terms of reference on 13 December 2019 (the "**2020 Terms of Reference**"). These final terms were thereafter submitted once again for public comment.

22. Despite engaging fully in these initial stages of the 2020 Tender Process, Neustar continued their litigious strategy and rushed to submit a Request for Arbitration ("**RFA**") before ICSID on 23 December 2019 – while at the same time also continuing the Council of State proceedings. This RFA was marked by several defects and Neustar was forced to make various amendments (including dropping its request to include .CO Internet as a party) before ICSID agreed to register

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[15] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, p. 65 **[C-0067]**.

[16] CO Internet also continued to submit direct requests for renewal to MinTIC which remained accessible and invited them to "*participate in the new tender process*" on 21 June 2019. *See* Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**

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

it on 6 March 2020. As regards the content of the RFA, Neustar continued to allege that it was being expropriated and speculated that the 2020 Tender Process – which had just been launched - had been designed to exclude it and favor another registry operator, Afilias.

23. Nevertheless, Afilias never submitted a bid. Rather .CO Internet and two other proponents submitted proposals and, on 3 April 2020, CO Internet was awarded the new contract for the operation of the .co domain (the "**2020 Contract**"), in light of its financial proposal to retain a 19% share of the proceeds (instead of 93% under the 2009 Contract).

24. Despite this adjudication, Neustar nevertheless continued the ICSID proceedings. In addition, on 6 April 2020, just three days after this adjudication, Neustar abruptly announced the sale of its entire registry business – including its interest in .CO Internet – to GoDaddy, another leading US internet company. Naturally, a transaction of this magnitude did not happen overnight, and had been in the making for months, if not years. However, Neustar had not communicated its intentions to Colombia before that, despite having had ample opportunity to do so, both during the 2020 Tender Process and in the context of the ICSID proceedings. In fact, as regards the present ICSID proceedings, it is only in its Memorial of 15 October 2021 – which contained numerous changes to Neustar's factual and legal claims - that Neustar disclosed this sale for the first time in a brief and vague reference.[18]

25. Today, even though .CO Internet was awarded the 2020 Contract and Neustar sold the business to Go Daddy, Neustar persists in alleging that Colombia should have renewed the 2009 Contract.

26. This peculiar, and indeed unique factual background, shows that Neustar's claims are nothing more than an opportunistic attempt to maximize their return on an already extremely profitable investment, which it operated for ten years before exiting the country right after having filed its RFA.

27. In any event, Neustar's claims fail jurisdictionally on multiple counts, as they are affected by several flaws.

- *First*, by introducing the Council of State proceedings as early as September 2019, Neustar made a final forum selection triggering the fork-in-the road clause contained in Annex 10-G of the TPA.

- *Second*, in its haste to file for ICSID arbitration, Neustar failed to respect the preliminary requirements of the TPA, and instead submitted on 13 September 2019 a defective Notice of Intent, at a time when the dispute had not yet crystallized, as evidenced *inter alia* by the constant changes to its claims and even the parties to the proceedings.

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[18] Memorial, para. 19.

- *Third*, Neustar breached its waiver obligation under Article 10.18 of the TPA by continuing the Council of State proceedings which went way beyond the sole purpose of preserving its rights during the arbitration.

- *Fourth*, Neustar in fact lacks standing to bring the present claims in light of its sale of .CO Internet to GoDaddy.

- *Fifth*, Neustar committed an abuse of process by submitting the RFA prematurely for the sole purpose of preserving its standing under the TPA, and generally using the present proceedings for purposes other than genuine dispute resolution.

- Finally, and fundamentally, Neustar's claims are entirely based on Colombia's autonomous contractual right and decision not to renew the 2009 Contract, and cannot give rise to treaty claims.

28. Even beyond the fact that the Tribunal has no jurisdiction over these claims, the claims are factually and legally baseless. Neustar misrepresents that Colombia breached the Fair and Equitable Treatment ("**FET**") standard under the TPA and acted discriminatorily by refusing to renew the 2009 Contract. However, Neustar completely overlooks the fact that Colombia's decision was based on its contractual right not to renew the 2009 Contract. Moreover, notwithstanding Colombia's independent right to contract going forward with whomever would be the best partner, Colombia continuously engaged with Neustar and .CO Internet and responded to their many unsolicited communications, providing explanations and inviting them to participate in the open and transparent 2020 Tender Process. Neustar's allegations that Colombia's decision lacked any rationale (or would jeopardize the future of the .co domain) are in any event disproved by an examination of the current situation of the .co domain: not only did the MinTIC achieve its stated objective of adapting the conditions and terms of operation of the .co domain to international best practices but also Colombia has received more proceeds in one year of operation of the 2020 Contract than over the full ten years of the 2009 Contract. [19]

29. Neustar's only real claim is that it wrongfully felt entitled to continue gorging on profits of 93% a decade later. It has taken what is genuinely a fair and reasonable decision by Colombia to exercise its right not to renew the 2009 Contract and tried to recast that as a violation of some right that it never had and claim it is worthy of an ICSID arbitration. At the same time, Neustar also launched proceedings before the Colombian Council of State in the hopes of forcing an undue renewal of the 2009 Contract, all along putting forward baseless, inconsistent and fabricated claims before this Tribunal. Respectfully, this must be dismissed.

[19] *See* para. 158 *infra*. *See also*, MinTIC, *Total Amounts perceived under Contract 16 of 2020*, 6 October 2021 **[R-0010]**; MinTIC, General data on the .co domain as at 31 March 2021, accessible at: <https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html> **[C-0120]**.

2. FACTUAL BACKGROUND

30. The Respondent sets out below the facts that are relevant to the present dispute, from the early stages of the .co domain up until Colombia's decision to launch the 2020 Tender Process for the conclusion of a new contract for the operation of the domain.

2.1 Early stages of the .co domain history and regulation in Colombia

(a) In the 1990s, the .co domain was created and its administration delegated to the Andes University

31. Following the initial stages of the development of the Internet (then denominated "ARPANET") in the 1960s and 1970s, the domain name system was created in 1983 by a team of academics led by Paul Mockapetris and Jon Postel, in order to facilitate bookkeeping of Internet resources and Internet navigation.

32. Up to that point, the academic institutions involved in the initial development of the Internet had maintained a global centralized table mapping the numerical addresses of computers connected to the internet (such as the IP address, a series of numbers used to identify a given computer on the network) to the host names (a series of letters used to form a name that is easier to remember than the numerical address, such as <www.example.com>). This centralized table had to be updated manually each time a new resource was added to the network, or whenever the address of an online resource changed.

33. However, as the Internet grew in the early 1980s, this centralized model proved unsustainable due to "*the size of this table, and especially the frequency of updates to the table* [being] *near the limit of manageability*".[20] The domain name system, which permitted the decentralization of domain name administration (meaning that it would no longer be necessary to update a centralized table manually each time a resource was added), was therefore created in order to solve these pressing issues and enable the Internet to continue expanding.[21]

34. From the mid-1980s, two categories of top-level domains ("**TLDs**"), intended to be at the top of the naming hierarchy of the domain name system, were progressively created by the same academic team:

- Seven generic top-level domains ("**gTLDs**") were created for general categories of organizations, such as .org, (intended for "*non-government organizations*") or .int (intended

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[20] Network Working Group, Request For Comments (RFC) No. 882, '*Domain names – Concepts and Facilities*', November 1983, p. 1 **[R-0011]**.

[21] Network Working Group, Request For Comments (RFC) No. 3467, '*Role of the Domain Name System (DNS)*', February 2003, p. 2 **[R-0012]**.

for "*organizations established by international treaties*"), the most famous undoubtedly being .com which was "*intended for commercial entities, that is companies.*"[22]

- Country-code top-level domains ("**ccTLDs**") were created from 1985 onwards by Jon Postel and the coordination group for the management of the domain name system that he headed, the Internet Assigned Numbers Authority ("**IANA**"). It should be noted that, while IANA remains responsible for the operational aspects of the domain name system management to this day,[23] the corresponding policies and procedures are now developed by ICANN, an American non-profit multi-stakeholder organization established to this end in 1998.[24]

35. Upon their creation, the administration of ccTLDs was delegated informally by Jon Postel and the IANA to local administrators in the corresponding countries, these were usually academic contacts involved in the early days of the Internet community.[25] These local managers acted as "*trustees of the top-level domain for both the nation, in the case of a country code, and the global Internet authority*".[26] In 1998, the authority of national governments to "*manage or establish policy for their own ccTLDs*" was formally recognized by the US Government and the wider Internet community.[27]

36. In this context, on 24 December 1991, the .co domain was originally delegated by Jon Postel and the IANA to their contacts at the Andes University, acting as trustees of Colombia.[28]

(b) **The Colombian State started to identify the .co domain as a public interest asset from 2001**

37. As the use of the Internet was virtually non-existent in Colombia in the early 1990s, the .co domain initially did not gather widespread public attention. Andes University therefore carried on the administration of the extremely limited number of domains on the .co domain over the next decade, without any specific oversight from the Colombian State.

38. The situation changed in the course of 2001, when Andes University started to develop plans to commercialize the .co domain for its own profit. This project was brought to the attention of MinTIC, which requested that Andes University not proceed with this commercialization until the status and

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[22] Network Working Group, Request For Comments (RFC) No. 1591, '*Domain Name System Structure and Delegation*', March 1994, pp. 1-3 **[R-0013]**.

[23] IANA, 'About us', accessible at: <https://www.iana.org/about> **[C-0122]**.

[24] ICANN, *Getting to know the Internet Corporation for Assigned Names and Numbers (ICANN)*, April 2020 **[R-0014]**.

[25] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, p. 65 **[C-0067]**.

[26] Network Working Group, Request For Comments (RFC) No. 1591, '*Domain Name System Structure and Delegation*', of March 1994, p. 4 **[R-0013]**.

[27] *See* United States Department of Commerce, *Statement of Policy on the Management of Internet Names and Addresses*, 10 June 1998 p. 31744 **[R-0015]**; ICANN, 'Resources for Country Code Managers', accessible at: <https://www.icann.org/resources/pages/cctlds-21-2012-02-25-en> (retrieved on 21 February 2022) **[R-0016]**; ICANN, *Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains*, 5 April 2005, para. 1.2 **[R-0017]**.

[28] IANA, *Report on the Transfer of the .CO (Colombia) top-level domain to the Ministry of Information and Communications Technologies*, 4 September 2020, p. 1 **[C-0012]**.

nature of the .co domain had been properly evaluated. In this context, Colombia's top administrative jurisdiction, the Council of State, was called upon to clarify the status of the .co domain.[29] The latter recognized the public interest nature of the .co domain on 11 December 2001, specifying that any plans to commercialize the .co domain would require the prior authorization of the Colombian State.[30]

39. Faced with this clarification, Andes University's first reaction was to express its intention of terminating its administrative and operational responsibilities in relation to the .co domain.[31] However, ICANN, Andes University and MinTIC carried out discussions, and were able to agree by mid-2002 that the .co domain would continue to be operated by Andes University for the near future.[32]

40. In parallel with the discussions carried out with ICANN and Andes University, MinTIC issued Resolution 600 of 5 May 2002 "*on partial regulation of administration of domain name .co*", whereby the .co domain was recognized as a "*public asset in the telecommunication sector, the administration, maintenance and development of which shall be planned, regulated and controlled by the State*".[33] Resolution 600 further provided that the administration of the .co domain could either be handled directly by the State, or through qualified third parties under supervision of the State.[34] Thus, from an operational point of view, the issuance of this resolution did not affect Andes University's continued administration of the .co domain,[35] which continued through 2009 in coordination with MinTIC.

41. In early 2003, MinTIC launched a national consultation process regarding the administration of the .co domain in order to better understand the particularities of this recently-recognized public interest asset.[36] This consultation process notably culminated in the organization of several working sessions with members of Colombia's limited Internet community in February 2003, and the adoption of further resolutions on specific aspects of the administration of the .co domain in the course of 2003.[37]

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29 IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 1 **[C-0123]**.

30 Council of State, Legal Opinion of 11 December 2001 (case No. 1376), p. 21 of the PDF **[R-0018]**.

31 IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 1 **[C-0123]**.

32 IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 1 **[C-0123]**. In the meantime, Colombian citizens brought additional proceedings before the Council of State regarding the status of the .co domain, resulting in a 2 April 2002 decision ordering MinTIC to take over the administration of the .co domain. *See* Resolution 600 of 7 May 2002 (ITU translation), p. 2 **[C-0008]**. This was confirmed by the Colombian Council of State: *see* Council of State, Decision of 10 July 2002 (case No. AP-474) **[R-0019]**.

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

34 Resolution 600 of 7 May 2002 (original version), Article 2 **[R-0020]**. *See also*, Resolution 600 of 7 May 2002 (ITU translation), Article 2 **[C-0008]**.

35 Andes University continued to operate the domain as a *de facto* qualified third party under the meaning of Resolution 600 of 2002.

36 *See* Resolution 20 of 14 January 2003 **[R-0021]**.

37 Resolution 1455 of 5 September 2003 **[R-0022]**.

2.2 Attribution and execution of the 2009 Contract with .CO Internet on 3 September 2009

(a) Adoption of a total outsourcing model for the administration of the .co domain in 2008

42. In mid-2006, as the development of the Internet in Colombia was progressing, Law 1065 of 29 July 2006 on the administration of the .co domain was enacted. In furtherance of the approach taken by MinTIC in previous resolutions, this law enshrined MinTIC's administrative function in the regulation of the .co domain:

> *For the purposes of the present law, the Internet domain name under the country code corresponding to Colombia -.co- is a resource of the telecommunications sector, of public interest, whose administration, management and development will be subject to the planning, regulation and* control *of the State, through the Ministry of Communications, for the advancement of global telecommunications and its use by users.*[38]

43. With regard to the method of administration and management of the .co domain, Law 1065 of 2006 confirmed that these tasks could be delegated to a third party for a duration of up to ten years, in the following terms at Article 2:

> *For all purposes, the administration of the register of names in the .co domain is an administrative function for which the Ministry of Communications is responsible, and its exercise may be conferred on private parties in accordance with the law. In this case, the duration of the agreement may be for up to 10 years,* ***renewable*** *on one occasion only, for a term equal to the original term.*[39]

44. As set out in this article, the Colombian legislator used the word "*renewable*" ("*prorrogables*") with respect to the renewal of any agreement concluded with a third party for the administration of the .co domain. It is clear from this choice of words that the legislator contemplated that such a renewal would only be a possibility open to the parties to this agreement, and certainly not an obligation. If the Colombian legislator had wished to make this renewal compulsory should one of the parties request it, it would have clearly signalled so (for instance, by using the wording "*which shall be renewed at the request of either party*"). But it did not, in line with the established jurisprudence of the Colombian Constitutional Court, according to which the inclusion of automatic renewal clauses in public contracts is contrary to, *inter alia*, the fundamental principle of free competition enshrined in the Colombian Constitution.[40]

45. Following the enactment of this law, Colombia initiated an extensive public consultation process. This process was necessary for the State to gain a better understanding of the challenges associated with the administration of the .co domain, with a view to selecting a third-party which would carry out its management on behalf of the State, in replacement of Andes University. In this

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[38] Law 1065 of 29 July 2006, Art. 1, para. 1 **[C-0009]**.

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

[40] Decree Law 222 of 2 February 1983, Art. 58 **[R-0002]**; Constitutional Court, Judgment No. C-949/01 of 5 September 2001, p. 74 of the PDF **[R-0003]**.

context, MinTIC held frequent exchanges with members of both the national and international Internet community,[41] including organizing "*a meeting on operational models held in September 2007, and creat*[ing] *an advisory committee to consider community opinions regarding .co policy in April 2008*."[42]

46. The Advisory Committee was established through Resolution 999 of 2007, which provided that the entity would be integrated by several directors of MinTIC (including for instance the Research and Planning Director and the Director of the Telecommunications Industry Development) and could "*invite to its sessions experts that are considered necessary.*"[43]

47. As MinTIC was planning on transferring the administration and operation of the .co domain from Andes University to a new administrator, it notably met with ICANN representatives to enquire about the requirements for the redelegation process of the .co domain, that is the formal change of administrator *vis-à-vis* ICANN, IANA, and other international Internet oversight bodies. Initially, MinTIC intended to have the domain redelegated to itself, pending selection of a new administrator. However, ICANN explained that, as per IANA procedures, the delegee of a ccTLD should have the technical ability to operate the domain,[44] which MinTIC did not possess at that time. ICANN representatives therefore "*strongly advis*[ed] *against this course of action*",[45] and MinTIC eventually abandoned this project pending selection of the new administrator.

48. Following the conclusion of the public consultation process, which evidenced that the .co domain was still underdeveloped in Colombia and recommended that its administration be delegated to a third-party, MinTIC issued Resolution 284 of 2008. This resolution formally adopted a "*total exclusive outsourcing model*" according to which "*the policies* [would] *be defined by the Ministry of Communications and the functions of registry and registrar* [would] *be outsourced through an objective selection process.*"[46]

49. As Ms. Constaín and Mr. Castaño explain in their witness statements,[47] this total exclusive outsourcing model limited MinTIC's role in the administration and operation of the .co domain to a minimum, and was adopted against a background of limited knowledge on these issues within the Colombian State:

> *In 2008, at a time when the Colombian government had little experience with domain names, it had been decided to adopt a total exclusive outsourcing model for the administration of the .co domain, pursuant to which, while the*

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[41] IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 2 **[C-0123]**.

[42] IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 2 **[C-0123]**.

[43] Resolution 999 of 23 March 2007, Art. 2, para. 1 **[R-0023]**. By mid-2008, MinTIC specified that the Minister of Commerce and the dean of Andes University would be permanently invited to the sessions of the Advisory Committee. *See* Resolution 1250 of 16 June 2008, Art. 2, para. 2. **[C-0036]**.

[44] *See* IANA, 'Delegating or transferring a country-code top-level domain (ccTLD)', accessible at: <https://www.iana.org/help/cctld-delegation> (retrieved on 3 February 2022) **[R-0024]**.

[45] IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 2 **[C-0123]**.

[46] Resolution 284 of 21 February 2008 (original version), Art. 1 **[R-0001]**.

[47] *See* First Witness Statement of Sylvia Constaín, paras. 8-10 **[RWS-01]**.

> *Ministry retained responsibility regarding general policy of the .co domain, all other functions were outsourced to the private party (including managing the relationship with ICANN on behalf of the Colombian State).*[48]

50. As seen above, the consultation process had evidenced to both MinTIC itself and ICANN/IANA that MinTIC did not have the in-house capacity to operate the .co domain. Moreover, the adoption of a total exclusive outsourcing model notably allowed the State to "*mitigate the potential technical, logistical, and operational risks related to the administration of the ccTLD .co*".[49]

51. On 30 July 2008, MinTIC issued Resolution 1652 of 2008 on the basis of the recommendations of the Advisory Committee, which set out the general framework of the total outsourcing model. Under this model, the administration of the .co domain would be delegated to a third-party administrator tasked with "*a-) promoting the ccTLD .co, b-) Administration of the ccTLD .co,* [and] *c) Technical operation of the ccTLD .co*."[50] It is through this resolution that MinTIC took the important decision to permit the commercialization of the .co domain without any geographical limitation, meaning that individuals and companies from all around the world would be able to register <.co> domain names.[51] This decision was motivated by the significant economic and marketing potential of the .co domain, which had long been recognized by several actors (including Andes University itself[52]). While previously the attribution of .co domains was limited to registrants located in Colombia, Resolution 1652 of 2008 would allow the new administrator to seize this potential and market the domain internationally.

52. Resolution 1652 of 2008 further defined the financial model of the contract to be concluded between the selected third-party and MinTIC, under which the third-party would pay MinTIC a percentage of the income generated by the sale of domain names.[53] In anticipation of the selection process that would be carried out for the selection of this new administrator, the resolution also laid down the general guidelines for the transition and redelegation process that would have to be requested by Andes University from ICANN and IANA, in light of the particular importance and sensitivity of transition and redelegation periods for the operation of TLDs (due *inter alia* to the necessity of ensuring continuity of service, and thereby the continued accessibility to the websites registered on the .co domain).[54]

53. One year later, on 30 July 2009, the definition of the legal framework for the .co domain concluded with the enactment of Law 1341 of 2009, which clarified MinTIC's policy-setting role in respect of the .co domain in the following terms:

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48 First Witness Statement of Iván Darío Castaño Pérez, para. 7 **[RWS-02]**.

49 2009 Terms of Reference (final version), p. 8 **[C-0014]**.

50 Resolution 1652 of 30 July 2008 (original version), Preamble, Art. 1 **[R-0025]**.

51 Resolution 1652 of 30 July 2008 (original version), Art. 3.1 **[R-0025]**.

52 IANA, *Redelegation of the .CO domain representing Colombia to .CO Internet*, November 2009, p. 1 **[C-0123]**:"[a]*t some point around 2001, the University explored the exploitation of the domain for commercial purposes, such as treating it as a de-facto generic top-level domain like .COM targeted globally for use by companies.*"

53 Resolution 1652 of 30 July 2008 (original version), Art. 10.5 **[R-0025]**.

54 Resolution 1652 of 30 July 2008 (original version), Art. 11 **[R-0025]**.

> *In addition to the functions conferred by the Political Constitution and Law 489 of 1998, the Ministry of Information Technologies and Communications will be responsible of: […]*
>
> *20. Defining the administration, management and development policies of the internet domain name under the country-code corresponding to Colombia - .co.*[55]

54. Having defined a general framework for the operation of the .co domain, MinTIC turned its attention to the organization of the selection process for the designation of the new administrator.

(b) **Attribution of the 2009 Contract to .CO Internet, then a 99% Colombian-owned company**

55. On 2 April 2009, MinTIC launched tender process No. 02 of 2009 for the attribution of a contract for the administration and operation of the .co domain by publishing the draft terms of reference for the tender process.[56] As Ms. Trujillo explains (and as will be further detailed at Section 2.5 below), the organization of a tender process in Colombia requires that several phases of public consultation be conducted, and notably that interested parties be able to submit comments on the tender documents which should then be answered in detail by the public body in charge of the organization of the tender.[57] It is therefore only following a first phase of public comments that MinTIC proceeded to formally open the tender process with the publication of the final terms of reference (the "**2009 Terms of Reference**").[58]

56. In line with the regulatory framework established by MinTIC in the previous years, the 2009 Terms of Reference provided that the selected administrator would be responsible for promoting, administering and operating the technical aspects of the .co domain, and should pay a percentage of the income generated by the administration and operation of the .co domain to MinTIC.[59] In light of MinTIC's primary objective of "*preserving the stability, security and reliability of the domain name system (DNS)*",[60] the bidders were required to have adequate experience in the technical operation of domain name registries in order to participate in the tender process.[61]

57. Provided that they met these qualifying requirements, bidders were then requested to submit a technical proposal as well as a financial proposal, the latter consisting of the "*share of the gross income generated by the administration of the .co domain, by range of registered domains, that will be paid to the Ministry of Communications, being specified that the share cannot be inferior to 5.7% of the gross income generated by the administration of the ccTLD .co, and that the percentage*

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[55] Law 1341 of 30 July 2009, Art. 18, para. 20 **[C-0013]**.

[56] 2009 Terms of Reference (final version), Art. 2.5 **[C-0014]**.

[57] First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 17 **[RWS-03]**.

[58] 2009 Terms of Reference (final version) **[C-0014]**.

[59] 2009 Terms of Reference (final version), Art. 2.1 **[C-0014]**.

[60] 2009 Terms of Reference (final version), Art. 2.1.1 **[C-0014]**.

[61] 2009 Terms of Reference (final version), Art. 3 **[C-0014]**.

should increase as the number of registered domains increases due to the economies of scale generated."[62]

58. .CO Internet, then a co-enterprise between Arcelandia, a Colombian company which was not originally focused on technology services,[63] and Neustar, then already an established company in the domain name industry, submitted a bid in this tender process. While Arcelandia held a 99% share in the joint venture, with Neustar only owning the remaining 1%, it was Neustar which was to provide the technical back-end services necessary to the operation of the .co domain.[64]

59. From a financial perspective, .CO Internet offered to pay Colombia the following percentage of the proceeds generated by the administration of the .co domain: (i) 6% between 0 and 1.7 million domains; (ii) 7% between 1.7 and 3.5 million domains;[65] (iii) 45% between 3.5 and 7 million domains; and 75.1% for domains above the 7 million mark.[66]

60. While two interested companies (including .CO Internet) submitted a bid, .CO Internet ultimately remained as the only qualified bidder to the 2009 Tender Process.[67] On 13 August 2009, MinTIC therefore proceeded to award the 2009 Contract to .CO Internet through Resolution 2121 of 2009.[68]

(c) Main terms of the 2009 Contract

61. On 3 September 2009, MinTIC and .CO Internet proceeded to execute the 2009 Contract.[69] The latter effectively granted .CO Internet a 93% share of the proceeds of the .co domain (**i**), and provided that it "*may*" be renewed for an additional 10-year term (**ii**).

(i) *.CO Internet was effectively entitled to at least 93% of the proceeds under the 2009 Contract*

62. Under the 2009 Contract, .CO Internet would be responsible for the promotion, administration, and technical operation of the .co domain.[70]

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62 2009 Terms of Reference (final version), Art. 5.2.3 **[C-0014]**.

63 Connected to Juan-Diego Calle, founder and former CEO of .CO Internet. *See* H. Zamora, 'The more tan USD 350 million fight for the .co domain', El Tiempo, 25 November 2019, p. 3 of the PDF **[R-0005]**.

64 IANA, *Report on the Transfer of the .CO (Colombia) top-level domain to the Ministry of Information and Communications Technologies*, 4 September 2020, p. 12 **[C-0012]**. *See also*, A. Allemann, 'Breaking: Neustar acquires .CO for $109 million', *Domain Name Wire*, 20 March 2014 **[R-0026]**.

65 .CO Internet's offer for the first two ranges of domains was therefore just above the minimum level set at 5.7% by the 2009 Terms of Reference.

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

67 Another company, Verisign (the largest domain name registry) had submitted a bid. However, Verisign failed to submit a number of documents accrediting its technical experience of operation of domain names, and was therefore ultimately excluded from the tender process. *See* MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 6 **[C-0027]**.

68 Resolution 2121 of 13 August 2009 **[C-0015]**. As at least one valid proposal had been submitted in the tender process, MinTIC was under a legal obligation to award the contract. *See* Law No. 1150 of 2007, Art. 32 **[C-0065]**; *See* 2009 Terms of Reference (final version), Arts. 2.13 and 2.14 **[C-0014]**; First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 31 **[RWS-03]**.

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

70 2009 Terms of Reference (final version), Art. 2.1.1 **[C-0014]**.

63. With respect to the remuneration of .CO Internet, the 2009 Contract referred back to .CO Internet's financial proposal described at paragraph 59 *supra*: .CO Internet was therefore entitled to 94% of the proceeds for the range of 0 to 1,700,000 domains (with 6% going to MinTIC), and 93% for the range of 1,700,001 to 3,500,000 domains (with 7% going to MinTIC).[71]

64. While .CO Internet offered significantly more favourable conditions to MinTIC for domains in excess of 3.5 million, .CO Internet appears to have known that this objective would be extremely difficult to achieve: there were only 27,000 registered domains when .CO Internet took over the administration of the .co domain,[72] and its own business plan only contemplated a growth to nearly 2 million domains by the term of the 2009 Contract (based on the global marketing potential of the .co domain).[73] In fact, the number of domains never reached that 3.5 million milestone during the term of the 2009 Contract (the maximum number of domains was reached by early 2017, with close to 2.3 million live registered domains).[74]

65. This means that, throughout the term of the 2009 Contract, .CO Internet remained effectively entitled to at least 93% of the proceeds generated by the administration and operation of the .co domain.

(ii) ***The 2009 Contract provided that it "may" be renewed for a 10-year additional term***

66. In line with the regulatory framework of the .co domain and the 2009 Terms of Reference, Article 1 of the 2009 Contract provided for a 10-year term:

> *PURPOSE. The present concession contract has the purpose of granting, for a ten (10) year term, the promotion, administration, technical operation, maintenance and other activities related to the nature of the ccTLD .co […] to the CONCESSIONAIRE at its own risk, and under the supervision and control of the GRANTOR.*[75]

67. Article 4 further specified that the term of the contract would run from the date of the authorization given by ICANN, and that the 2009 Contract may be renewed only once, for the same duration:

> *VALIDITY AND TERM. The present concession contract will have **a term of ten (10) years** which will run from the date of the authorization given by ICANN to THE CONCESSIONAIRE for the carrying out of the activities of the domain, provided that by such time, the University of Los Andes, in cooperation with the concessionaire, will have carried out in a timely and adequate manner each and every one of the activities required in the transition process.*

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

[72] .CO Internet, 'Final Transition of .CO ccTLD to .CO Internet S.A.S., Underway', 20 January 2010 **[C-0018]**.

[73] Business plan for the .co domain submitted by .CO Internet in the 2009 Tender **[R-0027]**.

[74] During the term of the 2009 Contract, the maximum number of domains was 2,297,837 in early 2017. *See* MinTIC, *Action plan - .co domain registry operator selection process*, November 2019, p. 8 **[R-0028]**.

[75] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 1 **[C-0017]**.

> *Paragraph: the agreed term* ***may be renewed*** *in the manner and terms established by the legislation in force at the time of the renewal. The term* [of the renewal] *may not be inferior to the term initially agreed* […].[76]

68. It is therefore abundantly clear from the use of the word "*may*" ('*podrá*') at Article 4 above that renewal was only a possibility contemplated under the 2009 Contract, and certainly not an obligation imposed on either party. As seen at paragraph 44 above, this was in line with both Law 1065 of 2006 and the legal framework for public contracts in Colombia, which prohibits the stipulation of automatic renewal clauses.[77]

69. Further, the 2009 Contract included a dispute resolution clause, providing for Bogotá-seated arbitration,[78] and distinguished explicitly between acts taken by MinTIC in its capacity as a contractual party and its capacity as a sovereign, in the following terms:

> *ADMINISTRATIVE ACTS: the decisions taken by the GRANTOR, within the limits of its competence, in accordance with the legal framework, qualify as administrative acts that bind the CONCESSIONAIRE only when these acts are of an exceptional nature. Any other acts will solely be considered as acts of contractual execution. Normal judicial remedies under the Code of Administrative Litigation and other applicable norms will be available against the administrative acts taken by the GRANTOR.*[79]

2.3 Neustar's acquisition of .CO Internet's full share capital in 2014

70. Following the completion of both the redelegation process with ICANN, and the technical transition process from the Andes University to .CO Internet, the 2009 Contract entered into force on 7 February 2010.[80] As per Article 4 of the 2009 Contract, its term was set to expire on 6 February 2020.[81]

71. Due both to Colombia's decision to allow the registration of .co domains all around the world (as detailed at paragraph 51 *supra.*), and .CO Internet's efforts to market the .co domain as an alternative to .com,[82] the .co domain grew exponentially during the first few years of the 2009 Contract, from 27,000 domains in February 2011 to over 1.5 million domains by early 2014.[83] Although the growth rate of the .co domain decelerated over the years and the .co domain never exceeded the 3.5 million milestone above which MinTIC would have been entitled to 45% of the proceeds, the number of domains would reach nearly 2.3 million by the end of the term of the 2009 Contract, making the .co domain one of the 20 largest TLDs worldwide.[84]

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[76] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]** (emphasis added).
[77] *See* paras. 43-44 *supra.*
[78] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 19 **[C-0017]**.
[79] Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 17 **[C-0017]**.
[80] .CO Internet, 'Final Transition of .CO ccTLD to .CO Internet S.A.S., Underway', 20 January 2010 **[C-0018]**.
[81] Contract 19 of 3 September 2009, Art. 4 **[C-0017]**.
[82] *See, for instance,* Elliot Silver, 'First Look: .CO Billboard on Times Square', Domain Investing, 23 February 2011 **[C-0023]**.
[83] MinTIC, *Action plan - .co domain registry operator selection process*, November 2019, p. 8 **[R-0028]**.
[84] MinTIC, *Action plan - .co domain registry operator selection process*, November 2019, p. 8 **[R-0028]**.

72. The promotion, administration and operation of the .co domain therefore proved to be a profitable business for .CO Internet, which reaped the immense majority of the total revenue: specifically, .CO Internet perceived approximately USD 87.9 million between 2010 and 2014 (more than 93% of the proceeds contemplated under the 2009 Contract),[85] while MinTIC only received approximately USD 6.6 million during the same period.[86]

73. Against this background, in late 2013, Neustar sought to acquire the totality of .CO Internet and engaged in discussions with Arcelandia, .CO Internet's Colombian joint-venture partner. However, .CO Internet was required to request the authorization to carry out this transaction with MinTIC, which it did on 22 October 2013.[87] Upon MinTIC's approval, .CO Internet and MinTIC proceeded to execute Amendment No. 3 to the 2009 Contract on 3 February 2014, which permitted the acquisition of .CO Internet by Neustar.[88]

74. On 14 April 2014, Neustar ultimately completed the acquisition of .CO Internet from Arcelandia, for a total purchase price of USD 113.7 million. As disclosed in its 2014 financial statements, Neustar was also obliged to make an additional USD 6 million contingent payment to Arcelandia in the first quarter of 2020:

> *This acquisition expanded the Company's registry services, which includes the .biz and .us top-level domains. Total consideration for this purchase, which was subject to certain customary working capital adjustments, included cash consideration of $113.7 million, of which $86.7 million was paid at closing and $27.0 million was deposited into escrow for the satisfaction of potential indemnification claims and certain performance obligations.* ***In addition, the Company may be required to make a contingent payment of up to $6.0 million prior to or during the first quarter of 2020 in the event that the sellers satisfy certain post-closing performance obligations****.*[89]

75. That is, the transaction with Arcelandia appears to have factored in the potential renewal of the 2009 Contract. According to the abovementioned financial statements, Neustar could be required to make an additional payment "*prior to or during* ***the first quarter of 2020***" if certain "*post-closing performance obligations*" were met. Similarly, the 2009 Contract was precisely set to expire on 6 February 2020, i.e. during the first quarter of 2020 noted in the Neustar-Arcelandia agreement. In

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85 MinTIC, General data on the .co domain as at 31 March 2021, accessible at: <https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html> **[C-0120]**: estimate calculated on the basis of the amount received by MinTIC between 2010 and 2014, USD 6.618.671, representing 7% of the total revenue generated by .co domain. The exchange rate used is the Market Representative Rate (*Tasa Representativa del Mercado*) set by the Colombian Central Bank as at 31 December of each year.

86 MinTIC, General data on the .co domain as at 31 March 2021, accessible at: <https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html> **[C-0120]**.

87 Amendment No. 3 to the 2009 Contract of 3 February 2014, Preamble, p. 3 **[C-0019]**. This is due to the fact that the 2009 Terms of Reference required that the percentage of Colombian control in the concessionaire remain unchanged.

88 It should be noted that there had been two previous amendments to the 2009 Contract, concluded respectively on 18 September 2009 and 14 April 2010, which implemented minor modifications to the financial conditions of the 2009 Contract. *See* Amendment No. 1 to the 2009 Contract of 18 September 2009 **[R-0029]**; Amendment No. 2 to the 2009 Contract of 14 April 2010 **[R-0030]**.

89 Neustar, *Annual Report for the fiscal year ended December 31, 2014*, 2015, p. 58 **[R-0004]**. *See also*, Memorial, para. 53.

fact, Neustar representatives later confirmed that there was one outstanding payment which was *"subject to the contract extension."*[90] As such, the performance obligations were those related to the potential renewal of the 2009 Contract.

76. Following this transaction, the execution of the 2009 Contract nevertheless carried on through 2018 without any critical issues arising in relation to the operation of the .co domain.

77. The 2009 Contract and accompanying documents[91] granted .CO Internet quite extensive leeway regarding the terms of administration and operation, while imposing relatively limited reporting obligations on the same.[92]

78. While .CO Internet provided regular reports on its performance under the 2009 Contract to MinTIC,[93] these only contained high-level information.[94] Generally, MinTIC's technical knowledge of the .co domain operation remained relatively limited, due notably to the total exclusive outsourcing model implemented by the 2009 Contract, and MinTIC almost exclusively relied on the information provided by .CO Internet for the supervision of the 2009 Contract. In the words of Mr. Castaño, who was directly in charge of overseeing the supervision of the 2009 Contract towards the end of its term:

> [M]*inTIC's technical oversight capacity was limited: there was a great reliance on the information provided by .CO Internet and MinTIC's technical capacities were relatively limited, with only two MinTIC contractors tasked with assisting with the supervision of the contract.*[95]

2.4 Colombia's decision not to renew the 2009 Contract

(a) The July 2018 Report on the options available to the new administration for the future of the .co domain

79. By late 2017, as the initial term of the 2009 Contract was nearing completion (it was due to expire on 6 February 2020), MinTIC started to carry out an evaluation of the 2009 Contract and the options open to Colombia for the future administration and operation of the .co domain name. However, presidential elections were set to take place during the second quarter of 2018. In light of this, and as in any event the term of the 2009 Contract would only expire after these elections, the then MinTIC decided to focus on doing the groundwork to enable the new administration that would assume office by mid-2018 to decide on the future of the .co domain name.[96]

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[90] H. Zamora, 'The more than USD 350 million fight for the .co domain', *El Tiempo*, 25 November 2019 **[R-0005]**.

[91] Including the 2009 Terms of Reference, which were incorporated to the 2009 Contract, and the accompanying legal framework including chiefly Resolution 1652 of 2008. *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Article 34 **[C-0017]**.

[92] First Witness Statement of Iván Darío Castaño Pérez, para. 7 **[RWS-02]**. *See also*, First Witness Statement of Sylvia Constaín, paras. 8-10 **[RWS-01]**.

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

[94] *See, for instance,* Report of .CO Internet to MinTIC on the execution of the 2009 Contract of February 2012 **[R-0031]**.

[95] First Witness Statement of Iván Darío Castaño Pérez, para. 7 **[RWS-02]**.

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

80. By July 2018, the services of the Vice Minister of Digital Economy had finalized a report on the situation of the .co domain (the "**July 2018 Report**"), with the purpose of:

> [S]*erving as a recommendation document for the new Government, so that the same can be provided with a complete panorama of the current situation and future prospects of the .co domain, both from a financial, legal, and operational standpoint. This has been done with the intention that the new Government be able to take its own decisions regarding the future of the Colombian domain in an informed manner and basing its analysis on real and hard data.*[97]

81. In the meantime, Iván Duque Márquez was elected as President of Colombia on 17 June 2018. Following a transition period between the former MinTIC administration and the new Minister appointed by Mr. Duque, Ms. Sylvia Constaín, the new administration assumed office on 7 August 2018.[98]

82. Ms. Sylvia Constaín and key members of her administration, including Ms. Luisa Trujillo and Mr. Iván Castaño (who were respectively appointed as General Secretary of MinTIC and Director of the Telecommunications Industry Development in August/September 2018) were promptly briefed on the .co domain question, including through the July 2018 Report.[99] As Ms. Sylvia Constaín recalls,[100] a series of points raised in the July 2018 Report caught MinTIC's attention:

- The July 2018 Report provided a brief overview of the history of the 2009 Contract tender process, and emphasized the necessity to obtain better economic conditions for Colombia than under the 2009 Contract.[101] Ms. Sylvia Constaín therefore "*understood early on that Colombia could potentially get a better deal than Neustar's current contract.*"[102]

- The July 2018 Report further presented the legal framework concerning the .co domain, and expressly tackled the question of a potential renewal of the 2009 Contract. Specifically, the report set out that, under the terms of the 2009 Contract, had an option to either (i) engage in negotiations with the current concessionaire for the renewal of the 2009 Contract or (ii) carry out a new tender process.[103] However, in light of the low remuneration perceived by MinTIC under the 2009 Contract, the report specified that, in case of a renewal, it would be imperative to "*renegotiate the Colombia's share of the revenues*".[104] While the July 2018

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97 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]**.

98 First Witness Statement of Sylvia Constaín, paras. 5-6 **[RWS-01]**; MinTIC, 'Sylvia Constaín assumed office as Minister of Information Technologies and Communications', 7 August 2018 **[R-0032]**.

99 First Witness Statement of Sylvia Constaín, para. 6 **[RWS-01]**; First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 5 **[RWS-03]**; First Witness Statement of Iván Darío Castaño Pérez, para. 8 **[RWS-02]**;

100 First Witness Statement of Sylvia Constaín, para. 6 **[RWS-01]**.

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

102 First Witness Statement of Sylvia Constaín, para. 7 **[RWS-01]**.

103 MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 8 **[C-0027]**.

104 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 **[C-0027]**.

Report listed some potential benefits that could be associated with a renewal,[105] it concluded that "*the best option* [would be] *to initiate a new public contracting process which would result in a new concession contract*".[106]

- Finally, the July 2018 Report concluded that, in light of the upcoming expiry of the 2009 Contract and the potential challenges associated with the implementation of a transition process (should the new government choose to carry out a new tender process), it was necessary to initiate the decision-making process regarding the future of the .co domain as soon as possible in order to guarantee continuity of service.[107]

83. The new MinTIC administration therefore started to take preliminary steps towards making a decision on the future of the .co domain. While the July 2018 Report provided a helpful overview of the history and status of the .co domain administration and operation,[108] the new MinTIC administration considered that this sole document was not sufficient to determine the way forward, let alone to start structuring the contracting process for a new concession. In the words of Ms. Sylvia Constaín:

> [I]*t was clear that this document was not complete enough to enable us to determine the most suitable model and terms for the administration of the .co domain following the expiration of the 2009 Contract, let alone to launch the process for the conclusion of a new contract.*[109]

(b) **Neustar and .CO Internet's initial request for a renewal of the 2009 Contract**

84. In parallel, in an official communication to MinTIC dated 20 September 2018, .CO Internet first expressed its interest in concluding a renewal of the 2009 Contract. In its communication, .CO Internet did not mention any alleged 'right' to such a renewal, but emphasized that it would be ready to discuss a modification of the financial terms of the 2009 Contract:

> *We are conscious of the dynamism of the industry and that a renewal of the contract would entail working on a restructuration of the compensation package, where in addition to revising the formula and calculation value of the same, it would also be possible to discuss other mechanisms that, taken together, would improve the contribution of the .co ccTLD to the digital transformation efforts in Colombia*[110]

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[105] Such as continuity of service, avoiding a transition period which could be complex to implement, and avoiding the ICANN redelegation process. *See* MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 8 **[C-0027]**.

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

[107] MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 8 **[C-0027]**.

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

[109] First Witness Statement of Sylvia Constaín, para. 7 **[RWS-01]**.

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

85. MinTIC responded to this formal request on 22 November 2018, reminding .CO Internet that the renewal was only a possibility and explaining that it was "*in the course of taking the necessary actions for an efficient administration of the .co domain*."[111]

(c) Structuring of Colombia's decision-making process regarding the future of the .co domain in late 2018

86. As explained above, MinTIC's knowledge of the domain name industry in general, and of the technical aspects of the operation of a ccTLD such as the .co domain in particular, was relatively limited in late 2018 and had not significantly developed during the term of the 2009 Contract due to the operating model of the .co domain, under which MinTIC's role was quite limited.[112]

87. From late 2018, MinTIC therefore started working on supplementing the July 2018 Report to be in a position to take an informed decision on the future of the .co domain. As Ms. Sylvia Constaín explains,[113] MinTIC took three main actions to this end: reorganize the .co domain Advisory Committee (**i**); obtain international expertise through the recruitment of ITU experts (**ii**); and create a dedicated MinTIC working group (**iii**).

(i) *Reorganization of the .co domain Advisory Committee*

88. As Ms. Constaín explains, MinTIC first and foremost "*needed to have a true advisory body available in order to formulate recommendations regarding the .co domain*",[114] in light of the extremely important decisions that would have to be taken by MinTIC regarding, *inter alia*, whether to renew the 2009 Contract or launch a new tender process, and whether to adapt the administration and operation model of the .co domain.

89. As seen at paragraph 46 above, an Advisory Committee had been created in 2008 to fulfil this function. Pursuant to Resolution 1250 of 2008, this committee was specifically responsible of:

> *Advis*[ing] *the Ministry of Communications on themes related with the ccTLD .co policy.*
>
> *Receiv*[ing] *reports prepared by the ccTLD .co administrator on the fulfilment of the ccTLD .co policy, and formulate recommendations to the Ministry of Communications on the ccTLD .co policy.*
>
> *Analys*[ing] *the necessities of the Colombian internet community and tendencies in ccTLD policies at the global level – which should be presented*

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[111] Communication from MinTIC to .CO Internet of 22 November 2018 **[C-0029]**: "*Article 2 of Law 1065 of 2006 established the possibility that the exercise of this administrative function* [in respect of the .co domain] *be conferred on particulars and additionally establishes the possibility that, **if considered appropriate, the agreement be renewed or not for one single time for the same duration than the initially agreed term**, which cannot be superior to 10 years.*" (emphasis added)

[112] *See* paras. 78 *supra.*

[113] First Witness Statement of Sylvia Constaín, para. 10 **[RWS-01]**.

[114] First Witness Statement of Sylvia Constaín, para. 10, point 1 **[RWS-01]**.

> *by the ccTLD administrator, and formulate recommendations on the ccTLD .co policy.*[115]

90. Throughout the term of the 2009 Contract, the role of the Advisory Committee had however shifted, as this body had increasingly focused on assisting the supervision of the 2009 Contract. The main task carried out by the Advisory Committee during these years was therefore the review of the administrator's various reports, including on the implementation of the .co domain policy by the concessionaire. In the words of Mr. Iván Castaño:

> [The Advisory Committee was] *officially tasked with advising the Ministry on .co domain policy. when I assumed my new role I rapidly realized that this Committee focused on assisting the supervision of the 2009 Contract, and that .CO Internet participated in this Committee. In fact, when I reviewed minutes of meetings of the Committee prior to my joining, I could see that the discussions mostly revolved around the presentation of the concessionaire's reports and MinTIC's monitoring reports.*[116]

91. Naturally, up until then, .CO Internet participated in the sessions of the Advisory Committee in its quality as administrator of the .co domain.[117] However, as Ms. Luisa Trujillo explains, .CO Internet's continued participation in the committee's sessions was not only highly unusual, but "*had the potential to create an obvious conflict of interest*" as the committee would now have to assess whether to renew the 2009 Contract or launch a new tender process. In fact, given that .CO Internet had already expressed its will to renew the 2009 Contract on 20 September 2018 and possessed far greater technical and industry knowledge than other participants to the committee sessions, it could have taken advantage of its position as member of the Advisory Committee to steer the discussions towards a renewal of the 2009 Contract. Further, this meant that .CO Internet would have had a direct insight into MinTIC's decision-making process, different from that of other private parties potentially interested in the operation of the .co domain.[118]

92. On 3 December 2018, MinTIC therefore issued Resolution 3278 of 2018, intended to focus the Advisory Committee on the elaboration of a decision for the future of the .co domain. This resolution modified the responsibilities of the Advisory Committee, which was notably tasked with "*recommending the implementation, modification and revision of the regulatory framework of the ccTLD .co*" and "*recommending the adoption of the operating and management model best adjusted to the needs of the Colombian State.*"[119]

93. With regard to the composition of the Advisory Committee, this resolution clarified that it would be made up of the Vice Minister of Digital Economy, the Director of Telecommunications Industry Development, the General Secretary of MinTIC, the Legal Director of MinTIC, and the Director of

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

116 First Witness Statement of Iván Darío Castaño Pérez, para. 6 **[RWS-02]**. *See also*, Minutes of the Advisory Committee session of 13 June 2018 **[C-0026]**.

117 Resolution 147 of 31 January 2011, Article 1 **[R-0033]**; 2009 Terms of Reference (final version), p. 10 **[C-0014]**.

118 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 7 **[RWS-03]**.

119 Resolution 3278 of 3 December 2018 (original version), Art. 2, paras. 3, 4 **[R-0034]**.

the Revenue Management Office of MinTIC. While .CO Internet was not anymore permanently invited to the sessions of the Advisory Committee, the resolution further provided that the Advisory Committee would have the possibility to "*invite to its sessions persons who, by virtue of their special knowledge, may provide input on ccTLD .co policy-related themes.*"[120] However, the Director of Telecommunications Industry Development (Mr. Castaño at the time) continued to communicate with .CO Internet on a regular basis regarding the supervision of the 2009 Contract.[121]

94. Following the issuance of Resolution 3278 of 2018, the Advisory Committee held a session on 10 December 2018 to consider the July 2018 Report and start structuring Colombia's decision-making process for the future of the .co domain.[122] During this session, the committee confirmed MinTIC's view that the July 2018 Report was insufficient to take an informed decision, particularly as it "*did not take into consideration the absence of a clear and specific public policy in this field,* [which could be] *different from the total exclusive outsourcing model for the operation and administration* [of the .co domain]."[123] The Committee further recommended that international experts be recruited by MinTIC in order to "*assist MinTIC in the structuration of the best scenario for the administration of the .co domain.*"[124]

(ii) ***Recruitment of ITU international experts***

95. In parallel, MinTIC turned to the international arena in order to "*try to better understand how other ccTLDs were administered and operated, in light of both the very internationalized nature of the domain name industry and the fact that there was limited expertise in Colombia.*"[125] MinTIC therefore contacted the ITU in the fall of 2018 and, in December 2018, MinTIC decided to recruit ITU experts who had experience assisting States in regard of domain name-related questions, in furtherance of the Advisory Committee's recommendations.[126] Besides providing general advice to MinTIC with regard to ccTLD policy, the ITU experts were also tasked with starting to prepare the preliminary documents for a potential new tender process.[127]

96. As Mr. Castaño explains, even though the decision whether to renew the 2009 Contract or conduct a new tender process had not yet been taken, the ITU experts were instructed to do so as it was still necessary to "*start taking the necessary steps for the preparation of a potential tender process as soon as possible. While the 2009 Contract only expired in February 2020, the preparation of a public tender process is a detailed and long process under Colombian law. In addition, in case of a new tender process, it was also necessary to factor in an appropriate amount of time to allow for*

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120 Resolution 3278 of 3 December 2018 (original version), Art. 1, para. 1 **[R-0034]**.

121 First Witness Statement of Iván Darío Castaño Pérez, para. 6 **[RWS-02]**.

122 *See also*, First Witness Statement of Iván Darío Castaño Pérez, para. 13 **[RWS-02]**; First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 6 **[RWS-03]**.

123 Minutes of the Advisory Committee session of 10 December 2018, Section 2.1 **[C-0037]**.

124 Minutes of the Advisory Committee session of 10 December 2018, p. 8 of the PDF **[C-0037]**.

125 First Witness Statement of Sylvia Constaín, para. 10 **[RWS-01]**.

126 Minutes of the Advisory Committee session of 10 December 2018, p. 8 of the PDF **[C-0037]**.

127 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 16 **[RWS-03]**.

the technical transition between the previous and the new concessionaire, a delicate process which we expected to take months and which could affect continuity of service."[128]

(iii) *Creation of a dedicated MinTIC working group integrated by external consultants*

97. Finally, it also proved necessary to recruit external consultants, which were "*tasked with (i) assisting the works of the Advisory Committee, (ii) assisting the ITU experts, in particular in understanding the specificities of the Colombian context and regulatory framework, and (iii) assisting in building up MinTIC's internal knowledge of the domain name industry and associated best practices.*"[129] MinTIC therefore proceeded to recruit several external consultants, including a technical coordinator (Ms. Adriana Arcila), and legal consultants (Mr. Lucas Quevedo and Ms. Dominique Behar).[130] The structure of the MinTIC's services in charge of overseeing the .co domain was also modified to take into account the recruitment of these external consultants.[131]

98. By early 2019, this reorganization was completed, and MinTIC "*had a team, both internal and external, in place to carry out the research and investigation necessary to make an informed decision on the future of the .co domain.*"[132]

(d) Contacts with .CO Internet regarding Colombia's decision-making process

99. Following its initial 20 September 2018 communication,[133] and despite MinTIC's indication that it was taking the necessary actions towards making a decision on the future of the .co domain,[134] .CO Internet reiterated its desire to conclude a renewal of the 2009 Contract on several occasions.

100. In particular, on 27 December 2018, .CO Internet submitted a further renewal request to MinTIC, accompanied by a legal opinion which concluded that the renewal of the 2009 Contract would be compliant with Colombian law.[135] Of particular note, this legal opinion both recognized that (i) the automatic renewal of public contracts is forbidden under Colombian law,[136] and that (ii) the renewal of public contracts "*does not constitute a right of the contractor*", in line with the Council of State's jurisprudence.[137]

101. MinTIC responded to .CO Internet's communication on 15 February 2020, explaining that "*on the basis of the information received from the previous administration, this Ministry is undertaking important actions aimed at guaranteeing that, taking into account best international practices and*

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[128] First Witness Statement of Iván Darío Castaño Pérez, para. 14 **[RWS-02]**.
[129] First Witness Statement of Sylvia Constaín, para. 10 **[RWS-01]**.
[130] First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 8 **[RWS-03]**.
[131] First Witness Statement of Iván Darío Castaño Pérez, para. 16 **[RWS-02]**.
[132] First Witness Statement of Sylvia Constaín, para. 13 **[RWS-01]**.
[133] Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.
[134] Letter from MinTIC to .CO Internet of 22 November 2018 **[C-0029]**.
[135] Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version) **[R-0035]**.
[136] Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 7 **[R-0035]**, *referring to* Constitutional Court, Judgment of 5 September 2001 (case No. C-949/01) **[R-0003]**. *See also*, para. 44 *supra.*
[137] Letter from .CO Internet to MinTIC of 27 December 2018 and accompanying legal opinion (full version), p. 7 **[R-0035]**.

the thorough analysis of the current contract, a decision will be taken regarding the best option for the future of the ccTLD .co administration."[138] On 5 March 2019, .CO Internet further reiterated its request for a renewal of the 2009 Contract, although it did recognize that this renewal was not automatic, but only an "*option*".[139]

102. MinTIC not only responded to .CO Internet's communications, but also acceded to .CO Internet's requests for meetings to discuss the potential renewal of the 2009 Contract.[140] For instance, on 11 February 2019, the Vice Minister of Digital Economy, Mr. Jehudi Castro, and Mr. Iván Castaño met Messrs. Eduardo Santoyo (legal representative of .CO Internet) and Nicolai Bezsonoff (Vice-President of Neustar) to discuss the renewal request. However, MinTIC did not represent to .CO Internet during this meeting that it would be putting in place a "*process of negotiating an extension to the* [2009 Contract] *with .CO Internet*", as claimed by Neustar.[141] Rather, MinTIC reminded .CO Internet that "*the potential renewal contemplated by the current contract is only one of the alternatives that this Ministry is in the process of analysing with the goal of securing the Nation's best interest.*"[142]

(e) Formalization and announcement of Colombia's decision not to extend the 2009 Contract and conduct a new tender process

103. In early 2019, the MinTIC team and external advisors started to engage with the ITU experts and carry out research on, *inter alia*, the best practices for the administration of ccTLDs.

104. MinTIC promptly confirmed that numerous changes to the domain name industry had occurred over the past ten years, rendering the administration model of the 2009 Contract obsolete. In particular, this initial research evidenced that:

- The domain name industry was *(and still is)* a particularly dynamic sector, which had undergone several changes over the past decade, including for instance the introduction of new gTLDs by ICANN from 2012 (which increased potential competition for existing domains);[143]

- The administration model for the .co domain was no longer in conformity with international best practices. In particular, recent contracts concluded by countries for the operation of ccTLDs with similar characteristics as the .co domain (such as Australia's .au domain name, or India's .in domain name) implemented a different administration model and were

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138 Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**.
139 Letter from .CO Internet to MinTIC of 5 March 2019 **[C-0032]**.
140 First Witness Statement of Iván Darío Castaño Pérez, paras. 19-21 **[RWS-02]**.
141 Memorial, para. 69.
142 Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007].**
143 First Witness Statement of Iván Darío Castaño Pérez, para. 12 **[RWS-02]**.

concluded for a maximum duration of five years, meaning that a ten-year renewal would not be standard practice;[144]

- The 7% share of proceeds received by Colombia under the 2009 Contract was not in line either with the market conditions of the ccTLD market.[145]

105. While, as Mr. Castaño explains, MinTIC initially did not entirely discard the possibility of a renewal of the 2009 Contract by that time, due notably to the potential challenges associated with a transition and redelegation process and Colombia's utmost priority of ensuring continuity of service, it quickly became apparent that the best option would be to initiate a tender process for the selection of a new operator of the .co domain.[146]

106. This conclusion was reinforced by the fact that MinTIC also identified potential legal risks associated with a renewal of the 2009 Contract.[147] While Colombian law contemplates the possibility for the State to renew concession contracts, the conclusion of such a direct renewal while at the same time modifying the essential elements of the contract could breach fundamental principles of transparency and equal opportunity.[148] In the case of the 2009 Contract, all the parties involved (including .CO Internet itself) precisely acknowledged that a renewal of the contract should entail a modification of the share of proceeds allocated to MinTIC. Agreeing on such a modification would therefore create "*an unnecessary risk regarding compliance with the legal framework for the administrative function and contractual activity of the State.*"[149]

107. On 18 March 2019, the Advisory Committee met to consider the results of the investigations carried out until then by MinTIC and its external consultants. All of the above points regarding the evolution of the domain name industry, best practices with regard to ccTLD administration, and the potential legal challenges associated with a renewal of the 2009 Contract, were discussed by the members of the Advisory Committee, who ultimately concluded that they "*recommend*[ed] *continuing with the structuration of a selection process (public tender process) to choose the operator for the administration of the .co domain*".[150]

108. Ms Constaín followed this recommendation and, as Minister of Telecommunications, she "*was ultimately responsible for the decision – in line with Law 489 of 1998.*"[151] Throughout this decision-making process, Ms. Constaín also kept President Duque updated about the actions that were being taken by MinTIC regarding the future of the .co domain. In this context and once the MinTIC reached the conclusion that the best course of action would be to structure a new tender process,

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144 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.
145 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.
146 First Witness Statement of Iván Darío Castaño Pérez, para. 14 **[RWS-02]**.
147 *See* First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 10 **[RWS-03]**.
148 Council of State, Decision of 31 August 2011 (case No. 18080) **[Exhibit R-0036]**; Council of State, Decision of 28 June 2012 (case No. 23966) **[Exhibit R-0037]**; Political Constitution of the Republic of Colombia, 1991, Art. 209 **[C-0111]**.
149 Minutes of the Advisory Committee session of 18 March 2019, p. 5 **[C-0039]**.
150 Minutes of the Advisory Committee session of 18 March 2019, p. 6 **[C-0039]**.
151 First Witness Statement of Sylvia Constaín, para. 16 **[RWS-01]**; Law 489 of 29 December 1998, Arts. 12, 61 **[R-0038]**.

the President communicated MinTIC's decision (amongst other points regarding the Colombian telecommunications sector) at the assembly of the Colombian Chamber of IT and Telecommunications in late March 2019, during which Ms. Constaín was also present.[152] It had indeed been decided by MinTIC that a public announcement had to be made before informing .CO Internet in order to ensure the equal treatment of the potential candidates to the tender process to come. As Mr. Iván Castaño explains, "[w]*e took into account that .CO Internet, in addition to being the current concessionaire, could also be a potential bidder in the tender process that was to be announced. Accordingly, communicating this decision in advance to .CO Internet could have interfered with the equal treatment of the potential participants to the tender process.*"[153]

109. On 10 April 2019, MinTIC therefore communicated its decision to .CO Internet, in the following terms:

> *In this regard, taking into account the regulations applicable to this case and the provisions of the concession contract, it is the sole and exclusive power of the Ministry of Information Technologies and Communications, through the advisory committee on the .co domain policy, to assess and decide on the pertinence of continuing with the current concessionaire or initiate a new public process to ensure the continuity of the service for the next ten years.*
>
> *In this context, on March 18, 2019, the ccTLD .co Policy Advisory Committee decided to continue with the structuring of the selection process (public bidding process) to choose the operator for the administration of the .co domain.*[154]

(f) **Subsequent communications between MinTIC and .CO Internet/Neustar**

(i) ***Communications regarding .CO Internet's requests for the renewal of the 2009 Contract***

110. In spite of MinTIC's 10 April 2019 communication, .CO Internet continued to submit requests for a renewal of the 2009 Contract to MinTIC in the following months. Most notably, on 21 May 2019, .CO Internet submitted an unilateral offer to MinTIC for the renewal of the 2009 Contract, offering *inter alia* the anticipated payment of USD 50 million to MinTIC, and falsely accusing MinTIC of failing to communicate its decision to .CO Internet.[155]

111. Even though MinTIC had already formalized its decision, the Advisory Committee met on 30 May 2019 to discuss .CO Internet's offer.[156] Following this meeting, MinTIC responded to .CO Internet

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152 Ernesto Rodriguez, 'Beware of Monopolies', *El Nuevo Siglo*, 30 March 2019 **[C-0041]**. It should be noted that in its Memorial (para. 83, fn. 107), Neustar relies on this press article to allege that the President had "*ordered that the operation of the .CO domain be given to another entity.*" This allegation is unsupported by this press article, in which it is the *columnist* who pleads for the attribution of the .co domain administration to a Colombian company. *See* English translation of Ernesto Rodriguez, 'Beware of Monopolies', *El Nuevo Siglo*, 30 March 2019 (produced as C-41) **[R-0039]**. First Witness Statement of Sylvia Constaín, para. 16 **[RWS-01]**; El Nuevo Siglo, 'Asamblea CCIT', 26 March 2019 **[R-0040]**.

153 First Witness Statement of Iván Darío Castaño Pérez, para. 24 **[RWS-02]**.

154 Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**. *See also*, First Witness Statement of Iván Darío Castaño Pérez, para. 24 **[RWS-02]**.

155 Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**.

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

on 21 June 2019, reiterating its decision to proceed with a tender process and inviting .CO Internet to participate in such process.[157]

112. However, as will be detailed at Section 2.8 *infra.*, over the next few months .CO Internet continued to submit an extensive number of communications both to MinTIC and to other entities of the Colombian State such as the Ministry of Commerce, in the hope of getting MinTIC to reverse its decision. While .CO Internet's requests were ultimately denied as Colombia proceeded to prepare and implement the tender process, .CO Internet's communications were continuously answered by Colombia, and both MinTIC and the Ministry of Commerce participated in several meetings with .CO Internet during which the latter presented its grievances regarding the non-renewal of the 2009 Contract.[158]

(ii) ***MinTIC's requests for a transition plan***

113. As explained above, one of the main challenges associated with the potential selection of a new operator for the .co domain was undoubtedly the technical transition and redelegation process that would have to be implemented. With this in mind, MinTIC's utmost priority was to ensure that the transition would run smoothly, in order to guarantee continuity of service.[159]

114. From 5 March 2019, in anticipation of a potential tender process which would entail such a transition, MinTIC therefore started to request that .CO Internet provide a transition plan, as contemplated under the 2009 Contract.[160] On 15 March 2019, .CO Internet indicated in response to such request that a transition plan was not necessary at this stage, since MinTIC was first required to negotiate the renewal of the 2009 Contract.[161]

115. Following further requests from MinTIC,[162] it is only on 4 July 2019 that .CO Internet delivered a preliminary transition report to MinTIC.[163] However, as this report proved incomplete, MinTIC was forced to request once more the provision of a complete transition report to .CO Internet on 26 July 2019.[164] Up until the fall of 2019, further exchanges ensued with .CO Internet, which notably contended that it could not provide a complete transition report before the designation of a new administrator and operator for the .co domain.[165]

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

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

159 *See, for instance,* First Witness Statement of Iván Darío Castaño Pérez, para. 29 **[RWS-02]**.

160 Letter from MinTIC to .CO Internet of 6 March 2019 **[C-0033]**. Under the 2009 Contract, .CO Internet had the obligation to guarantee a smooth transition of the .co domain operation, and to provide a complete transition plan to MinTIC. *See* Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]**.

161 Letter from .CO Internet to MinTIC of 15 March 2019 **[C-0034]**.

162 First Witness Statement of Iván Darío Castaño Pérez, para. 29 **[RWS-02]**.

163 Letter from .CO Internet to MinTIC of 4 July 2019 **[C-0078]**.

164 Letter from MinTIC to .CO Internet of 26 July 2019 **[C-0080]**.

165 Letter from .CO Internet to MinTIC of 6 August 2019 **[C-0081]**; Letter from MinTIC to .CO Internet of 26 August 2019 **[C-0083]**.

2.5 The 2020 Tender Process for the conclusion of a new contract for the operation of the .co domain

(a) The ITU Report

116. In May 2019, the ITU experts which had been recruited by MinTIC in December 2018 submitted their general report on the .co domain to MinTIC (the "**ITU Report**").[166]

117. This comprehensive 176-page report provided an overview of the domain name industry and international best practices with respect to ccTLD administration and management,[167] and included recommendations on the implementation of an effective .co domain policy,[168] as well as on the financial and technical aspects that the ITU experts estimated should be taken into account for the structuration of a new tender process for the operation of the .co domain.[169] As Mr. Castaño explains,[170] the ITU Report confirmed the findings of the preliminary research carried out by MinTIC regarding ccTLD administration:

- The ITU experts considered that Colombia should increase its participation in the different ICANN bodies, "*not only in order to make sure that* [MinTIC] *is aware of what is happening in the industry, but also so that* [MinTIC] *be able to take an active role when necessary to defend its interests or prevent undesirable events.*"[171]

- The ITU experts further noted that the Colombian State's involvement in the administration operation of the .co domain was too limited, and recommended that MinTIC "*develop its internal expertise and a better supervision*", including by adapting the .co domain administration model.[172]

- The ITU Report also confirmed that the share of proceeds received by MinTIC under the 2009 Contract of only 7% was not in line with international practice, and that Colombia could obtain "*more favourable commercial terms than those of the last contract.*"[173]

- Finally, in light of both the size of the .co domain and the risks associated with the transition process, the ITU experts emphasized the need to include stringent technical requirements in the tender process, including a requirement that the interested companies have

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[166] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

[167] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Sections 1-3 **[C-0067]**.

[168] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 4.1 **[C-0067]**.

[169] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Sections 4.2, 4.3, 5 **[C-0067]**.

[170] First Witness Statement of Iván Darío Castaño Pérez, para. 23 **[RWS-02]**.

[171] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 1.3, pp. 29-30 **[C-0067]**.

[172] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 2.5, p. 50 **[C-0067]**.

[173] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 4.3, p. 69 **[C-0067]**.

experience in the carrying out of large TLD transition processes.[174] With regard to the setting of the specific technical and financial requirements to be included in the tender process, the ITU Report referred to a wide array of examples taken from recent tender processes for the administration of TLDs (including ccTLDs, such as India's and Australia's).[175]

118. On the basis of this report, MinTIC started to work on preparing the tender process. In light of the particular complexity of this specific process, MinTIC decided on 27 June 2019 to recruit the law firm Durán & Osorio to coordinate the structuration of the tender process,[176] and specifically to "*ensure that the ITU experts' recommendations were included in the draft terms of reference in compliance with Colombian law.*"[177] By the same token, it later proved necessary to recruit a local financial consultant who possessed the necessary expertise to prepare the financial provisions of the terms of reference on the basis of the ITU recommendations. Mr. Orlando Garcés (through his advisory firm, GACOF Consulting), was therefore hired by MinTIC in September 2019 to integrate MinTIC's external consultants team,[178] in addition to the previously mentioned technical coordinator (Ms. Adriana Arcila) and legal consultants (Mr. Lucas Quevedo and Ms. Dominique Behar).[179]

(b) **Preparation and publication of the draft terms of reference on 5 November 2019**

119. As seen above, the structuring of a public tender process under Colombian law is a complex process, regulated first and foremost by Laws 80 of 1993 and 1150 of 2007.[180]

120. Prior to awarding the contract, the public entity is required to take a number of steps, including first establishing the central document of the tender process, the terms of reference (which not only sets out the details of the eligibility requirements and selection criteria, but also includes a minute of the draft contract).[181]

121. Ms. Luisa Trujillo, who was directly in charge of overseeing the 2020 Tender Process in her capacity as then General Secretary of MinTIC, recaps the different phases of a public tender process in her witness statement:

> *In essence, and in a simplified manner, the state entity must follow the following stages to award the bid: (i) conduct preliminary studies in which the suitability of the contract is analysed, (ii) publish notices of call for bids and draft terms of reference, (iii) collect comments from the public on these draft terms of*

174 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 4.2 **[C-0067]**.

175 *See* ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Annexes **[C-0067]**.

176 Contract No. 644 between MinTIC and Durán & Osorio of 27 June 2019, Art. 2 **[C-0074]**.

177 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 19 **[RWS-03]**.

178 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 19 **[RWS-03]**.

179 *See* para. 97 *supra*.

180 Law 80 of 28 October 1993, Art. 30 **[R-0041]**; Law 1150 of 16 July 2007, Arts. 8, 9 **[C-0065]**.

181 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 18 **[RWS-03]**.

reference and publish the reasons for accepting or rejecting these comments, (iv) formally open the process by publishing the final terms of reference by means of an administrative act, (v) collect comments from the public on the final terms of reference and publish the reasons for accepting or rejecting these comments, (vi) after the deadline for submitting proposals, prepare and publish preliminary evaluation reports (on which comments are collected from the bidders), (vii) award the bidding through a public hearing, and (viii) finally conclude the contracts.[182]

122. All of the above steps taken by the public entity towards the adjudication of the contract are duly registered on a publicly-available platform, SECOP II, where all the documents submitted by MinTIC and interested parties to the tender process are published.[183]

123. From mid-2019, MinTIC's internal team and external consultants therefore focused on the preparation of the draft 2020 Terms of Reference, and in particular the structuring of the legal, technical, and financial eligibility requirements, as well as the definition of the objective selection criteria.

124. Throughout this process, the ITU experts continued to provide assistance to MinTIC, in particular with regard to the financial and technical structure of the draft 2020 Terms of Reference.[184] From a technical standpoint, and in line with the recommendations of the 2019 ITU report,[185] MinTIC's general focus was to provide for stringent technical requirements "*in order to ensure that the future operator would have the necessary experience and infrastructure to ensure the smooth operation of the .co domain, one of the largest ccTLDs worldwide.*"[186]

125. However, as confirmed by Ms. Luisa Trujillo, there were no attempts to favour any specific domain name company: "*to the contrary, we also wanted to ensure that the process would be competitive, and that various interested companies would be interested in participating*."[187] Contrary to Neustar's allegation, Ms. Constaín further confirms that she "*did not meet specifically with Afilias and certainly did not discuss details of the tender process at any stage*."[188]

126. On 5 November 2019, MinTIC proceeded to publish the draft 2020 Terms of Reference and accompanying documents,[189] a "*set of documents which totalled more than one thousand pages of indications and specifications on the tender process, the financial, technical and legal*

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[182] First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 17 **[RWS-03]**.

[183] *See* Colombian Public Procurement Platform (SECOP II), Information on the 2020 Tender Process, accessible at <https://community.secop.gov.co/Public/Tendering/ContractNoticeManagement/Index?currentLanguage=es-CO&Page=login&Country=CO&SkinName=CCE> (retrieved on 22 February 2022) **[R-0042]**.

[184] In following suggestions of the ITU, MinTIC also maintained contacts with the Australian Ministry of Telecommunications and entity responsible for administering the .au domain ("**auDA**") as Australia had recently carried out its own tender process for the operation of the .au domain, and this was one of the extremely rare instances in which a ccTLD transition process regarding a domain of a similar size than the .co domain had been carried out.

[185] ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 4.2 **[C-0067]**.

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

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

[188] First Witness Statement of Sylvia Constaín, para. 22 **[RWS-01]**.

[189] 2020 Terms of Reference (draft version) **[R-0043]**.

requirements, and the new contract to be concluded."[190] Interested parties could submit comments to these draft terms of reference by 27 November 2019,[191] and .CO Internet engaged fully in the process by submitting three sets of comprehensive comments to this draft.[192]

127. On 6 December 2019, MinTIC issued a detailed 126-document responding in detail to each and every one of the observations, and explaining the reasons for which MinTIC decided to either adopt or reject the suggested modifications to the draft terms of reference.[193] In particular, several interested parties noted that the technical eligibility requirements were quite restrictive. While, as explained above, the ITU experts had recommended that a high bar be set with respect to technical requirements, MinTIC was mindful of the necessity to "*reach a balance between having sufficiently high technical requirements, and ensuring that a varied number of interested parties would be able to meet these requirements and participate in the process, in order to promote competition and ensure that the State would receive appropriate bids.*"[194] After consulting with the ITU experts, MinTIC therefore endeavoured to adapt the technical requirements where appropriate, and implemented several of the interested parties' observations in the final terms of reference, including from .CO Internet.[195]

(c) Launch of the tender process on 13 December 2019

128. On 13 December 2019, MinTIC formally launched the 2020 Tender Process by publishing the final 2020 Terms of Reference through Resolution 3316 of 2019.[196]

129. In its Memorial, Neustar speculatively alleges that the 2020 Terms of Reference "*had been prepared to exclude Neustar and to benefit only one competitor - AFILIAS.*"[197] In support of this allegation, Neustar points to some of the alleged "*arbitrary and discriminatory provisions of the TOR*".[198] However, a simple examination of the ITU Report, the draft 2020 Terms of Reference, and the final 2020 Terms of Reference suffices to show that all of the allegedly discriminatory provisions were included on the basis of the ITU's express recommendations, and that in any event

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190 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 21 **[RWS-03]**.

191 Notice of amendment to the draft 2020 Terms of Reference of 19 November 2019 **[R-0044]**.

192 First observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0045]**; Second observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0046]**; Third observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019 **[R-0047]**.

193 Response of MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019 **[R-0048]**.MinTIC even responded to observations submitted outside the agreed timeframe. *See* Response from MinTIC to observations on draft 2020 Terms of Reference, 20 December 2019 **[R-0049].**

194 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 24 **[RWS-03]**.

195 Addendum No. 3 to the 2020 Terms of Reference of 18 February 2020 **[R-0050]**.

196 2020 Terms of Reference (final version) **[R-0051]**; Resolution 3316 of 13 December 2019 **[R-0052]**.

197 Memorial, para. 128.

198 Memorial, para. 129. It should be noted that Neustar relies on several instances on articles published by one author, Kieran McCarthy (on *The Register*) in order to argue that the 2020 Terms of Reference were tailor-made for Afilias. An examination of Mr. McCarthy's articles (*see, for instance,* **[C-0119]**, p. 5) and Neustar's contemporaneous communications (*see, for instance,* Third observations of .CO Internet to the draft 2020 Terms of Reference of 27 November 2019, pp. 2-3 **[R-0047]**) reveal troubling similarities: for instance, both Kieran McCarthy and Neustar argued that the evaluation criteria for the 2020 Tender Process should include a "*marketing*" component.

these requirements were adapted throughout the process (including in response to requests from .CO Internet). Specifically:

- Section 5.2.2 of the draft terms of reference included a requirement that proponents have a level of indebtedness under or equal to 70%.[199] Without referring to any support, Neustar alleges that this is "*unusual given that the average of the domain industry is (115%)*" and that the only registry company meeting this threshold was Afilias.[200] However, Neustar overlooks the fact that it is the ITU which had expressly recommended that this requirement be set at 70% in its May 2019 report.[201] Neustar further omits that MinTIC in fact accepted an express request from .CO Internet that this ratio of indebtedness be re-evaluated,[202] and set the requirement at 75% in the final 2020 Terms of Reference.[203]

- Section 5.4(c) of the draft 2020 Terms of Reference included a requirement that proponents have more than 1,500 distributors (registrars) accredited by ICANN. Neustar contends that this provision was tailor-made for Afilias, which was allegedly the only company in the world meeting this criterion at the time. Once more, Neustar both omits that (i) this criterion was originally suggested by the ITU experts,[204] and that (ii) in any instance, it was taken out from the final 2020 Terms of Reference,[205] at the request of another interested party.[206]

- Neustar alleges that Section 6(9) of Technical Appendix 2 (Service Levels) of the draft contract to be concluded is an exact transcript of a provision contained in the terms of reference of a tender process initiated by Public Interest Registry (a non-profit organization in charge of administering the .org domain), in which the contract was ultimately awarded to Afilias.[207] Neustar further alleges that "*since those terms of reference* […] *were not public,* […] *Respondent must have obtained the information from AFILIAS or persons concerned with AFILIAS when drafting the TORs.*"[208] This is plainly inaccurate: while it is true that Section 6(9) of Technical Appendix 2 was based on the Public Interest Registry tender process, MinTIC certainly did not obtain this information through inappropriate means, but rather through the ITU: in their report, the experts specifically referenced the Public Interest

199 2020 Terms of Reference (draft version), Section 5.2.2 **[R-0043]**.

200 Memorial, para. 129. Neustar's unsubstantiated allegation is highly doubtful, as in the context of the submission of observations to MinTIC, other interested registry companies requested that the indebtedness ratio be ***lowered*** to 50%. *See* Response from MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019, p. 67 (question 194) **[R-0048]**.

201 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 4.3.4, p. 110 **[C-0067]**.

202 Response from MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019, p. 20 (question 38) **[R-0048]**.

203 2020 Terms of Reference (final version), Art. 5.2.2 **[R-0051]**.

204 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 3.4, p. 76 **[C-0067]**.

205 2020 Terms of Reference (final version), Art. 5.4.1 **[R-0051]**.

206 Response from MinTIC to observations on draft 2020 Terms of Reference, 6 December 2019, p. 110 (question 330) **[R-0048]**.

207 *See* Annex 11 to the 2020 Terms of Reference (final version), 'Technical Appendix No. 1', Art. 6(9) **[R-0053]**.

208 Memorial, para. 129, point 3.

Registry tender process and recommended the implementation of similar provisions.[209] In any event, Neustar does not explain how this provision could have had the potential to favour Afilias in any way.

- Finally, Section 5.4(b) of both the draft terms and the final 2020 Terms of Reference required the proponent to demonstrate experience in the operation of domain name system ("**DNS**") databases with an average of at least 25 million transactions per day during one month.[210] Without any support, Neustar once more alleges that Afilias "*was arguably the only entity which could satisfy this arbitrary requirement*".[211] This allegation is simply incorrect: the MinTIC studies had revealed that, at that time, not only Afilias, but also other companies including Neustar itself and Verisign met this threshold. In any event, just as the other alleged 'arbitrary' requirements, this provision was recommended by the ITU experts,[212] and MinTIC ultimately acceded to .CO Internet's request that this requirement be modified.[213]

130. Following the publication of the 2020 Terms of Reference, and while the 2020 Tender Process had just been initiated, Neustar filed on 23 December 2019 its RFA before ICSID, alleging that Colombia had breached its obligations under the TPA by failing to renew the 2009 Contract, and that the "*outcome of the new tender process is predetermined.*"[214] However, irrespective of this, MinTIC continued its transparent consultation process with all interested stakeholders.

131. *First*, MinTIC organized a public hearing on 18 December 2019, during which interested parties had the opportunity to submit comments on the 2020 Terms of Reference, which were then answered in writing by MinTIC. Representatives of .CO Internet and Neustar participated in this hearing.[215]

132. *Second*, as was done for the draft 2020 Terms of Reference, interested parties had the possibility to submit comments to the 2020 Terms of Reference by 3 January 2020.[216] Once more, .CO Internet engaged fully in the process, submitting more than 40 pages of observations to MinTIC.[217]

133. *Third*, MinTIC also organized meetings with the interested parties, which were regulated through a protocol for the interaction of MinTIC with the market.[218]

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209 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Annex B (p. 28 of the Annex) **[C-0067]**.

210 2020 Terms of Reference (final version), Art. 5.4.(b) **[R-0051]**.

211 Memorial, para. 129, point 4.

212 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019, Section 3.4, p. 75 **[C-0067]**.

213 Addendum No. 1 to the 2020 Terms of Reference of 24 January 2020 **[C-0103]**.

214 RFA, para. 80.

215 Attendance list of the public hearing on the 2020 Tender Process of 18 December 2019 **[R-0054]**; Observations of .CO Internet to the final 2020 Terms of Reference of 3 January 2020 **[R-0055]**.

216 Resolution 3316 of 13 December 2019, Art. 3 **[R-0052]**.

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

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

134. As MinTIC accepted a certain number of the requests submitted by the interested parties (including for instance .CO Internet's request that the 25 million daily transactions requirement be modified), it proved necessary to issue a number of addenda to the 2020 Terms of Reference. As Ms. Luisa Trujillo explains:

> *Addenda 1 to 3 contained adjustments to the requirements and conditions of the tender process, notably to incorporate the interested parties' comments which had been accepted;*
>
> *Addenda 4 to 7 only contained adjustments to the timeline of the tender process.*[219]

135. The deadline for the presentation of offers was set on 24 February 2020: proponents were required to submit their technical proposal publicly on the dedicated government platform, SECOP II. With regard to the financial proposal, the 2020 Terms of Reference provided that these should be presented in person by the proponents in a sealed envelope, in order to preserve their confidentiality.[220] On this date, three interested companies submitted proposals: Nominet UK, Consorcio Dotco, and .CO Internet.[221]

136. In parallel to the carrying-out of the tender process, the administration model of the .co domain was also progressively updated in order to align it with international best practices. As seen above, the ITU Report recommended that Colombia take on a more active role in the administration of the .co domain.[222] Through Law 1978 of 25 July 2019, MinTIC was therefore tasked with "*administering the use of the internet domain name under the [ccTLD] corresponding to Colombia -.co-.*"[223] In order to implement this legislative evolution and adapt the .co domain operational framework, MinTIC issued Resolution 161 on 5 February 2020, which confirmed the switch from the previous total exclusive outsourcing model to a "*partial outsourcing*" model.[224] In the words of Ms. Constaín, "*the main consequence of this evolution was that MinTIC would take on a more active role vis-à-vis ICANN, while the private party would continue to oversee the registry operation, commercialization and relationship with the registrars.*"[225]

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219 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 28 **[RWS-03]**. *See also*, Addendum No. 2 to the 2020 Terms of Reference of 7 February 2020 **[C-0104]**; Addendum No. 3 to the 2020 Terms of Reference of 18 February 2020 **[R-0050]**; Addendum No. 4 to the 2020 Terms of Reference of 26 March 2020 **[C-0106]**; Addendum No. 5 to the 2020 Terms of Reference of 27 April 2020 **[R-0056]**; Addendum No. 6 to the 2020 Terms of Reference of 7 May 2020 **[R-0057]**; Addendum No. 7 to the 2020 Terms of Reference of 22 May 2020 **[R-0058]**.

220 2020 Terms of Reference (final version), Arts. 4.2, 9.1 **[R-0051]**.

221 Certificate of closing of financial proposals for the 2020 Tender Process of 24 February 2020 **[R-0059]**.

222 *See* paragraph 117 *supra.*

223 Law 1978 of 25 July 2019, Art. 14, para. 20 **[C-0046]**.

224 Resolution 161 of 5 February 2020 (original version), Art. 2 **[R-0060]**.

225 First Witness Statement of Sylvia Constaín, para. 21 **[RWS-01];** Resolution 161 of 5 February 2020 (original version), Art. 7 **[R-0060]**.

(d) Conclusion of Amendment No. 4 to the 2009 Contract on 10 January 2020 to enable a transition period

137. In the fall of 2018, while the 2020 Tender Process was being prepared by MinTIC, it became apparent that the tender process would not be concluded by the end of the term of the 2009 Contract, on 6 February 2020. As seen above, avoiding any service interruption was undoubtedly the most important challenge for MinTIC,[226] in a context where .CO Internet appeared reluctant to provide a full transition plan to MinTIC.[227]

138. On 30 September 2018, Ms. Constaín therefore personally wrote to .CO Internet, requesting them to engage with the law firm Durán & Osorio regarding the preparation of the transition.[228] However, .CO Internet, which was protesting against MinTIC's decision to launch a new tender process, refused to engage in meaningful discussions with Durán & Osorio despite MinTIC's repeated requests throughout October, November and December 2019.[229]

139. On 26 December 2019, with the expiry of the 2009 Contract getting dangerously close, MinTIC had no choice but to indicate to .CO Internet that, should .CO Internet keep on refusing to engage with MinTIC, the latter would be forced to implement a unilateral modification of the contract in order to guarantee the continuity of service (in line with its prerogatives under the 2009 Contract and Colombian law).[230]

140. .CO Internet finally accepted to engage in negotiations with MinTIC, and on 10 January 2020 the parties were able to agree on an Amendment No. 4 to the 2009 Contract.[231] Under this amendment, .CO Internet undertook to "*guarantee, in its capacity as current concessionaire, the carrying-out of all the activities for which it is responsible in order to achieve the technical transition with the new entrant operator*".[232] To this end, .CO Internet notably accepted to continue operating the .co domain after the expiry of the initial term of the 2009 Contract on 6 February 2020, for a minimum of 240 days (should .CO Internet remain the operator following the conclusion of the tender process) and up to 365 days (should a new operator for the .co domain be designated by MinTIC, in which case a lengthy transition process would need to be completed).[233]

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[226] *See also*, First Witness Statement of Sylvia Constaín, paras. 25-26 **[RWS-01]**.

[227] *See* paragraph 115 *supra.*

[228] Letter from MinTIC to .CO Internet of 2 October 2019 **[C-0086]**.

[229] First Witness Statement of Sylvia Constaín, paras. 25-26 **[RWS-01]**; Letter from .CO Internet to MinTIC of 16 October 2019 **[C-0087]**; Letter from .CO Internet to MinTIC of 18 November 2019 **[C-0091]**; Letter from MinTIC to .CO Internet of 9 December 2019 **[C-0088]**; Letter from .CO Internet to MinTIC of 12 December 2019 **[R-0061]**; Letter from MinTIC to .CO Internet of 17 December 2019 **[R-0062]**; Letter from .CO Internet to MinTIC of 20 December 2019 **[C-0098]**.

[230] Letter from MinTIC to .CO Internet of 26 December 2019 **[R-0063]**.

[231] Amendment No. 4 to the 2009 Contract of 10 January 2020 **[C-0125]**. It should be noted that this amendment even memorialized Neustar and .CO Internet's concerns regarding Colombia's decision to launch a new tender process, thereby proving that it was negotiated and did not constitute an example of Colombia's alleged "*strongarm*" approach. *See* Preamble, para. 18.

[232] Amendment No. 4 to the 2009 Contract of 10 January 2020, Art. 1, para. 1(a) **[C-0125]**.

[233] Amendment No. 4 to the 2009 Contract of 10 January 2020, Art. 2, para. (i) **[C-0125]**.

141. As Ms. Constaín explains, "[t]*his Amendment was evidently beneficial to .CO Internet, as it meant that it would keep on receiving the 93% share of proceeds provided for by the 2009 Contract for up to a maximum of one additional year*."[234] On its part, MinTIC could now refocus its efforts on the conduct of the 2020 Tender Process with the assurance that there would not be any interruption of service.

(e) **Attribution of the 2020 Contract to .CO Internet on 3 April 2020**

142. Under the 2020 Terms of Reference, and evaluation committee had been formed to assess the proposals submitted by interested parties.[235] The 2020 Terms of Reference set out several evaluation criteria. However, the main selection factor was undoubtedly the financial proposal, which accounted for 70% of the evaluation, while the technical proposal represented 19% (the 2020 Terms of Reference also took into account whether the proponent supported national industry - 10% – and whether it employed disabled workers – 1%).[236]

143. As seen above, three proponents had submitted an offer on 24 February 2020: Consorcio Dotco, Nominet UK and .CO Internet. The evaluation committee therefore proceeded to perform a preliminary assessment of both the eligibility and the technical component of the offers.

144. In its preliminary report of 9 March 2020, the evaluation committee found that Nominet UK had not complied with one of the requirements as it had failed to submit a bank guarantee.[237] Nominet UK failed to comment on this preliminary report and to submit the missing document in the allocated timeframe. In its final report of 2 April 2020, the evaluation committee therefore confirmed that Nominet UK would be excluded from the tender process, with .CO Internet and Consorcio Dotco remaining as the only two eligible proponents.[238]

145. On 3 April 2020, MinTIC carried out the adjudication hearing, which was broadcast live.[239] During this hearing, MinTIC proceeded to open the financial proposals, which consisted of the percentage of proceeds from the operation of the .co domain that the operator proposed to *retain* (while the remaining share would be paid to MinTIC).[240] While Consorcio Dotco offered to retain a 36% share of the proceeds, .CO Internet offered to retain only a 19% share and was therefore selected as the new operator for the .co domain. In other words, .CO Internet went from offering 7% of the proceeds from the operation of the .co domain to Colombia under the 2009 Contract, to 81% under the new contract.

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234 First Witness Statement of Sylvia Constaín, para. 30 **[RWS-01]**.

235 2020 Terms of Reference (final version), Art 2.9 **[R-0051]**; Resolution 480 of 10 March 2020 **[R-0064]**.

236 2020 Terms of Reference (final version), Art 9.9 **[R-0051]**.

237 MinTIC, *Consolidated Preliminary Evaluation Report of Tender Process No. MTIC-LP-01-2019*, 10 March 2020 **[R-0065]**.

238 MinTIC, *Consolidated Preliminary Evaluation Report of Tender Process No. MTIC-LP-01-2019*, 2 April 2020 **[R-0066]**.

239 *See* Video Recording of Public Tender Hearing of 3 April 2020 **[R-0067]**.

240 2020 Terms of Reference (final version) **[R-0051]**.

146. On the same day, upon conclusion of the adjudication hearing, Ms. Luisa Trujillo (in her capacity as then General Secretary of MinTIC) proceeded to formally award the 2020 Contract to .CO Internet through Resolution 649 of 2020.[241] At the close of the hearing, .CO Internet and Neustar representatives expressed their satisfaction with the results of the 2020 Tender Process.[242]

2.6 Preparation and disclosure of Neustar's sale of .CO Internet to GoDaddy on 6 April 2020

147. In parallel to .CO Internet's participation to the 2020 Tender Process, it appears that Neustar was preparing the announcement of its sale of .CO Internet to GoDaddy, one of the leading Internet companies worldwide (and notably the largest domain name registrar).

148. Neustar first proceeded to transfer the shares it held in .CO Internet to Registry Services LLC ("**Registry Services**") on 24 January 2020, then a wholly-owned subsidiary (**a**), before announcing to Colombia the sale of its registry business, including .CO Internet, to GoDaddy on 6 April 2020, just three days after the 2020 Contract had been awarded to .CO Internet (**b**).

(a) Announcement of Neustar's transfer of .CO Internet's shares to Registry Services on 24 February 2020

149. On 24 February 2020, in parallel to its participation in the 2020 Tender Process, .CO Internet suddenly announced to MinTIC that Neustar had proceeded to transfer its registry division, including .CO Internet, to Registry Services, a Delaware-incorporated company, on 24 January 2020.[243] In the same communication, submitted one month after the transfer had taken place, .CO Internet and Neustar however assured Colombia that this would have no impact on the operations of .CO Internet.[244]

150. Faced with this unusual transfer, as Neustar and .CO Internet had concurrently filed their RFA with ICSID on 23 December 2019 (as will be detailed at Section 2.8(c) below), Colombia submitted a communication to the ICSID Secretariat on 3 March 2020, requesting Neustar to clarify the situation of .CO Internet following this transfer.[245] In response, Neustar further confirmed that Registry Services remained "*wholly owned and controlled by Neustar*" and disingenuously suggested that that it "*had to transfer to .CO Internet shares* […] *to, among other reasons, satisfy the requirements in the* [2020 Tender Process]."[246] Neustar, however, failed to mention the ongoing sale of .CO Internet to GoDaddy.

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[241] Minutes of the Tender Hearing of 6 April 2020 **[R-0068]**; Resolution 649 of 3 April 2020 **[C-0107]**.

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

[243] Letter from .CO Internet to MinTIC of 24 February 2020 **[R-0069]**.

[244] Letter from .CO Internet to MinTIC of 24 February 2020, p. 2 of the PDF **[R-0069]**: "*this change of control does not affect the legal status of .CO Internet S.A.S. and therefore has no impact on the Colombian operation of .CO Internet SAS..*"

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

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

(b) Announcement of Neustar's sale of .CO Internet to GoDaddy on 6 April 2020

151. On 6 April 2020, just three days after the new contract for the operation of the .co domain had been awarded to .CO Internet by MinTIC, the Presidency and MinTIC received simultaneous communications from GoDaddy and .CO Internet, informing that GoDaddy and Neustar had agreed on the sale of Neustar's registry business, including .CO Internet, to GoDaddy.[247] Less than an hour later, the transaction was made public by GoDaddy.[248]

152. Such a complex purchase of course did not happen overnight, and was well advanced – if not closed way before the award of the 2020 Contract. As both representatives of GoDaddy and Neustar confirmed in a subsequent press interview, the negotiations had been ongoing for over a year before the public announcement.[249] The parties, however, had already agreed to delay any public announcement until the 2020 Tender Process was concluded.[250] In light of the timing of Neustar's transfer of .CO Internet's shares to Registry Services (to which Neustar had also transferred its interests in other registry businesses),[251] it would appear that Registry Services clearly served as a special purpose vehicle for this transaction.

153. The announcement of the deal raised some concerns worldwide regarding a potential vertical concentration of the domain name industry, since GoDaddy, the largest registrar company (in charge of retailing domain names to individual registrants), was now entering the wholesale registry business.[252] GoDaddy thus committed to implement a governance model that would maintain independence between its registrar and registry businesses.[253] The transfer went forward and ultimately closed in early August 2020, for a reported purchase price of nearly USD 220 million.[254]

154. As explained below, Neustar's lack of transparency with respect to the transfer to GoDaddy evidences a clear abuse of the rights granted to investors under the TPA. While Neustar knew and had already agreed to transfer the registry to GoDaddy, it simply concealed the agreement until the 2020 Tender Process was over, thereby allowing it to 'maintain' its status as an alleged investor under the TPA.

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[247] Email from .CO Internet to MinTIC of 6 April 2020 **[R-0072]**; Email from GoDaddy to Colombia of 6 April 2020 **[R-0073]**.

[248] GoDaddy, 'GoDaddy acquires Neustar's registry business', 6 April 2020 **[R-0074]**.

[249] L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.

[250] L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.

[251] *See* Letter from .CO Internet to MinTIC of 24 February 2020, p. 18 of the PDF **[R-0069]**: "*we hereby declare that Registry Services is the controlling parent of the following corporations: Neustar Asia Pacific Pty Ltd (formerly named AusRegistry Pty Ltd). Domeciled: Australia. .CO Internet S.A.S. Domeciled: Colombia.*"

[252] A. Allemann, 'GoDaddy goes vertical with Neustar registry integration', *Domain Name Wire*, 6 April 2020 **[R-0076]**.

[253] A. Allemann, 'GoDaddy goes vertical with Neustar registry integration', *Domain Name Wire*, 6 April 2020 **[R-0076]**.

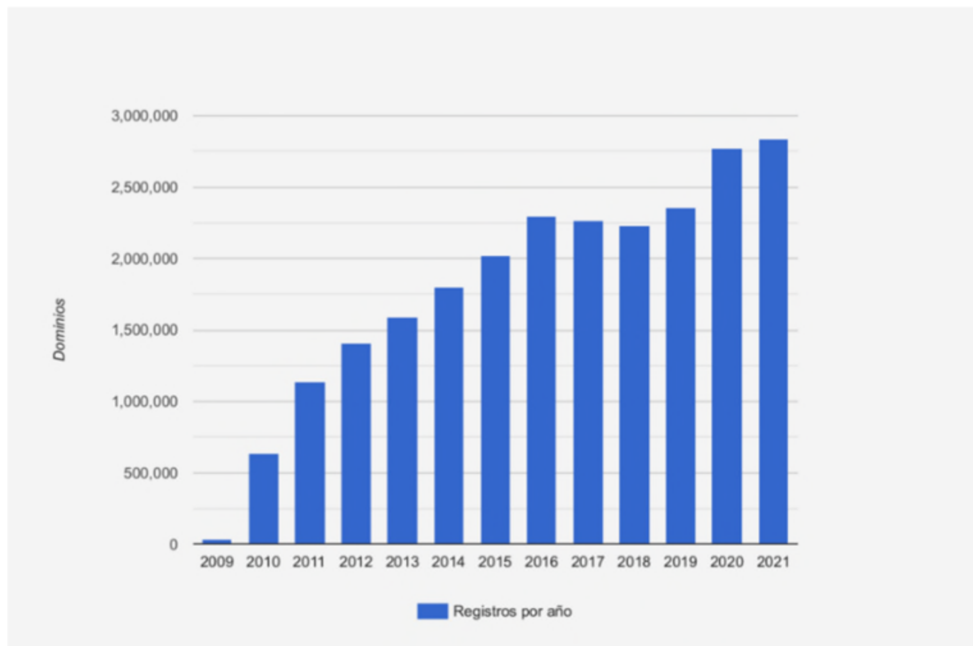
[254] MarketScreener, 'GoDaddy Inc. completed the acquisition of Registry business of Neustar, Inc.', 5 August 2020 **[R-0077]**.

2.7 Performance of .CO Internet under the 2020 Contract

155. On 22 May 2020, MinTIC and .CO Internet proceeded to execute the 2020 Contract,[255] which entered into force on 5 October 2020 following the expiration of Amendment No. 4 to the 2009 Contract.[256]

156. Under the new ownership of GoDaddy, the general performance of the .co domain appears to have improved, and so far "*the fulfilment and supervision of the 2020 Contract have been considered satisfactory by MinTIC.*"[257]

157. As can be seen from the below chart produced by Neustar, the number of registered domains, which had reached a plateau of approximately 2.3 million domains during the four final years of the 2009 Contract, started to increase steadily from the start of the 2020 Contract, reaching nearly 2.75 million domains by the end of 2020, and approximately 2.85 million domains by March 2021:



Source: MinTIC, General data on the .co domain as at 31 March 2021 (accessible at: https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html) ***[C-0120]***

158. The proceeds received by Colombia have also increased exponentially, owing to both the renewed growth in the number of .co domains, and the increase of Colombia's share of the proceeds under the 2020 Contract. In fact, as can be seen from the below table based on official MinTIC data,[258] in

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[255] Contract 16 between MinTIC and .CO Internet of 22 May 2020 **[R-0078]**.

[256] Amendment No. 4 to the 2009 Contract of 10 January 2020 **[C-0125]**.

[257] First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 34 **[RWS-03]**.

[258] *See* MinTIC, General data on the .co domain as at 31 March 2021, accessible at: <https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html> **[C-0120]**; MinTIC, 'Total Amounts perceived under Contract 16 of 2020', 6 October 2021 **[R-0010]**.

only 15 months of operation under the 2020 Contract Colombia has already received more than twice the total proceeds received during the full ten years of the 2009 Contract:

Proceeds received by Colombia	**2009 Contract** *(full term)*	**2020 Contract** *(from 5 October 2020 to 31 December 2021)*
In Colombian pesos	49,374,511,000	110,922,999,457.03
In USD (converted as at 25 February 2022)	12,644,254.34	28,406,126.73

Source:
MinTIC, 'Total Amounts perceived under Contract 16 of 2020', 6 October 2021 ***[R-XX]****;*
MinTIC, General data on the .co domain as at 31 March 2021, accessible at:
<https://gobernanzadeinternet.mintic.gov.co/752/w3-propertyvalue-198153.html> ***[C-0120]***

159. Accordingly, contrary to the constant allegations that Neustar and .CO Internet made against MinTIC during 2019 regarding the alleged financial risk of organizing a new tender process,[259] the 2020 Contract entailed significant progress for the Colombian public interest. This is all the more true given that the proceeds of the 2020 Contract are used *inter alia* to foster Colombia's digital transformation policies and increase connectivity in remote areas.[260]

160. In the words of Ms. Constaín, who spearheaded the entire process:

> *If we simply take into account that .CO Internet previously paid only a 7% share to the Colombian State under the 2009 Contract, it is clear that the decision to launch a tender process was the correct one as it enabled us to obtain considerably better economic conditions for the Colombian State, while adapting the .co domain operation model to the evolving reality of the domain name industry and aligning it with international best practices. I feel that we not only respected the Colombian public procurement framework and the terms of the 2009 Contract by deciding not to extend this contract, but that we also put in place the best possible course of action to defend the Colombian public interest and ensure the adequate operation of the .co domain.*[261]

259 Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**, Letter from .CO Internet to MinTIC 2 August 2019 **[C-082]**; Letter from .CO Internet to MinTIC of 25 September 2019 **[C-079]**.

260 Law No. 1978 of 25 July 2019, Articles 3, 37 **[C-0046]**.

261 First Witness Statement of Sylvia Constaín, para. 32 **[RWS-01]**.

2.8 Neustar's introduction of different set of proceedings to disrupt the 2020 Tender Process

(a) Over the course of 2019, Neustar explored every single alternative to try and coerce MinTIC into renewing the 2009 Contract

161. On 7 June 2019, concurrently to .CO Internet's communications with MinTIC regarding MinTIC's decision to launch a new tender process and the transition period described at Sections 2.4(e) and 2.4(f) *supra.*, .CO Internet and Neustar submitted a joint notice of dispute under the TPA to the Ministry of Commerce and MinTIC (even though this document is not contemplated by the Treaty).[262] In this notice, Neustar requested *inter alia* that the tender process for the new concession be suspended and that Colombia negotiate the renewal of the 2009 Contract, threatening to request compensation in a – so far – unsubstantiated amount of at least USD 350 million in the alternative.[263] On 14 June 2019, the Ministry of Commerce scheduled a meeting to discuss Neustar's complaints.

162. From that point on, Neustar and .CO Internet adopted a strategy of trying to flood the Colombian State with incessant communications questioning every single action of MinTIC in relation to the .co domain, and constantly repeating its threat of legal action under the TPA.

163. On 18 June 2019, even before the scheduled meeting between .CO Internet/Neustar and the Ministry of Commerce, .CO Internet submitted a further communication to the Ministry of Commerce, requesting as a precondition to the discussions that Colombia "*revoke the measures which lead to the expropriation of the 2020-2030 term of Contract 019 of 2009.*"[264] On 25 June 2019, .CO Internet sent a further communication to the Ministry of Commerce,[265] purporting to respond to MinTIC's 21 June 2019 letter whereby MinTIC had confirmed to .CO Internet that it would proceed with the structuration of the tender process.[266] While this letter was addressed to the Ministry of Commerce, .CO Internet made sure to copy MinTIC and to include a reference to the TPA in the letter, in the hopes of twisting MinTIC's arm by threatening action under the TPA.[267]

164. In spite of Neustar/.CO Internet's extraordinary demands and unsolicited further communications, the Ministry of Commerce proceeded with the scheduled meeting on 26 June 2019, during which Neustar/.CO Internet were afforded the opportunity to present their complaints.

165. The Ministry of Commerce held further meetings with Neustar/.CO Internet on 23 and 26 July 2019, during which .CO Internet reiterated its financial offer for the renewal of the 2009 Contract. On its part, Colombia reiterated that it would proceed with the tender process, as it was permitted to do

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[262] Notice of Dispute from .CO Internet to Ministry of Commerce and MinTIC of 7 June 2019 **[R-0006]**.

[263] Notice of Dispute from .CO Internet to Ministry of Commerce and MinTIC of 7 June 2019, p. 2 **[R-0006]**.

[264] Letter from .CO Internet to Ministry of Commerce of 18 June 2019 **[R-0079]**.

[265] Letter from .CO Internet to Ministry of Commerce of 25 June 2019 **[C-0073]**.

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

[267] Letter from .CO Internet to Ministry of Commerce of 25 June 2019 **[C-0073]**.

under Colombian law and the 2009 Contract.[268] Contrary to Neustar's unsubstantiated and self-serving allegation, at no point during these meetings MinTIC did represent that it would convene further meetings to discuss the renewal of the 2009 Contract:[269] its contractual decision had already been taken months ago, and communicated specifically to .CO Internet on two occasions (including *in response to* .CO Internet's unsolicited financial offer of 21 May 2019).[270] In addition MinTIC (as well as the Ministry of Commerce) had answered all of .CO Internet's requests for meetings and clarifications, setting out not only the legal and contractual basis for its decision, but also its rationale.

166. However, what .CO Internet and Neustar were truly seeking was certainly not to engage in discussions with Colombia as provided under the TPA, but rather to force MinTIC into stopping the tender process.[271] .CO Internet was all too well aware that if the preparation of the tender process was halted at that stage, putting in place a technical transition process for the operation of the .co domain would be impossible, and MinTIC would be under enormous pressure to conclude a renewal in order to avoid any service interruptions.

167. Over the next few months, .CO Internet continued to submit numerous communications to either or both MinTIC and the Ministry of Commerce, seeking to create further confusion.[272] MinTIC sought to respond to each and every one of these communications.[273] Of note:

- On 26 August 2019, MinTIC indicated that any discussions under the TPA should be carried out with the Ministry of Commerce. In response to .CO Internet's allegation that MinTIC's request of a transition plan was an attempt to put in place an early termination of the 2009 Contract, MinTIC reiterated that automatic renewals were forbidden under Colombian law and that the 2009 Contract therefore expired on 6 February 2020.[274]

- On 17 September 2019, MinTIC further reiterated that the carrying-out of the 2020 Tender Process was in compliance with both Colombian law and the TPA, as "*there is no regulation in the Colombian legal framework which would confer on .CO Internet either a right to an*

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268 Letter from .CO Internet to MinTIC of 6 August 2019 **[C-0081]**. Letter from .CO Internet to MinTIC of 25 September 2019 **[C-0079]**.

269 *See* Memorial, para. 116.

270 Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**; Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**.

271 Letter from .CO Internet to Ministry of Commerce of 18 June 2019 **[R-0079]**.

272 Letter from .CO Internet to MinTIC of 6 August 2019 **[C-0081]**; Letter from .CO Internet to MinTIC of 2 August 2019 **[C-0082]**.

273 Letter from MinTIC to .CO of 13 June 2019 **[C-0071]**; Letter from MinTIC to .CO of 21 June 2019 **[C-0072]** (both replying to .CO's offer: Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**); *see also* Letter from MinTIC to .CO Internet of 26 July 2019 **[C-0080]** (replying to Letter from .CO Internet to MinTIC of 4 July 2019 **[C-0078]**);Letter from MinTIC to .CO Internet of 26 August 2019 **[C-0076]** (replying to Letter from .CO Internet to MinTIC of 6 August 2019 **[C-0081]** and Letter from .CO Internet to Ministry of Commerce of 2 August 2019 **[C-0082]**); Letter from MinTIC to .CO Internet of 2 October 2019 **[C-0086]** (replying to Letter from .CO Internet to MinTIC of 25 September 2019 **[C-0079]**.); Letter from MinTIC to .CO Internet of 23 October 2019 **[C-0088]** (replying to Letter from .CO Internet to MinTIC of 16 October 2019 **[C-0087]**);Letter from MinTIC to .CO Internet of 20 December 2019 **[C-0098]**. (replying to Letter from .CO Internet to MinTIC of 25 November 2019 **[C-0093] and [C-0094]**).

274 Letter from MinTIC to .CO Internet of 28 August 2019, p. 3 **[C-0076]**.

automatic renewal of the contract, or a priority right for the selection of the contractor which will carry out the operation of the .co domain", and MinTIC therefore "*conserved its right to initiate an open selection process for the continuation of the operation of the .co domain from the term of the current contract.*"[275]

168. .CO Internet's response of 25 September 2019 to this last communication from MinTIC evidences the inaccuracies and inner contradictions of .CO Internet's position under Colombian law with respect to the renewal of the 2009 Contract:

- While .CO Internet maintained that Law 1065 of 2006 effectively rendered the renewal obligatory, it acknowledged in the same letter that "*the automatic renewal is not valid*".[276]

- While .CO Internet alleged that MinTIC was not obligated to renew the 2009 Contract automatically, but purportedly simply to engage in negotiations, .CO Internet argued in a self-serving manner that "*the right to negotiate of Neustar/.CO Internet arises because they presented a meaningful offer, which requires that the State adopt act in good faith by considering it, responding, **and accepting the offer due to its appropriateness for the State and the stability of*** [Neustar's] ***investment.***"[277]

169. In line with its earlier communications, .CO Internet also reiterated its threat that unless MinTIC agreed to the renewal on .CO Internet's proposed terms, it would seek compensation in an amount of "*at least USD 350 million.*"[278]

(b) Neustar and .CO Internet introduced proceedings before the Council of State to obtain the renewal of the 2009 Contract

170. Far from only resorting to threats to file for arbitration under Section B of Chapter 10 of the TPA, .CO Internet and Neustar also introduced proceedings before the Council of State, with the goal of forcing Colombia to conclude a renewal of the 2009 Contract.

171. Specifically, on 18 September 2019, both .CO Internet and Neustar submitted identically-worded requests for provisional measures. .CO Internet and Neustar notably requested that the Council of State "*order MinTIC-Republic of Colombia to formalize the renewal of the Concession 019 of 2009 until 2030, approve the guarantees and execute the corresponding document with .CO Internet.*"[279]

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[275] Letter from MinTIC to .CO Internet of 17 September 2019, p. 3 **[C-0084]**.

[276] Letter from .CO Internet to MinTIC of 25 September 2019, pp. 5-6 **[C-0079]**.

[277] Letter from .CO Internet to MinTIC of 25 September 2019, p. 10 **[C-0079]**.

[278] Letter from .CO Internet to MinTIC of 25 September 2019, p. 22 **[C-0079]**.

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

These initial requests were denied for procedural reasons, respectively on 9 October 2019 for .CO Internet,[280] and 30 October 2019 for Neustar.[281]

172. On 14 November 2019, Neustar appealed the Council of State's 30 October 2019 decision.[282] However, on 12 March 2020, the Council of State denied this request on the merits, holding *inter alia* that Neustar had failed to prove a *prima facie* case of breach of the standards of protection in the TPA.[283]

(c) Neustar introduced the present proceedings in parallel to the 2020 Tender Process

173. On 16 September 2019, as their initial attempts to threaten Colombia and coerce MinTIC into agreeing to the renewal of the 2009 Contract had failed, .CO Internet and Neustar submitted a Notice of Intent under Article 10.16 of the TPA.[284] The Ministry of Commerce acknowledged receipt of this Notice of Intent on 19 September 2019, and assured .CO Internet and Neustar of "*its availability to participate in the corresponding negotiation meetings.*"[285] However, Neustar and .CO Internet did not follow up on this offer.

174. On 2 December 2019, Colombia's National Legal Defence Agency ("**ANDJE**") responded to Neustar and .CO Internet's Notice of Intent, highlighting that (i) the MinTIC's decision to open a new bidding process was a contractual prerogative, and that (ii) the investors had not incurred in any damages at the time of submitting the Notice of Intent, therefore concluding that the dispute resolution mechanism under the TPA had not been properly initiated.[286]

175. While the ANDJE also suggested specific dates for a meeting with Neustar in order to discuss the allegations raised in the Notice of Intent,[287] Neustar only responded allusively to the ANDJE's offer and instead decided to submit the RFA to ICSID on 23 December 2019. However, the ICSID Secretariat raised several jurisdictional-related questions before proceeding with the registration of

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[280] Council of State, Decision on Neustar's request for interim measures of 30 October 2019 (case No. 64832), para. 39 **[R-0009]**.

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

[282] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832) , paras. 5-9 **[R-0080]**. In parallel, on 13 February 2020, .CO Internet and Neustar also filed a new request for interim measures in proceedings No. 64831. *See* Council of State, Decision on .CO Internet and Neustar's additional request for interim measures of 12 March 2020 (case No. 64831), para. 12 **[C-0115]**.

[283] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832) , paras. 32-41 **[R-0080]**. Neustar and .CO Internet's joint request of 13 February 2020 in proceedings No. 64831 was denied by the Council of State on the same date: *see*, Council of State, Decision on .CO Internet and Neustar's additional request for interim measures of 12 March 2020 (case No. 64831), para. 22 **[C-0115]**.

[284] Notice of Intent of Neustar and .CO Internet of 16 September 2019 **[C-0004]**.

[285] Acknowledgment of receipt of Neustar and .CO Internet's Notice of Intent by Ministry of Commerce of 19 September 2019 **[C-0005]**.

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

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

the RFA.[288] It is only after numerous exchanges and amendments by Neustar to its allegations that ICSID proceeded to register the RFA on 6 March 2020.[289]

3. RESPONDENT'S JURISDICTIONAL OBJECTIONS

176. As seen above, over the course of 2019 Neustar and .CO Internet explored every potential avenue to push MinTIC to renew the 2009 Contract, including delaying the elaboration of a transition plan, launching proceedings before the Council of State and making repeated threats to bring ICSID proceedings before actually submitting the RFA on 23 December 2019. Then, as soon as .CO Internet was awarded the 2020 Contract on 3 April 2020, following the conclusion of the 2020 Tender Process, Neustar suddenly announced that, for more than a year, it had been negotiating a deal to sell .CO Internet to GoDaddy and exit Colombia.

177. In these circumstances, Colombia submits that the Tribunal has no jurisdiction to hear Neustar's claims, and/or that such claims are inadmissible.

178. This is because Neustar made a final forum selection under Annex 10-G of the TPA by introducing the Council of State proceedings in September 2019 (**3.1**). Neustar then failed to comply with the preliminary requirements established in Article 10.16 of the TPA in its haste to bring this arbitration before announcing the sale of .CO Internet to GoDaddy (**3.2**) and breached its waiver obligation under Article 10.18 of the TPA by continuing the Council of State proceedings concurrently to this arbitration (**3.3**).

179. Furthermore, Neustar has failed to show it has standing to bring any claims before the Tribunal in light of its sale of .CO Internet to GoDaddy (**3.4**), and committed an abuse of process by doing so (**3.5**).

180. In any event, Neustar's claims fall far short of constituting potential treaty breaches and are instead purely contractual claims stemming from Colombia's contractual decision not to renew the 2009 Contract, for which this Tribunal lacks jurisdiction (**3.6**).

3.1 Claimant made a definitive forum selection under Annex 10-G of the TPA by bringing the Council of State proceedings

181. By bringing the Council of State proceedings on 19 September 2019 and alleging the same breaches of the TPA in these proceedings as in the present arbitration, Neustar made a final forum selection under Annex 10-G of the TPA that affects this Tribunal's jurisdiction.

182. Annex 10-G of the TPA provides:

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[288] Letter from the ICSID Secretariat to Neustar of 24 February 2020 **[R-0082]**.

[289] Letter from Colombia to the ICSID Secretariat of 30 January 2020 **[R-0083]**; Letter from Neustar to the ICSID Secretariat of 2 March 2020 **[R-0084]**; Letter from Colombia to the ICSID Secretariat of 3 March 2020 **[R-0070]**; Letter from Neustar to the ICSID Secretariat of 6 March 2020 **[R-0071]**.

> *1. An investor of the United States* ***may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A*** *either:*
>
> *(a) on its own behalf under Article 10.16.1(a), or*
>
> *(b) on behalf of an enterprise of a Party other than the United States that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),*
>
> *if the investor or the enterprise, respectively,* ***has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.***
>
> *2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States,* ***that election shall be definitive****, and the investor may not thereafter submit the claim to arbitration under Section B.*[290]

183. This provision requires the US investor to make a choice between arbitration under the TPA and domestic litigation, and establishes that this election shall be "*definitive*". It is therefore constitutive of a fork-in-the-road provision, defined by Profs. Dolzer and Schreuer as "[providing] *that the investor must choose between the litigation of its claims in the host State's domestic courts or through international arbitration and that the choice, once made, is final*".[291]

184. In line with the general purpose of fork in the road clauses, Annex 10-G of the TPA seeks to avoid duplication of procedures and conflicting decisions.[292] Its wording is however notable as it (i) applies solely to US investors, and (ii) prescribes that only the choice of a "*court or administrative tribunal of a Party other than the United States*", that is chiefly Colombian courts, shall be final. Further, Annex-10-G specifies that it apples to "*claims that a Party has breached an obligation under Section A*" in respect of which the investor "*has alleged that breach of an obligation under Section A*" in the local proceedings, meaning that the investor should have invoked a breach of the same TPA standard in the domestic proceedings for the "*definitive*" election to be triggered.

185. It is therefore apparent from the use of this specific wording that Annex-10-G of the TPA is primarily aimed at preventing US investors from bringing arbitration proceedings under the TPA if they had chosen to bring proceedings before the Colombian courts in which they "*alleged*" the same breaches of TPA standards. As will be shown below, this is precisely what Neustar did in the context of the Council of State proceedings.

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290 Emphasis added.

291 R. Dolzer and C. Schreuer, *Principles of International Investment Law,* Oxford University Press, 2nd ed. (2012), p. 267. **[RL-001]**.

292 G. Kaufmann-Kohler and M. Potestà, *European Yearbook of International Economic Law – Special Issue: Investor-State Dispute Settlement and National Courts* (2020), Chapter 3: 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework', paras. 64 and 67 **[RL-002]**.

186. On 18 September 2019, both .CO Internet and Neustar submitted applications to the Council of State.[293] They characterized their applications as requests for interim relief, referring specifically to Article 10.18(3) of the TPA, which provides that an investor "*may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent,* ***provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration****.*"[294].

187. However, as will be further demonstrated below at Section 3.3(b), Neustar and .CO Internet's requests before the Council of State went far beyond the limited scope of Article 10.18(3) of the TPA: rather than requesting strict interim relief, Neustar and .CO Internet notably 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.*"[295]

188. In support of its requests before the Council of State, Neustar clearly alleged breaches of the TPA standards which it has also raised in the present ICSID proceedings: specifically, it argued that that *"the concession guarantees the right to extension, which is also based on the rights enshrined in the TPA in favor of the investor to guarantee its legitimate expectations, to act in good faith, not to expropriate its rights and not to discriminate against it*",[296] basing these arguments on a violation of Articles 10.3 (National Treatment), 10.4 (Most-Favoured-Nation Treatment), 10.5(1) (Minimum Standard of Treatment), 10.7(1) and 10.7(2) (Expropriation and Compensation) of the TPA.[297]

189. Not only did Neustar *allege* a breach of the same TPA standards as those invoked in the present arbitration, but the Council of State undertook an examination of the merits of Neustar's claims under the TPA in order to reach its 12 March 2020 decision, whereby it denied Neustar's requests. Specifically, the administrative judge examined:

- Whether Law 1065 of 2006 or the 2009 Contract provided for an option or an obligation to renew;[298]

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[293] 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]**.

[294] Emphasis added.

[295] 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]**.

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

[297] *Ibid:* "*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.*"

[298] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), paras. 19-26 **[R-0080]**.

- Whether Colombia specifically represented to .CO Internet or Neustar that the 2009 Contract would be renewed;[299]

- Whether .CO Internet was being treated unfairly or inequitably in disregard of Article 10.5.1 of the TPA;[300]

- Whether .CO Internet was being discriminated against in disregard of Articles 10.3 or 10.4 of the TPA.[301]

190. In comparison, in its RFA Neustar claimed in an almost identical manner that "*Respondent's breaches of the TPA based on its conduct to date include: (i) breach of the minimum standard of treatment standard, including fair and equitable treatment (Article 10.5); (ii) breach of the national treatment standard (Article 10.3); and (iii) breach of the most-favoured-nation treatment standard (Article 10.4). Further, Colombia has manifested a clear intention to continue to act in violation of Neustar/.CO's rights under the TPA, including but not limited to expropriating their Investments without regard to the obligations imposed by Article 10.7.*"[302]

191. Thus, both when Neustar submitted its RFA on 23 December 2019, and when this RFA was ultimately registered by ICSID on 6 March 2020, Neustar had already made a definitive forum selection under Annex 10-G of the TPA by introducing the Council of State proceedings and claiming breaches of the TPA in support of its request for renewal of the 2009 Contract, thereby depriving this Tribunal of jurisdiction. As will be seen below at Section 3.3(b), Neustar also breached its waiver obligation under Article 10.18 of the TPA by continuing the Council of State proceedings after having submitted its RFA.

3.2 Claimant failed to comply with the preliminary requirements under Article 10.16 of the TPA

192. The Tribunal further lacks jurisdiction over Neustar's claims,[303] as Neustar failed to comply with the preliminary requirements set out in Article 10.16 of the Treaty.

193. Article 10.16(1) authorizes a disputing party to submit a claim arising from an "*investment dispute*" to arbitration under Section B of Chapter 10 of the TPA.

194. However, this authorization is conditioned on the respect of several preliminary steps. In particular, Article 10.16(2) of the TPA requires a claimant to deliver respondent with a notice of intent

[299] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), paras. 27-28 **[R-0080]**.
[300] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 40.2 **[R-0080]**.
[301] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), paras. 40.3 and 40.4 **[R-0080]**.
[302] RFA, para. 124.
[303] Or at the very least, these are inadmissible.

containing detailed information on each claim it intends to submit to arbitration, at least 90 days before proceeding to do so.

195. In the case at hand, Neustar failed to comply with the above requirements, as the alleged "*investment dispute*" had not crystallized both when Neustar submitted its Notice of Intent and its RFA (**a**). In addition, Neustar's Notice of Intent is defective in several respects (**b**).

(a) Neustar submitted its Notice of Intent prematurely as the alleged "investment dispute" had not crystallized

196. As seen above, for a claim to be submitted to arbitration under Article 10.16(1), there must naturally be an alleged "*investment dispute*" which should be brought to the attention of the Respondent State through a notice of intent. This requirement is echoed by the ICSID Convention and Rules: Article 25 of the ICSID Convention provides that the jurisdiction of the Centre covers "*legal dispute*[s]" which the parties "*consent in writing to submit to the Centre*", while Article 36(1) requires that the request for arbitration "*contain information concerning the* ***issues in dispute*** *[…] in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.*"[304]

197. However, the concept of "*investment dispute*" is not specifically defined by the TPA or the ICSID Convention. In this context, previous tribunals tasked with assessing whether a dispute was in existence have relied on the established definition of dispute set out by the Permanent Court of International Justice ("**PCIJ**"), which held in *Mavrommatis* that a dispute is "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*".[305] The International Court of Justice ("**ICJ**") progressively defined this concept in more detail, notably holding that "[a] *mere assertion is not sufficient to prove the existence of a dispute*",[306] and that "*the facts and situations which have led to a dispute must not be confused with the dispute itself.*"[307]

198. On the basis of the above definition of dispute, international tribunals ruling under investment protection agreements have detailed the distinction between the events leading up to the dispute, and the moment at which the dispute itself crystallizes in the context of investment disputes.[308] Tribunals have also emphasized the large discretion they enjoy in the characterization of a dispute, as well as the context-sensitive nature of the inquiry. In the words of the *Argawal and Mehta v. Uruguay* tribunal:

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304 Emphasis added. *See also*, ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Rule 2(1)(e), providing that the request for arbitration shall contain "*information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment.*"

305 *Mavrommatis Palestine Concessions*, Judgment No. 2, 30 August 1924, P.C.I.J., Series A, No. 2, p. 11 **[RL-003]**.

306 *South West Africa (Ethiopia v. South Africa*), Preliminary Objections, Judgment, 21 December 1962, I.C.J. Reports 1962, p. 328 **[RL-004]**. *See also*, *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, Judgment, 4 April 1939, PCIJ Series A/B. No 77, p. 82 **[RL-005]**.

307 *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgment, 21 March 1959, I.C.J. Reports 1959, p. 22 **[RL-006]**.

308 *See, for instance*, *Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras. 96-97 **[RL-007]**.

> *These cases reveal that, beyond the acceptance of the definition of Mavrommatis by these courts in their decisions, the point at which a dispute arises will be determined by the factual context in which the dispute arises and the wide discretion of a court to decide whether the divergence between the parties has developed into a dispute, which in turn will depend on the factors that are taken into account.*[309]

199. Finally, several authors, including the late Prof. Emmanuel Gaillard, have emphasized that a dispute only arises when the entirety of its constituent elements, both factual and legal, come into existence:

> [A] *dispute arises at the moment a disagreement is formed between the parties over points of law or fact. In turn, a disagreement is formed once the claims or positions of one of the parties over those points of law or fact are contested or ultimately ignored by the other.* ***A dispute, therefore, presupposes the existence of the factual and legal framework on which the disagreement is based and cannot arise until the entirety of such constituent elements has come into existence.***[310]

200. Applying these principles to the instant case, the alleged dispute had not crystallized by the time Neustar submitted its Notice of Intent on 13 September 2019, or its RFA on 23 December 2019, since all of the constituent elements of the dispute had not come into existence by either of these points. Specifically:

201. *First*, when Neustar submitted its Notice of Intent on 13 September 2019, the 2020 Tender Process had not even been put in motion yet: as seen above, the preliminary stages of this tender process only started on 5 November 2019, when Colombia published the draft 2020 Terms of Reference, and the tender process itself formally started only on 13 December 2019 through the issuance of Resolution 3316 of 2019.[311] Logically, Neustar therefore could not make any allegations or factual statements regarding the conduct of the 2020 Tender Process in its Notice of Intent; rather, the entirety of Neustar's claims that Colombia had breached the standards of protection of the TPA were based on Colombia's decision not to renew the 2009 Contract and Neustar's speculative fear that another concessionaire would replace it.[312]

202. It is only with the submission by Neustar of its Memorial on 22 October 2021 that it was established that a large proportion of Neustar's factual allegations relate to Colombia's alleged actions or omissions in the context of the 2020 Tender Process. Yet, these alleged deficiencies in the carrying out of the 2020 Tender Process, which Neustar alleges now form an integral part of the constituent

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309 *Agarwal and Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04 (UNCITRAL), Award, 6 August 2020, para. 239 **[RL-008]** (our translation).

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

311 *See* paras. 128-130 *supra. See also*, Resolution 3316 of 13 December 2019 **[R-0052]**.

312 Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 45 **[C-0004]**. Neustar only briefly mentions the announcement of an "*Action Plan to commence a public selection process of the .CO Domain*".

elements of the dispute, could not have materialized by the time Neustar submitted both its Notice of Intent and its RFA.

203. *Second*, the speculative nature of Neustar's Notice of Intent is apparent from the fact that it placed great emphasis on an alleged expropriation claim therein, alleging *inter alia* that "[t]*he actions and omissions on the part of the MinTIC have caused grave and substantial damages, which equate to expropriation, since the refusal to extend the* [2009] *Contract means it will not be possible to continue operating.*"[313] While Neustar continued to mention a possible expropriation claim in its RFA,[314] it ultimately dropped this claim in its Memorial, presumably due to both the award of the 2020 Contract to .CO Internet and the sale of .CO Internet to GoDaddy.[315]

204. *Third*, the lack of crystallisation of the dispute by the time Neustar submitted its Notice of Intent is further confirmed by the numerous changes in Neustar's factual allegations and claims between the Notice of Intent, RFA, and Memorial. These changes are recapped in detail below at Section 3.4(a) and include for example:

- In its Notice of Intent and RFA, Neustar indicated that it intended to present claims "*on behalf*" of .CO Internet.[316] However, Neustar later dropped these "on behalf" claims in its Memorial;

- In its RFA, Neustar also sought to have .CO Internet included as a Claimant in these proceedings by relying on the Most-Favoured Nation clause at Article 10.4 of the TPA to invoke Article 1(2)(b) of the Swiss-Colombia bilateral investment treaty ("**BIT**"),[317] despite the very clear wording of the TPA to the contrary. However, Neustar was forced to drop this request in order for the ICSID Secretariat to proceed to register its RFA on 6 March 2020;

- As explained above, Neustar mentioned a potential expropriation claim in its Notice of Intent and RFA before dropping it in its Memorial, presumably in light of the award of the 2020 Contract to .CO Internet;

- Despite failing to mention this potential claim in its Notice of Intent, Neustar submitted claims under an "*investment agreement*" in its RFA, only to drop these in its Memorial;

- Conversely, Neustar introduced new claims for the first time in its Memorial based on Colombia's alleged "*unreasonable measures*" under the Swiss-Colombia BIT,[318] and

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313 Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 83(i) **[C-0004]**.

314 RFA, para. 124.

315 Which further confirmed that far from being unable "*to continue operating*", .CO Internet had retained a substantial value which was factored towards the more than USD 220 million paid by GoDaddy for the acquisition of Neustar's registry business.

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

317 RFA, para. 111.

318 Memorial, paras. 266 *et seq.*

Colombia's alleged failure to protect confidential business information under Article 10.14 of the TPA,[319]

205. *Fourth*, it bears reminding that Neustar/.CO Internet had acknowledged that the 2009 Contract was not in accordance with market practice and offered to negotiate an increase of Colombia's share as soon as September 2018,[320] and that .CO Internet was ultimately awarded the 2020 Contract (with improved financial conditions for MinTIC).[321] Therefore, Neustar's alleged damages at the time of the Notice of Intent were not only uncertain in their quantum, but entirely speculative.

206. Accordingly, in the absence of a crystalised "investment dispute", Neustar's Notice of Intent of 13 September 2019 must be deemed invalid.

(b) **Neustar's Notice of Intent is defective**

207. In addition to being invalid due to the alleged "*investment dispute*" not having crystallized by the time of its submission, Neustar's Notice of Intent is also defective as it fails to comply with Article 10.16(2).

208. Article 10.16(2) of the TPA provides that:

> *At least 90 days before submitting any claim to arbitration, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent').The notice shall specify:"*
>
> *(a) The name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;*
>
> *(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*
>
> *(c) the legal and factual basis for each claim; and*
>
> *(d) the relief sought and the approximate amount of damages claimed.*[322]

209. Under Article 31.1 of the Vienna Convention on the Law of Treaties ("**VCLT**"), the above provision should be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.*"[323]

210. *First,* turning to the ordinary meaning of Article 10.16(2), it is clear from the use of the word "*shall*" that the submission of a notice of intent is intended to be a mandatory condition precedent to

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319 Memorial, paras. 264-265.
320 Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.
321 *See* para. 146 *supra.*
322 TPA, Article 10.16 **[C-0002]**. *See also*, TPA, Chapter 10 (original Spanish version), Article 10.16 **[RL-116]**.
323 Vienna Convention on the Law of Treaties, Article 31.1 **[RL-010].**

arbitration.[324] While the parties to the treaty employed terms such as "*may*" or "*should*" for other preliminary requirements,[325] they specified that this notice "*shall*" be submitted 90 days prior to submitting any claim to arbitration, and that it "*shall*" include not merely general information, but for "*each*" claim, the "*provision of this Agreement*" alleged to have been breached, the "*legal and factual basis*" for "*each claim*", and the "*approximate amount of damages claimed*".[326]

211. *Second*, the object and purpose of Article 10.16(2) read in the context of Section B of Chapter 10 of the TPA confirm its mandatory nature. This provision is intended to provide the respondent State with an opportunity to have a detailed overview of the investor's claims prior to any submission to arbitration. As recognized by the *Aven v. Costa Rica* tribunal, this in turns enables the respondent State to "*prepare and argue its defense.*"[327] In order for the notice of intent to fulfil this purpose, it is therefore necessary that investors include a high degree of specificity on each of their claims in their notice of intent. As aptly put by the *Pac Rim* tribunal (ruling under the Dominican Republic-Central America Free Trade Agreement ("**DR-CAFTA**") which contains an identically-worded provision):

> *It would therefore be impermissible for a claimant to evade pleading the factual basis for each of its claims in the notice of intent: a mere conclusion could not specify a factual basis. Accordingly,* ***liability, causation and damages must be pleaded under CAFTA Article 10.16.1 and Article 10.16.2(b), (c) and (d) as regards the notice of intent*** *.*[328]

212. Similarly, the *Aven* tribunal (also ruling under DR-CAFTA) held that:

> *The Tribunal agrees that the State's consent to arbitration under DR-CAFTA presupposes the compliance with the requirement for the submission of a claim, including but not limited to those under article 10.16(2), which establish the need to include in the notice of intent not only a factual description for each claim, but also the 'legal basis' thereof. It is a right of the Respondent to have a clear framework of the claims from the outset.*[329]

213. Failure by the investor to comply with this condition precedent will therefore affect the State's consent to arbitrate, and in turn the Tribunal's jurisdiction. This has been recognized by various investment tribunals, ruling not only under treaties containing similar imperative language (with the use of the word '*shall*'),[330] but also treaties containing more permissive language (with the use of

324 *See Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]**.

325 *See* Article 10.15 of the TPA, which provides that the parties "*should*" seek to resolve the dispute through consultation and negotiation, which "*may*" include the use of non-binding, third-party procedures **[C-0002]**.

326 Article 10.16(2) of the TPA **[C-0002]**. As Colombia noted in its 30 January 2020 communication to ICSID, this was not the case of Neustar's Notice of Intent, which failed to specify the legal and factual bases for its claims. *See* Letter from Colombia to the ICSID Secretariat of 30 January 2020, p. 4 **[R-0083]**.

327 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 346 **[RL-011]**.

328 *Pac Rim v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para. 93 **[RL-012]** (emphasis added).

329 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]**.

330 *See, for instance, Kiliç v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, paras. 6.3.12-6.3.15 **[RL-013]**: "*First, having regard to the language of Article VII as a whole, it is far easier to see it as containing a conditional offer to arbitrate (given the inclusion of the words "shall" and "provided that"), rather than an unconditional offer to arbitrate.*

the word '*should*').[331] By the same token, specific claims which have not been pleaded in the notice of intent, even though they were already in existence, will be excluded from the scope of the tribunal's jurisdiction.[332]

214. In the present case, the Notice of Intent that Neustar submitted on 13 September 2019 was defective in several respects, probably as a result Neustar's haste in submitting the claim to arbitration before any crystallization of the alleged investment dispute.

215. *First*, Neustar failed to specify the "*factual and legal basis*" of its claims as required under Article 10.16(2). Both the facts and claims that it put forward were highly speculative, and in many instances did not materialize.

216. For instance, Neustar alleges that Colombia had the intention to "*terminate in advance*" the 2009 Contract due to "*alleged breaches*" from .CO Internet,[333] despite the fact that ultimately Amendment No. 4 to the 2009 Contract was concluded pending awarding of the 2020 Contract.[334] In addition, Neustar put considerable emphasis throughout its Notice of Intent on an alleged expropriation claim,[335] alleging *inter alia* that "*the refusal to extend the Contract means it will not be possible to continue operating*."[336] As seen above, Neustar was certainly not prevented in any manner from operating in Colombia or participating in the 2020 Tender Process in the wake of MinTIC's decision not to renew the 2009 Contract. In fact, it was ultimately awarded the 2020 Contract, leading Neustar to drop its speculative expropriation claim in its Memorial.

217. Conversely, Neustar did not identify all of the claims it put forward in the arbitration in its Notice of Intent: specifically, it failed to mention Colombia's alleged failure to protect Neustar's investment against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT,[337] and Colombia's alleged failure to protect confidential business information under Article 10.14 of the

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[…] *For these reasons, and on the basis of the factual record, the Tribunal concludes that the requirements set forth in Article VII.2 are to be treated as conditions, and that the failure to meet those conditions goes to the existence of the Tribunal's jurisdiction, and are not to be treated as issues of admissibility*."; *Mabco v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, 30 October 2020, para. 445 **[RL-014]**: "*In its reading of the BIT, Kosovo's offer to arbitrate could not be accepted by Mabco until the stated consultations were held, or at least requested, and failed. The condition is therefore jurisdictional in nature. Nor can the Tribunal conclude that consultations would be futile. They might or might not have been futile, but Respondent has adduced no evidence to that effect.*"

331 *Murphy v. Republic of Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras. 149, 157 **[RL-015]**; *Burlington . v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras. 316-318 **[RL-016]**; *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 88 **[RL-017]**. *See also, under NAFTA, which contains slightly more permissive language than the TPA*: *Methanex v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 120 **[RL-018]**; *Merrill & Ring v. Canada*, ICSID Case No. UNCT/07/1, Decision on Motion to Add a New Party, 31 January 2008, paras. 28-29 **[RL-019]**.

332 *Burlington v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras. 316-318 **[RL-016]**; *Guaracachi v. Plurinational State of Bolivia*, PCA Case No. 2011-17 (UNCITRAL), Award, 31 January 2014, paras. 385-391 **[RL-017]**.

333 Notice of Intent of Neustar and .CO Internet of 13 September 2019, paras. 54-65 **[C-0004]**. *See, in particular*, paras. 54, 61

334 *See* paras. 139-140 *supra.*

335 Notice of Intent of Neustar and .CO Internet of 13 September 2019, paras. 81-84 **[C-0004]**.

336 Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 83 **[C-0004]**.

337 Memorial, paras. 266 *et seq.*

TPA.[338] As per the above authorities, these should therefore be excluded from the scope of the Tribunal's jurisdiction.

218. *Second*, Neustar failed to plead "*liability, causation and damages*" as required by Article 10.16(2).[339] In its Notice of Intent, Neustar only evoked briefly the question of "*reparation requested and approximate amount of damages*".[340] Neustar requested that Colombia "*revoke all the acts and measures aimed at taking forward the tendering process for the administration of the .CO Domain*" (despite the fact that such relief is not contemplated by the TPA[341]) or in the alternative that it pay compensation in an amount of at least USD 350 million. As evidenced by the very wording of Neustar's compensation request, it is highly speculative and exclusively premised on its expropriation claim:

> [T]*he breach of the FTA would mean a total loss of Neustar's/.CO Internet's assets. This would mean that an* <u>*expropriation*</u> *of the investment would occur if the contract is not extended for which Neustar/.CO Internet can no longer work on the administration of the .CO Domain. Thus, the damages suffered* <u>*would*</u> *equate to an amount of no less than USD $350 million plus interest up to the date of the actual payment.*[342]

219. Neustar's Notice of Intent does not specify the basis for this approximate amount, or the causation between Colombia's alleged breaches and the alleged "*total loss of Neustar's/.CO Internet's assets.*" In addition, as explained at Section 3.2(a) *supra.*, these damages were in fact not certain at the time Neustar submitted its Notice of Intent, but purely speculative in light of the fact that Neustar would be able to submit a proposal in the 2020 Tender Process. In fact, Neustar's failure to identify "*the causation of a certain damage that affects its investment and* [would require] *compensation*" in its Notice of Intent was specifically highlighted by Colombia as early as 2 December 2019, prior to Neustar's submission of its RFA.[343]

220. Accordingly, the above defects in Neustar's Notice of Intent, which did not allow Respondent to "*have a clear framework of the claims from the outset*",[344] have the effect that the Tribunal does not have jurisdiction to hear Neustar's claims.[345]

3.3 Claimant breached its waiver obligation under Article 10.18 of the TPA

221. In addition to the preliminary requirements contained in Article 10.16(2), Neustar also breached its obligations under Article 10.18 of the TPA, pursuant to which an investor must submit a waiver of

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338 Memorial, paras. 264-265.

339 *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para. 93 **[RL-012]**.

340 Notice of Intent of Neustar and .CO Internet of 13 September 2019, paras. 84-87 **[C-0004]**.

341 Article 10.26 of the TPA provides that "*the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property,* <u>*in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution*</u>." (emphasis added)

342 Notice of Intent of Neustar and .CO Internet of 13 September 2019, para. 87 **[C-0004]**.

343 Letter from ANDJE to Neustar of 2 December 2019, p. 2 **[R-0081]** (our translation).

344 *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]**.

345 Or, at the very least, render these inadmissible.

the right to initiate or continue any local proceedings upon the initiation of arbitration under Chapter 10, Section B of the TPA. Neustar failed both submit a valid waiver, and to comply with this waiver.

222. Article 10.18 (2) of the TPA provides for a waiver obligation as follows:

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

223. The meaning of this provision is clear: as evidenced from the title of Article 10.18 ("*Conditions and Limitations on Consent of Each Party*"), the consent of the State to arbitrate is conditioned to the submission of a sufficient waiver. Further, the use of the words "*any* right", "*any* administrative tribunal or court", "*any* proceeding" and "*any*" measure" confirm that the waiver must be comprehensive, and that the claimant may not waive only *some* proceedings or measures: unless the waiver respects these formal conditions, the State's consent is not formalized.

224. This interpretation of the waiver is confirmed by its object and purpose, which is to shield the State from the risk of multiple proceedings.[346] This purpose is further evidenced by identically-worded provisions in other treaties, such as the North-American Free Trade Agreement ("**NAFTA**"),[347] or DR-CAFTA.[348] Tribunals ruling under NAFTA have held that this requirement serves "*to achieve finality of decision and avoid multiplicity of* proceedings",[349] and to "*prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.*"[350] Here, Article 10.18(2) requires the waiver to include "*any proceeding*", not only actions

[346] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 84 **[RL-021]**. *See also*, L. M. Caplan and J. K. Sharpe, 'United States' in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013), p. 829 **[RL-022]**.

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

[348] Dominican Republic-Central America-United States Free Trade Agreement (CAFTA), Chapter 10, Art. 10.18 **[CL-0166]**.

[349] *See, for instance*, *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 27 **[RL-024]**.

[350] *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, para. 27 **[RL-025]**; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, paras. 805-808 **[RL-026]**; *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 111 **[RL-027]**.

involving the payment of damages, showing that the Treaty's main focus is on avoiding multiplicity of proceedings rather than just preventing double redress.[351]

225. Further, Article 10.18 of the TPA imposes two obligations on the claimant: (i) that it comply with the formal components of the waiver, and (ii) that it satisfy the waiver requirement in practice:[352]

- The formal requirements are specifications about the content, the timing when the waiver should be filed (for instance with the request for arbitration).[353] Here, the TPA requires the waiver to cover "*any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16*". In this regard, the Tribunal's task is to "*ascertain whether [claimant] did indeed submit the waiver in accordance with the formalities envisaged.*"[354]

- The material requirement is fulfilled by the conduct of the waiving party vis-à-vis effective compliance therewith.[355] The Tribunal must therefore "*ascertain whether [claimant] has respected the terms of the same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.*"[356]

226. Finally, it is firmly established that failure to comply with either one of these requirements affects the tribunal's jurisdiction, waiver being a condition precedent to the State's consent to arbitration.[357]

227. Neustar has failed to comply with both of these requirements: its waiver contains two formal defects (**a**), and it has adopted a conduct contrary to its waiver obligation by continuing the Council of State proceedings (**b**).

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351 *See Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 54 **[RL-028]**.

352 *In relation to similarly-worded treaties, see Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 84 **[RL-027]**; *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 23 of the PDF **[RL-025]**; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 73 **[RL-021]**.

353 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 23 **[RL-025]**; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 73 **[RL-021]**.

354 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 20 **[RL-025]**. *See also*, *Methanex v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, Part II – Ch. F, para. 25 **[CL-050]**.

355 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 231 **[RL-025]**; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 733 **[RL-021]**.

356 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 20 **[RL-025]**.

357 *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 115 **[RL-027]**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 61 **[RL-028]**.

(a) Claimant failed to comply with the formal requirements of Article 10.18(2) of the TPA

228. Neustar has breached the formal requirements of the waiver laid down by Article 10.18(2) of the TPA, thereby depriving the Tribunal of jurisdiction over its claims.

229. As seen above, Article 10.18(2) of the TPA expressly provides that the waiver should encompass "*any right to initiate **or continue***" proceedings, "*before **any administrative tribunal or court under the law of any Party**.*"[358]

230. It is established that in order to comply with the formal requirements laid down by a specific treaty, the waiver must be clear, explicit, and categorical. This standard, which was first set out by the *Waste Management (I)* tribunal,[359] has been consistently followed by other tribunals.[360] For instance, in *Renco*, the tribunal (ruling under a treaty containing a waiver provision worded identically to that of the TPA[361]) concluded that it lacked jurisdiction due to claimant's failure to comply with several formal requirements included in the waiver, including *inter alia* to waive its right to pursue "*any*" proceedings:

> *In the Tribunal's opinion, the repeated references to the word any in Article 10.18 demonstrate that an investor's waiver must be comprehensive: waivers qualified in any way are impermissible.*[362]

231. Neustar's waiver is defective in two respects.

232. *First*, just on its face, Neustar's waiver is defective as Neustar sought to limit the waiver to Colombian courts, while failing to waive Neustar's rights to initiate or continue proceedings before the US courts in relation to the measures: as can be seen from the title of the waiver, it only covers the initiation of "*dispute settlement procedures before Colombian courts.*"[363]

233. *Second*, Neustar also failed to waive its right to "*continue"* proceedings before Colombian courts. While Neustar explicitly acknowledges in its waiver that "[a]*rticle 10.18.2 of the FTA provides that a claimant must waive its rights to **commence or continue** any claim according to the law of the respondent*",[364] it failed to comply with this very requirement at the following line of the document, where it mentions only the initiation of proceedings and not the "*continuation*" of any pending proceedings.[365]

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[358] Emphasis added.

[359] *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, para. 18 **[RL-025]**.

[360] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 74 **[RL-021]**; *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 84 **[RL-027]**.

[361] United States-Peru Trade Promotion Agreement, Article 10.18 **[RL-029]**.

[362] *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 79 **[RL-021]**.

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

[364] Neustar's Waiver of 18 December 2019, p. 1 **[C-0007]** (emphasis added).

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

234. Neustar went on to further qualify its waiver by specifying that it did "*not* [include] *the interim injunctive relief filed before the Consejo de Estado*",[366] and indeed continued the Council of State proceedings after the submission of the RFA. Yet, as will be shown below at Section 3.3(b), these proceedings went beyond the sole purpose of preserving Neustar's right pending conclusion of the ICSID proceedings, in breach of Article 10.18(3) of the TPA. Neustar's specific exclusion of the Council of State proceedings from the scope of its waiver was therefore in breach of the formal requirements of Article 10.18(2).

235. In line with the above authorities,[367] this Tribunal therefore lacks jurisdiction over Neustar's claims due to Neustar's failure to comply with the formal requirements of the waiver.

(b) **Claimant continued the Council of State proceedings in breach of Article 10.18(2) of the TPA**

236. The waiver obligation at Article 10.18(2) of the TPA not only requires that the investor comply with the formal requirements of the waiver, but also that its conduct be coherent with the waiver. In the words of the *Waste Management (I)* tribunal, "*the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued*."[368] This is particularly so in the case of the TPA, which includes a particularly wide-ranging waiver obligation.[369] In this regard, the tribunal in *Commerce Group v. El* Salvador, which was called upon to interpret the similarly-worded waiver provision in DR-CAFTA, held that it applies to "*proceedings 'with respect to any measure alleged to constitute a breach and the definition of 'measure' in Article 2.1 of CAFTA 'includes any law, regulation, procedure, requirement or practice'.*"[370]

237. As seen above, Article 10.18(3) of the TPA sets out a limited exception to the waiver requirement, intended to enable investors to request interim injunctive relief before national courts only under very specific conditions:

> *Notwithstanding paragraph 2(b), the claimant […] and the claimant or the enterprise […] may initiate or continue an action that seeks* ***interim injunctive relief*** *and* ***does not involve the payment of monetary damages*** *before a judicial or administrative tribunal of the respondent,* ***provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration****.*[371]

238. In the instant case, Neustar did not discontinue the Council of State proceedings it had introduced on 19 September 2019 after the submission of its RFA on 23 December 2019,[372] and in fact

366 Neustar's Waiver of 18 December 2019, p. 1 **[C-0007]**.
367 *See* para. 230 *supra*.
368 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 24 **[RL-025]**. *See also*, *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 60 **[RL-021]**.
369 *See* para. 222 *supra*.
370 *Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 101 **[RL-027]**.
371 Emphasis added.
372 Neustar's Waiver of 18 December 2019, p. 1 **[C-0007]**.

continued these proceedings until March 2020.[373] In its waiver of 18 December 2019, Neustar has attempted to justify this by pretending that these proceedings only involved a request for "*interim injunctive relief*".[374]

239. However, a closer examination of Neustar's claims in the Council of State proceedings reveals that these proceedings did not respect the conditions set out at Article 10.18(3).

240. *First*, with regard to the scope of this exception, one author observes that the interpretation and definition of "*interim injunctive relief*" under treaties which such as NAFTA and the 2004 U.S. Model BIT,[375] which include a similar carveout, may prove delicate. This is particularly the case in presence of a "*domestic interim order in its form equivalent to a decision on the merits in substance,* [which could] *possibly be considered as a 'fork in the road' choice*."[376] This is why Article 10.18(3) sets out restrictive conditions, by providing *inter alia* that the investor's action for interim relief must be "*brought **for the sole purpose of preserving*** [the investor's] ***rights***" pending resolution of the investment dispute.[377]

241. *Second*, it is clear from the very wording of Neustar's request for relief before the Council of State that these proceedings went far beyond the sole purpose of preserving Neustar's rights . In fact, Neustar went as far as to request the suspension of the 2020 Tender Process, and that the Colombian State be ordered to renew the 2009 Contract pending the ICSID proceedings:

> *i. Order the MINTIC - Republic of Colombia, **to suspend the Roadmap for the selection process of the .CO Domain** and the suspension of the decisions and actions to initiate an administrative process of objective selection for the hiring of a new administrator of the .CO Domain as of the year 2020.*
>
> *ii. In the event that the administrative act for the opening of the selection of a new administrator has been issued, to suspend the administrative act for the opening of the objective selection process.*
>
> *iii. Order the MINTIC - Republic of Colombia, to suspend all contracts, acts and measures issued, which have the purpose of advising, studying, analysing or structuring, the objective selection process for the hiring of a 'new administrator' of the .CO Domain as of the year 2020, or a similar.*
>
> *iv. Order the MINTIC - Republic of Colombia to refrain from making public statements to the media and social networks, including official web pages, that*

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

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

[375] 2004 US Model BIT, Article 26.3 **[RL-030]**; North American Free Trade Agreement (NAFTA), Chapter 11, Article 1121.1(b) and 2(b) **[RL-023]**.

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

[377] Further, it follows from the very wording of Article 10.18(3), which is intended to qualify the waiver obligation contained at Article 10.18(2), that any breach of the conditions set out in paragraph 3 entails a breach of the material component of the waiver obligation at paragraph 2. *See notably*, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 53 **[RL-028]**.

> *may generate a negative public judgment or exposure against the investors in the media (trial by media).*
>
> *v. Order the MINTIC - Republic of Colombia* ***to formalize the extension of Concession 019 of 2009 until 2030, approve the guarantees and sign the corresponding document with .CO Internet****.*
>
> *vi. Order the MINTIC - Republic of Colombia to negotiate in good faith, during the remainder of the consultation and negotiation stage under Article 10.15 of the FTA; the proposed improvement to the financial terms* [of the 2009 Contract]*, and as a consequence to review the investors' offers and submit its own counterproposals in good faith, to cooperate in good faith without making use of its position of power as a public authority.*[378]

242. *Third*, the fact that Neustar requested specific performance from the Colombian administrative judge further confirms that its claim was not solely intended to preserve its rights during the pendency of the arbitration.

243. Under Articles 230 *et seq*. of the Colombian Code of Administrative Procedure, on which Neustar based its claims, the administrative judge is granted wide powers.[379] These extend to suspending an administrative proceeding or act, including a contract, or ordering the adoption of an administrative decision.[380] Such an order can have wide-ranging consequences, in particular in a situation where the technical constraints of the .co domain operation could affect the State's practical options.

244. As seen above, Neustar requested that the State be ordered to conclude the renewal of the 2009 Contract. Had this request been granted, the conclusion of a renewal would have affected the *statu quo ante* and it would have been extremely difficult, if not impossible, to unwind this situation. Neustar also requested that MinTIC be ordered to suspend the 2020 Tender Process: from a practical perspective, this would similarly have forced Colombia to conclude a renewal of the 2009 Contract in light of the abovementioned risk to the service continuity.[381]

245. *Fourth*, under Article 231 of the Colombian Code of Administrative Procedure, the determination of Neustar's requests in the Council of State proceedings required that the administrative judge examine the merits of its claims, including under the TPA.[382] As seen at paragraph 172 *supra.*, it is readily apparent from the 12 March 2020 decision that the Council of State examined Neustar's allegations of breaches of obligations under the TPA.

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[378] Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832), para. 6 **[R-0080]**.

[379] Law 1437 of 18 January 2011 enacting the Code of Administrative Procedure, Article 230 **[C-0113]**. *See also*, Constitutional Court, Judgment of 15 May 2014 (case No. C-284/14), para. 17.2 **[R-0085]**.

[380] Law 1437 of 18 January 2011 enacting the Code of Administrative Procedure, Article 230 **[C-0113]**.

[381] *See* para. 139 *supra*.

[382] Law 1437 of 18 January 2011 enacting the Code of Administrative Procedure, Article 231 **[C-0113]**: the Council of State was required to assess *inter alia* whether the requests "*ha*[d] *a reasonable legal basis*" and whether Neustar satisfied the requirement of an "*appearance of a prima facie case.*" (our translation)

246. In fact, as evidenced by both the structure of the Council of State decision[383] and Neustar's allegations as summarized in the decision,[384] it is only after a detailed consideration of these issues that the Council of State denied the measures requested by Neustar.

247. By continuing these proceedings for almost four months after having filed the RFA, Claimant therefore overstepped the boundaries of the Article 10.18(3) exception and breached the material requirement of the waiver obligation. It demonstrated that its intention was never to actually waive its right to action before Colombian administrative courts, but rather to open as many litigation fronts as possible.

248. This strategy put Respondent in a situation where parallel legal actions stemming from the same measures were brought, contrary to the very purpose of Article 10.18(2).[385]

249. Neustar's failure to conduct itself in a manner consistent with its waiver obligation under Article 10.18(2) therefore deprives the Tribunal of jurisdiction over Neustar's claims.[386]

3.4 Claimant lacks standing to bring any claims before the Tribunal

250. In its Memorial, Neustar briefly mentions its sale of .CO Internet to GoDaddy,[387] before alleging in passing that it held its investment in .CO Internet "[a]*t all relevant times*".[388] Tellingly, Neustar does not dwell on evidencing this point. This is unsurprising as Neustar's standing should be assessed at the time of the full initiation of the dispute, which only intervened with the submission of its Memorial on 22 October 2021 (**a**). Considering that Neustar sold CO Internet to GoDaddy before this submission ",[389] Neustar lacks standing to bring any claims before the Tribunal (**b**).

(a) The proceedings were only fully initiated upon the submission of Claimant's Memorial, for no dispute had crystallized beforehand

251. It is commonly admitted that standing can be defined as whether the plaintiff has the right to bring a particular case or to seek particular relief.[390] As in any dispute, an investor wishing to rely on an investment treaty's investor-State dispute settlement provisions such as Chapter 10, Section B of

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

384 Council of State, Decision on Neustar's appeal for reversal of the 30 October 2019 decision on interim measures,12 March 2020 (case No. 64832) paras. 6-12 **[R-0080]**.

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

386 *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, para. 24 **[RL-025]**. *See also*, *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, paras. 60 and 88 **[RL-021]**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 53 **[RL-028]**.

387 Memorial, para. 19.

388 Memorial, para. 167.

389 Memorial, fn. 214. *See also*, A. Allemann, 'GoDaddy completes Neustar Registry acquisition', *Domain Name News*, 4 August 2020 **[C-0110]**.

390 *See, for instance, Elettronica Sicula SpA (ELSI) (USA v. Italy)*, Judgment, 20 July 1989, I.C.J Reports 1989 p. 15 **[RL-032]**; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles (Second Edition)* (2017), Chapter 6: 'Investments', para 6.93 **[RL-033]**.

the TPA must have a right to bring their case and to seek particular relief thereunder.[391] The situation is no different here.

252. It is well established under international law that a tribunal must assess whether it has jurisdiction over a given case, including whether a claimant has standing to bring its claim, upon the initiation of the proceedings.

253. The ICJ has developed a *jurisprudence constante* that its jurisdiction must be determined upon the introduction of the proceedings.[392] Investment tribunals have followed the same line of reasoning when assessing whether investors have standing and, as such, whether they have jurisdiction over a case. For instance, in *CSOB v. Slovakia*, the tribunal explained that "*it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted*".[393]

254. However, as seen above, the TPA and the ICSID Convention[394] require that a dispute be in existence in order for an investor to initiate arbitration proceedings validly.[395] The introduction of the proceedings therefore intrinsically relies on the existence of a crystallised dispute – as any jurisdictional requirement, this must be fulfilled upon the initiation of the proceedings.[396]

255. However, in the instant case, the dispute had not crystallized both when Neustar submitted its RFA on 23 December 2019, or when ICSID proceeded to register Neustar's RFA on 6 March 2020. Both factual and procedural elements in this case instead point to the Memorial as marking the full introduction of the proceedings, for the dispute had not crystallized beforehand.

256. *First*, from a factual perspective, there was no crystallization of the dispute at either of these dates. This is evidenced *inter alia* by the fact that the 2009 Contract was still in force and the 2020 Contract

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[391] Tribunals have consistently declined jurisdiction over cases in which the claimant lacked standing. *See for instance*, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Jurisdiction and Admissibility, Judgment, 5 October 2016, I.C.J. Reports 2016 p. 55, paras. 55 and 56 **[RL-034]** (in which the court rejected jurisdiction, having found that "*the Court has found that no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions*"); *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections, Judgment, 15 December 2004, I.C.J. Reports 2004 p. 1160, paras. 90, 116, 118 and 119 **[RL-035]**; *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11 (UNCITRAL), Partial Award, 23 May 2011, para. 152 **[RL-036]**; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, paras. 84 and 86 **[RL-037]**; *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras. 269, 270 and 339 **[RL-038]**.

[392] *See for instance*, *Nottebohm case (Lichtenstein v. Guatemala),* Preliminary Objections, Judgment, 18 November 1953, I.C.J. Reports 1953 p. 111, pp. 13, 15-16 **[RL-039]**; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, 14 February 2002, I.C.J. Reports 2002 p. 3, para. 26 **[RL-040]**.

[393] *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic,* ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 31 **[RL-041]**. *See also, Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, para. 60 **[RL-042]**; *Teinver S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 255 **[RL-043]**.

[394] *See* para. 197 *supra*.

[395] *See* paras. 196-199 *supra.*

[396] C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary (Second Edition)* (2009), 'Article 25 – Jurisdiction', p. 92, para. 36 **[RL-044]**.

had not yet been awarded. In these circumstances, as explained *supra.*,[397] it was uncertain that the divergence of views between MinTIC and Neustar regarding the non-renewal of the 2009 Contract would actually create any damage for Neustar, all the more in light of the latter's readiness to discuss a renegotiation of the financial conditions of the contract even before MinTIC announced its intention to conduct a new tender process.[398] In fact, the TPA requires that the investor have "*incurred loss or damage by reason of, or arising out of* [the alleged breach]" at the time of submitting a claim to arbitration:[399] this was not the case when Neustar submitted its RFA on 23 December 2019 or when it was registered by ICSID on 6 March 2020.

257. *Second*, from a procedural perspective, the numerous changes introduced by Claimant to its position between its Notice of Intent, its RFA as submitted initially, its supplementary letters to ICSID to have its RFA registered by the Centre on 6 March 2020, and Neustar's substantial amendments to its claims between the RFA and its Memorial filed on 22 October 2021, further evidence that there was no crystallized dispute until the Memorial was filed. In particular:

- Neustar was required to make substantial changes to its RFA before ICSID accepted to register it. In particular, it changed the parties to the dispute. Indeed, in order to have .CO Internet appear as a Claimant, Neustar originally sought to rely on the Most-Favoured Nation clause at Article 10.4 of the TPA to invoke Article 1(2)(b) of the Swiss-Colombia BIT, which allows a covered investment to appear as claimant in investment proceedings.[400] However, after ICSID directed Neustar to the clear language of the TPA, which expressly provides that the scope of Article 10.4 "*does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements*",[401] Neustar dropped its request to include .CO Internet as a party to the dispute.[402] Yet, Neustar did not submit an amended version of the RFA.
- Claimant entirely abandoned the following claims in its Memorial of 22 October 2021:
    - In its Notice of Intent, filed on 13 September 2019 (before the start of the 2020 Tender Process), Claimant placed great emphasis on Colombia's alleged breach of its obligation under Article 10.7 not to expropriate a covered investment and also referred to this alleged breach in its RFA.[403] However, as .CO Internet decided to engage fully in the 2020 Tender Process, concluded Amendment No. 4 to the 2009 Contract on 10 January 2020, and was awarded the 2020 Contract on 3 April 2020, it decided to withdraw this unsubstantiated claim in its Memorial;

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397 *See* para. 219 *supra.*
398 *See* para. 205 *supra*; Letter from .CO Internet to MinTIC of 20 September 2018 **[C-0028]**.
399 TPA, Art. 10.16(1)(a)(ii) **[C-0002]**.
400 RFA, para. 111.
401 TPA, Art. 10.4, fn. 2 **[C-0002]**; Letter from the ICSID Secretariat to Neustar of 24 February 2020 **[R-0082]**.
402 Letter from Neustar to the ICSID Secretariat of 2 March 2020 **[R-0084]**.
403 Notice of Intent of Neustar and .CO Internet of 13 September 2019, paras. 81-84 **[C-0004]**; RFA, paras. 108, 124.

- In addition to seeking to have .CO Internet appear as a direct claimant in these proceedings, Neustar had indicated that it intended to introduce claims "*on behalf*" of .CO Internet under Art. 10.16(1)(b) of the TPA in its Notice of Intent,[404] and did so in the RFA.[405] However, Neustar decided drop these "on behalf" claims in its Memorial;

- Despite failing to mention this claim in the Notice of Intent, Claimant submitted claims under an "*investment agreement*" as per by Articles 10.16(1)(a)(a)(i)(C) and 10.16(1)(b)(b)(i)(C) of the TPA in the RFA and the observation of obligations clause of the Swiss-Colombia BIT,[406] only to later retract these claims in the Memorial;

- Conversely, it is only in the Memorial that Claimant introduced for the first time its claims based on Colombia's alleged failure to protect Neustar's investment against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT,[407] and Colombia's alleged failure to protect confidential business information under Article 10.14 of the TPA.[408]

258. Both factual and procedural elements in this case point confirm that the dispute had not crystallized before the Memorial. Whether Claimant had standing to bring its claims must therefore be assessed upon the filing of this submission.

(b) Claimant lacked standing when it submitted its Memorial due to its sale of .CO Internet to GoDaddy

259. Investment tribunals have consistently held that for a claimant to have standing under an investment protection agreement, it is in principle required to be the owner of an investment when submitting the dispute to arbitration proceedings. In the words of the *Aven v. Costa Rica* tribunal:

> *"[A]n investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present. Such circumstances include, inter alia, the loss of the investment by the actions of a third party or the retroactive application of a treaty, neither of which are applicable to the matter at hand.*[409]

260. It is relevant to note that this award was based on the DR-CAFTA, which contains the same definitions of "*investor of a Party"* and of "*investment*" as those enshrined in the similarly U.S. Model BIT-based TPA.[410]

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[404] Notice of Intent of Neustar and .CO Internet of 13 September 2019, pp. 36-37 **[C-0004]**.

[405] RFA, paras. 99-100.

[406] RFA, paras. 124, 126. The observation of obligations clause in the Swiss-Colombia BIT was allegedly relied upon by Neustar through the operation of the Most-Favoured Nation clause at Article 10.4 of the TPA.

[407] Memorial, paras. 266 *et seq.*

[408] Memorial, paras. 264-265.

[409] *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]**, para. 301.

[410] Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), Article 10.28 **[CL-016]**.

261. Likewise, in *Littop v. Ukraine*, the tribunal concluded that it did not have jurisdiction over shares which were not owned by the claimant at the time it had brought the dispute.[411]

262. It is thus clear both from the TPA and the above established line of jurisprudence that to qualify as an investor under the TPA, a claimant must in principle own or control an investment when submitting the dispute to arbitration. This was not the case of Neustar.

263. It is undisputed by Neustar that it closed the sale of its registrar business to GoDaddy, including .CO Internet, in August 2020 at the latest.[412] Therefore, Neustar no longer owned nor controlled the investment at stake when it effectively introduced the dispute, which as seen at Section 3.4(a) *supra* only occurred upon the filing of its Memorial on 22 October 2021. Accordingly, Neustar must be deemed to lack standing to bring any claims whatsoever as a protected investor before this Tribunal.[413]

264. In any event, Neustar's elusive mention of its sale of .CO Internet to GoDaddy raises more questions than answers: while it is clear that such a transaction required months of preparation, when exactly did this sale start being negotiated? Had the companies reached an agreement before the submission of the RFA on 23 December 2019, or its registration by ICSID on 6 March 2020 (considering they had started to negotiate the deal months before[414])? Was the finalisation of the sale conditional on the renewal of the 2009 Contract or the awarding of the 2020 Contract? If not, how did the companies take into account the potential risks that the 2020 Contract not be awarded? In any event, how did the companies factor the present ICSID proceedings in the transaction? Without an answer to these questions, it is clearly not possible for Neustar to reasonably allege that it has standing to bring its claims in the present proceedings.

3.5 Claimant has committed an abuse of process by bringing forward these proceedings

265. Neustar behaved abusively by bringing forward these proceedings: as will be shown below, Neustar not only introduced the RFA prematurely for the sole purpose of artificially securing its standing to sue in the wake of its sale of .CO Internet to GoDaddy (**a**), but also used the present ICSID proceedings for purposes other than genuine dispute resolution (**b**).

266. Abuse of process, which is an application of the cardinal principle of good faith in the exercise of rights,[415] is a particular feature of the abuse of rights principle. As such, it has progressively been recognized to be a general principle of customary international law, and has been relied on by

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[411] *Littop Enterprises Limited et al.,* SCC Case No. V 2015/092, Final Award, 4 February 2021, para. 362 **[RL-045]**.

[412] Memorial, para. 167; A. Allemann, 'GoDaddy completes Neustar Registry acquisition – Domain Name Wire', 4 August 2020, *Domain Name News* **[C-0110]**.

[413] Even if, *par extraordinaire*, this Tribunal were to find that the Claimant had standing, such standing is necessarily limited. *See Mobil v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, para. 272 **[RL-046]**, where the tribunal found that the transfer from an investor to a third party had the effect that the initial investor had lost its standing to claim for possible damage or harm affecting the investment after that date.

[414] H. Zamora, 'The more tan USD 350 million fight for the .co domain', *El Tiempo*, 25 November 2019 **[R-0005]**.

[415] R. Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (2001), Chapter II: 'La bonne foi et les compétences', para. 106 **[RL-047]**.

parties in a considerable number of international disputes within a wide range of dispute settlement procedures.[416]

267. Relying on the well-established principle of abuse of rights,[417] the ICJ has recognized the possibility that the introduction of proceedings may be constitutive of an abuse of process. For instance, when presented with an abuse of process claim for "*manifest absence of any legal remedy*", in the *Immunities and Criminal Proceedings* the ICJ relied on its own jurisprudence and sought to find out whether the claimant's application had been "*properly submitted in the framework of its right to have recourse to the Court in the circumstances of the case*".[418]

268. Other international tribunals have also been called upon to determine the scope of the abuse of rights principle. For instance, in the *U.S-Shrimp* case, the WTO Appellate Body defined abuse of rights as prohibiting *"the abusive exercise of a state's rights and* [enjoining] *that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.*"[419]

269. In the context of investment arbitration, the concept of abuse of process has been applied by numerous tribunals to a wide array of situations, in particular in relation to issues of treaty shopping and parallel litigation.[420] In the words of the *Abaclat* tribunal, abuse of process may arise from "*the context and the way in which a party, usually the investor, initiates its treaty claim seeking protection for its investment*".[421]

270. As observed by the late Prof. Emmanuel Gaillard, while an abuse of process "*does not violate any hard and fast legal rule and cannot be tackled by the application of classic legal tools*",[422] it can serve multiple purposes contrary to the genuine exercise of rights by the claimant: artificially securing international jurisdiction, delaying the proceedings, and frivolous purposes where the

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416 A. Mitchell and T. Malone, 'Abuse of Process in Inter-State Dispute Resolution', *Max Planck Encyclopaedia of International Law* (2018), para. 16 **[RL-048]**. *See also,* R. Kolb, 'General principles of procedural law', in A. Zimmerman, C. Tomuschat and K. Oellers-Frahm (eds.), *The statute of the International Court of Justice: A Commentary* (2006), para. 65 **[RL-049]**; Y. Fukunaga, 'Abuse of Process under International Law and Investment Arbitration', *ICSID Review - Foreign Investment Law Journal* 33(1) (2018), p. 183 **[RL-050]**.

417 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, 6 June 2018, I.C.J. Reports 2018 p. 292, paras. 147, 149 **[RL-051]**; *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment, 26 June 1992, I.C.J. Reports 1992 p. 255, paras. 37-38 **[RL-052]**.

418 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, 6 June 2018, I.C.J. Reports 2018 p. 292, para. 141 **[RL-051]**, citing *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, I.C.J. Reports 1991 p. 63, para. 27 **[RL-053]**. *See also*, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 26 June 1992, I.C.J. Reports 1992 p. 255, para. 38 **[RL-052]** (in which the court similarly rejected an abuse of process argument as the claimant's application had been "*properly submitted in the framework of the remedies open to it*").

419 WTO, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Case No. WT/DS58, 12 October 1998, para. 158 **[RL-054]**.

420 C. Ceretelli, 'Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?', *Journal of International Dispute Settlement* 11(1) (2020), p. 49 **[RL-055]**. *See also*, E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review - Foreign Investment Law Journal 32(1)* (2017), p. 4 **[RL-056]**.

421 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 647 **[RL-057]**.

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

party wants to gain a benefit inconsistent with the purpose of the procedure.[423] Prof. Gaillard proceeded to classify the applications of abuse of process in the context of investment arbitration under a number of categories, including:

- Schemes designed to secure jurisdiction under an investment treaty;[424] and
- Gaining a benefit which is inconsistent with the purpose of international arbitration.[425] In relation to this last typology of abuse of process, the *Abaclat* tribunal has considered that "*the key question is whether the way in which the investor initiated the proceedings, although in accordance with the applicable provisions, aim to obtain a protection, which he is – under the principle of good faith – not entitled to claim.*"[426]

271. Finally, it is widely accepted that a tribunal's assessment of an abuse of process is discretionary and based on the specific circumstances of the case. In the words of the *Mobil v. Venezuela tribunal*, "[u]*nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.*"[427]

272. In this instance, Neustar committed an abuse of process by bringing these proceedings prematurely in order to try to secure its standing in the wake of the sale to GoDaddy (**a**). Moreover, the evidence suggests that the present ICSID proceedings were brought for purposes inconsistent with the purposes of international arbitration (**b**).

(a) Neustar introduced the Request for Arbitration prematurely for the sole purpose of securing its standing to sue

273. An abuse of process can arise from the use of schemes to secure jurisdiction under an investment treaty. This type of abuse of process, generally denominated as 'treaty shopping', refers to the situation where an investor seeks to adopt a certain nationality through relocation or corporate restructuring for the purpose of gaining jurisdiction under a particular investment treaty.[428]

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[423] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review - Foreign Investment Law Journal* 32(1) (2017) pp. 3, 6 and 10 **[RL-056]**. *See also*, R. Kolb, 'General principles of procedural law', in A. Zimmerman, C. Tomuschat and K. Oellers-Frahm (eds.), *The statute of the International Court of Justice: A Commentary* (2006), para. 65 **[RL-049]**.

[424] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review - Foreign Investment Law Journal* 32(1) (2017), p. 3 **[RL-056]**.

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

[426] *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 649 **[RL-057]**.

[427] *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 177 **[RL-058]**. *See also*, *Orascom v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020, para. 309 **[RL-059]**.

[428] *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 12 June 2012, para. 2.42 **[RL-060]**; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 94 and 95 **[CL-012]**; *Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 542 **[RL-061]**. *See also*, C. Schreuer, 'Nationality Planning', in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2012),* Vol. 6, p. 24 **[RL-062]**.

274. The established criterion to assess whether such a corporate restructuring constitutes an abuse of process is whether the investment dispute was "*foreseeable*" at that time.[429]

275. For instance, in the *Gremcitel* case, Peruvian nationals had concluded a contract for the transfer of their shares in Gremcitel, a Peruvian company, to a French relative less than one month before the Peruvian government passed a resolution that allegedly frustrated the investment, and the actual transfer had occurred only one day before the resolution was issued.[430] In this context, after recalling that the actions carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process, the tribunal went on to find that the dispute was clearly foreseeable at the time of the transfer, and therefore that "*a global evaluation of the facts of this case patently confirms that the Claimants' restructuring constitutes an abuse.*"[431]

276. Other tribunals have used a similar "reasonable prospect" standard for the foreseeability of the dispute. The tribunal in *Philip Morris v. Australia*, which upheld respondent's objection based on abuse of process, ruled that "*a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise*".[432]

277. The facts of the present case suggest that Neustar committed an abuse of process. Neustar prematurely filed the RFA (at a time where the dispute had not yet crystallised) and kept silent on the sale to Go Daddy, seeking to fabricate an appearance of good standing for the present proceedings (i.e. giving the impression that it held its investment "at all relevant times"). Indeed, it would have been a much bigger hurdle for Neustar to contend that it had standing if it had fully completed the transfer of .CO Internet to Go Daddy at the time of the submission of the RFA.

278. Several factual elements point to this inevitable conclusion.

279. *First*, Neustar's sale to GoDaddy was well advanced (if not already concluded) when Neustar submitted its RFA on 23 December 2019 and when this RFA was registered by ICSID on 6 March 2020. This is demonstrated by Neustar representatives' own assertions that GoDaddy and Neustar had been negotiating the sale of .CO Internet for at least a year when the deal was announced in early April 2020, that is since at least April 2019.[433] As explained in the factual section of this memorial, these sort of deals do not happen overnight and thus, it is to expect, and as it should

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

[430] *Renée Rose Levy and Gremcitel v. Peru,* ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 188 **[RL-064]**.

[431] *Renée Rose Levy and Gremcitel v. Peru,* ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 193 **[RL-064]**.

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

[433] L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.

come to light in this arbitration, that the deal between Neustar and GoDaddy had in practice already been sealed before Neustar filed its RFA. It was kept secret, however, to abusively maintain the appears of jurisdiction *ratione personae*.

280. *Second*, Neustar kept silent about the GoDaddy purchase, time and again, despite having had a number of opportunities to disclose it:

- In its RFA of 23 December 2019, Neustar made not a single reference to the sale to GoDaddy;
- Shortly after the submission of this RFA, Neustar transferred its shareholding in .CO Internet to Registry Services. As seen above, the evidence suggests that this transfer was one of the steps in the finalization of GoDaddy's acquisition of Neustar's registry business. However, when Neustar and .CO Internet informed MinTIC of this transfer on 24 February 2020, they disingenuously indicated that this transfer had occurred as part of a "*process of corporate restructuring carried out in the United States of America* [by Neustar]", and that this transaction "[did] *not affect the legal status of .CO Internet.*"[434] No reference to the sale to GoDaddy was made;
- On 3 March 2020, while Neustar's RFA was still unregistered by ICSID, Colombia brought Neustar's transfer of .CO Internet's shares to Registry Services to the attention of the Centre.[435] In its 6 March 2020 response to Colombia and ICSID, Neustar explained that it "*had to transfer the .CO Internet shares to Neustar's wholly owned subsidiary Registry Services, LLC to, among other reasons, satisfy the requirements in the tender*", but stressed that Registry Services remained a fully-owned subsidiary of Neustar.[436] Here again, Neustar carefully omitted any reference to the GoDaddy sale;
- Concurrently, on 2 March 2020, and after having refused to remedy the obvious defects in its RFA for more than 3 months since the original submission of the RFA on 23 December 2019, Neustar suddenly accepted the Centre's suggestion to drop its request to include .CO Internet as a party to the dispute, and urged the Secretariat to "*proceed with the registration of the Request*".[437] However, here again no reference to the sale to GoDaddy was made, even though the deal was probably already sealed.

281. *Third*, the delay regarding the announcement of the sale appears to have been deliberate, as demonstrated by the sequence of events and the statements of Neustar's representatives. Indeed, it is only on 6 April 2020, i.e. after the registration of the RFA and just three days after .CO Internet was awarded the 2020 Contract, that Neustar announced its sale to GoDaddy, with Neustar

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434 Letter from .CO Internet to MinTIC of 24 February 2020 **[R-0069]**.
435 Letter from Colombia to ICSID Secretariat of 3 March 2020 **[R-0070]**.
436 Letter from Neustar to ICSID Secretariat of 6 March 2020 **[R-0071]**.
437 Letter from Neustar to ICSID Secretariat of 2 March 2020 **[R-0084]**.

representatives conceding that they had delayed the announcement precisely due to the ongoing 2020 Tender Process.[438]

282. In this context, it can only be concluded that Neustar introduced its RFA prematurely for the purpose of artificially securing jurisdiction in the wake of its sale of .CO Internet to GoDaddy*.* This constitutes an abuse of process which should preclude Neustar from bringing its claims before this Tribunal.

(b) Neustar used the ICSID proceedings for purposes other than genuine dispute resolution

283. Neustar not only committed an abuse of process by introducing the RFA prematurely, but also as it sought to use of the ICSID proceedings for purposes other than genuine dispute resolution.

284. In the words of late Prof. Emmanuel Gaillard, there have been increasing instances of investors initiating proceedings for purposes other than resolving genuine disputes, such as "*to harass and exert pressure on another party*".[439] When an arbitration is initiated for purposes other than the resolution of genuine disputes, it constitutes a "*clear violation of the spirit of international arbitration law*".[440] This type of abuse process has been linked by Prof. Gaillard to the general doctrine of abuse of rights under international law. In the words of E. Lauterpacht, "[i]*t is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences.*"[441]

285. The facts of the present case clearly indicate that Neustar's main motive for the introduction of the ICSID proceedings was not to pursue genuine dispute resolution, but to exert undue pressure on Colombia for the renewal of the 2009 Contract and/or the awarding of the 2020 Contract.

286. *First*, as explained at Section 2.4(f) *supra.*, Neustar started to threaten arbitration under the TPA as soon as June 2019, at a time when the dispute was far from having crystallized, in the hopes of disrupting the preparation of the 2020 Tender Process. In particular, Neustar mentioned the TPA not only in its communications under Article 10.15 of the TPA with the Ministry of Commerce, but also in its routine communications under the 2009 Contract with MinTIC, seeking to create confusion.

287. *Second*, Neustar's effort to thwart the 2020 Tender Process and force MinTIC to conclude a renewal of the 2009 Contract continued with the submission of the Notice of Intent and the initial submission of the RFA on 23 December 2019, at a time when the 2020 Tender Process had just commenced. Further, as seen above, Neustar also continued the Council of State proceedings in

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[438] L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.

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

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

[441] H. Lauterpacht, 'The Development of International Law by the International Court' (1958), reprinted Oxford University Press 1982, p. 162 **[RL-066]**.

parallel to the ICSID proceedings, thereby multiplying proceedings for the resolution of the same dispute to increase its chances of success.

288. *Third*, there are several indications of bad faith regarding Neustar's initiation of the present proceedings:

- The constant variation in Neustar's claims and requests for relief, as detailed at para. 257 *supra.*, shows that Neustar was unsure of the true basis of its claims by the time it submitted its RFA to ICSID, and at least until the submission of its Memorial on 22 October 2021. The most telling example of Neustar's general lack of substantiation and definition of its claims is undoubtedly its expropriation claim, which Neustar emphasized in its Notice of Intent and RFA before proceeding to drop it in its Memorial;

- More generally, Neustar's claims are based on the supposition that Colombia was under an obligation to renew the 2009 Contract, in spite of the very clear contractual language to the contrary. As seen above, Neustar's own position with respect to the renewal varied over time, with Neustar arguing at times that the renewal was compulsory under Colombian law,[442] while at other times it limited itself to alleging that Colombia was under an obligation to engage in negotiations for the renewal.[443] This further evidences Neustar's awareness of the fundamentally flawed premise of their claims and their lack of good faith in initiating these proceedings.

289. *Fourth*, the fact that Neustar is still pursuing the present arbitration despite .CO Internet having been awarded the 2020 Contract is also indicative of the fact that Neustar is using the present proceedings for purposes which are unrelated to the proceedings and Colombia more generally. The facts and the little publicly available evidence that Colombia has been able to gather in this regard strongly suggest that at the time of its acquisition of .CO Internet from Arcelandia in 2014, the parties had factored any potential renewal of the 2009 Contract into the transaction.[444] However, any such terms are extraneous to the Colombian State, and cannot bind the latter. These proceedings should not be used as a forum by Neustar to air any claims it might have against Arcelandia relating to the 2014 acquisition.

290. It follows from the above that Neustar also engaged in abuse of process by bringing the present proceedings and continuing them to this date, which deprives this Tribunal of jurisdiction to hear its claims.

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

[443] *See* paras. 168 *supra*; Letter from .CO to MinTIC of 5 March 2019 **[C-0032]**: "[a]*lthough the renewal of the contract is not automatic, it is an option that was both legally and contractually raised and the negotiation process is prescribed based on the public procurement principles, for which .CO INTERNET S.A.S. is ready to discuss the new conditions that the renewal would contain.*"

[444] L. Patiño, 'We want the .CO to become the new .Com: GoDaddy', *El Tiempo*, 5 May 2020 **[R-0075]**.

3.6 **Claimant's claims are mere contractual claims under the 2009 Contract**

291. It is undisputed (and Neustar has not argued otherwise) that the jurisdiction of this Tribunal is limited to treaty claims and that any contractual claims would fall outside its jurisdiction. This is because Neustar exclusively relies on the international substantive protections afforded in Section A of the TPA, and has introduced the present ICSID proceedings on the basis of Article 10.16 (1) of the TPA, pursuant to which Colombia consented to arbitrate claims "*that the respondent has breached an obligation under Section A*".[445]

292. The importance of distinguishing treaty claims from contractual claims has been acknowledged in numerous cases. In the words of the *ad hoc* annulment committee in *Vivendi v. Argentina (I)*, *"whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.*"[446] On this basis, tribunals have consistently refused to afford treaty protection to contractual claims. For example, in *Abaclat v. Argentina*, the tribunal found that there is "*no jurisdiction where the claim at stake is a pure contract claim*".[447] This, it explained, is because investment treaties are "*not meant to correct or replace contractual remedies, and in particular* [are] *not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims*".[448] Likewise, in *Joy Mining Machinery Limited v. Egypt*, the tribunal found that "*the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.*"[449] Relevantly, the tribunal found that, being a purely commercial issue, the respondent's non-release of a bank guarantee could not amount to a treaty claim and as such it fell outside of its jurisdiction.[450] Similarly, in *Emmis v. Hungary*, the tribunal found that the claimant's alleged contractual right to have a licence renewed could not give rise to a treaty claim falling within its jurisdiction.[451]

293. In order to overcome this distinction, Neustar contends in its Memorial that its claims are not related to a contractual breach of the 2009 Contract by Colombia but rather treaty claims regarding specific

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[445] Memorial, para. 152 referring to Section A, in accordance with Article 10.16(1)(a)(i)(A) ("Submission of a Claim to Arbitration"). Preliminarily, it bears reminding that, as seen at Sections 3.2 and 3.3 *supra.*, Colombia's consent is absent in this case due to Neustar's failure to comply with the requirements to submit a valid Notice of Intent and a valid waiver.

[446] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I),* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 96 **[RL-067]**. *See also*, *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 143 **[RL-068]**; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 167 **[RL-069]**; *Supervision y Control S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 279 **[RL-070]**.

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

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

[449] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004, para. 82 **[CL-006]**.

[450] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004, para. 78 **[CL-006]**.

[451] *Emmis International Holding et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, paras. 199, 221, 265 **[RL-071]**.

governmental actions and standards of protection.[452] On this basis, it pretends that "[t]*his is not a Contract Dispute*".[453]

294. However, the mere evocation of protection standards enshrined in the TPA cannot suffice to demonstrate the existence of treaty claims. As explained by the tribunal in *Hamester v. Ghana*, "[i]*t is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the* [fair and equitable] *standard*."[454] The real essence of the claims has to be considered in order to determine their contractual or treaty nature. As such, in *Hamester v Ghana* the tribunal considered that the claimant's "*so called treaty claims*" were in reality contract claims by noting that they were "*inextricably linked to the JVA"* and that "'*the essential basis of Hamester's claims is purely contractual"*, before going on to find that it lacked jurisdiction over these claims.[455]

295. In the present case, an examination of Neustar's allegations shows that its claims are also "*no more than a contractual claim* […] *dressed up as Treaty case*"[456], falling outside of this Tribunal's jurisdiction.

296. Indeed, Neustar's entire case depends on the assertion that MinTIC had the alleged obligation to renew the 2009 Contract. In the Claimant's own introductory words "*the decision of Respondent to refuse to engage with Neustar left Neustar no choice but to bring this action to remedy Respondent's wrongdoing.*"[457] Its alleged treaty claims are therefore all systematically based on MinTIC's decision not to renew the 2009 Contract, thus on MinTIC's purported obligation to renew this contract. For example:

- Regarding alleged violations of the minimum standard of treatment by MinTIC, Neustar alleges that "[t]*he Respondent violated Article 10.5 of the TPA* ***by failing to even negotiate with Neustar regarding an extension of the Concession**" and "by discriminating against Neustar* ***with respect to the extension and negotiation for an extension***".[458] It also claims that its expectations "*derive from the law and* ***the terms of the Concession itself,*** *as these fulfil the requirements of being "legitimate and reasonable*."[459]

- Similarly, regarding allegedly discriminatory conduct by MinTIC in violation of the national treatment and most-favoured nation standards, Neustar purports that it "*was treated*

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[452] Memorial, para. 176.
[453] Memorial, para. 176.
[454] *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana*, ICSID Case No. ARB/07/24), Award, 18 June 2010, para. 337 **[RL-072]**.
[455] *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana*, ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 329, 334 **[RL-072]**.
[456] *RSM and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.3.7 **[RL-073]**.
[457] Memorial, para. 19.
[458] Memorial, para. 190.
[459] Memorial, para. 232.

differently in that it was ***not even allowed to negotiate, much less extend the Concession***";[460] and,

- In the same vein, regarding the alleged breach of the "*unreasonable measures*" standard incorrectly imported from the Swiss-Colombia BIT Article 4(1), Neustar claims that *"Respondent's* ***refusal to extend the Concession and refusal to negotiate*** *in good faith was "unreasonable*".[461]

297. Even the purported governmental actions to which Neustar refers in the hopes of creating an appearance of treaty claims (i.e. the alleged involvement of the President in the decision making process of MinTIC and the speculative allegation that MinTIC was seeking to favour Afilias) are related to the decision not to renew the 2009 Contract.

298. Yet, the decision not to renegotiate and renew the 2009 Contract was a contractual decision made by MinTIC in the exercise of its contractual prerogatives, Article 4 of the 2009 Contract explicitly provided that that the contract "*may*" be renewed by the parties to the contract.[462].

299. Neustar's so called treaty claims are entirely predicated on a question of contractual interpretation of Article 4 of the 2009 Contract, namely (i) whether the renewal was a mere possibility open to the parties or an obligation, and/or (ii) whether the Colombian State was required to negotiate and renew the 2009 Contract.[463] The basis for the claims that Neustar raises in these proceedings therefore rests solely on Colombia's alleged breach of the 2009 Contract.[464]

300. Previous investment tribunals have held that "*the protection afforded by investment treaties does not necessarily cover purely contractual claims where the parties to the contract have agreed on another clause granting jurisdiction, provided the parties are the same.*"[465] As seen above, this is precisely the case here: MinTIC and .CO Internet had agreed on the inclusion of an arbitration clause at Article 19 of the 2009 Contract, which explicitly covers all "*disputes arising between the parties relating to the signature, execution, development,* ***termination****, liquidation,* ***and interpretation of the contract***".[466] The contractually-agreed dispute resolution mechanism is

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460 Memorial, para. 253.

461 Memorial, para. 268. Similarly, Neustar also contends that "[t]*he refusals were unreasonable and the result of an irrational decision-making process because* ***.CO Internet had performed remarkably well*** *with respect to the .CO domain".*

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

463 While Neustar refers to Colombia's alleged discriminatory actions in relation to the 2020 Tender Process, which therefore form part of the **factual basis** for its claims (and thus of the constituent elements of the dispute – see Section 3.2 *supra*.) it should be noted that Neustar only uses Colombia's alleged actions to favour AFILIAS towards seeking to claim that in refusing the renewal, Colombia acted discriminatorily in breach of the FET standard. As seen above however, Neustar's allegations in relation to the 2020 Tender Process are purely speculative and disproved by the facts.

464 Similarly to the findings of the tribunal in *Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 103 **[RL-074]**.

465 *Malicorp v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 103 **[RL-074]**; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004, paras. 89-91 **[CL-006]**; *LESI S.p.A and Astaldi S.p.A v. Algeria*, ICSID Case No. ARB/05/03, Decision on Jurisdiction, 12 July 2006 **[RL-075]**.

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

therefore the appropriate forum for addressing the question of whether MinTIC had an obligation to negotiate and renew the 2009 Contract , not the present ICSID proceedings.

301. Neustar's claims, which are entirely based on Colombia's alleged violation of the 2009 Contract, should accordingly be considered as contractual claims falling outside the Tribunal's jurisdiction.

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

302. Not only Neustar's claims fall outside the jurisdiction of this Tribunal but they are also in any event meritless. As explained above, Colombia was fully entitled not to renew the 2009 Contract and to launch the 2020 Tender Process which resulted in the award of the 2020 Contract to Co. Internet, Neustar's former Colombian subsidiary.

303. In these circumstances, Neustar's claim that somehow Colombia breached the fair and equitable treatment standard of the TPA must be dismissed (**4.1**). Similarly, Neustar cannot reasonably sustain that it was discriminated against under the TPA (**4.2**) and its attempts to import a standard from another treaty, i.e the Swiss-Colombia BIT, should also be rejected (**4.3**).

4.1 Colombia has granted fair and equitable treatment to Claimant, in accordance with Article 10.5 of the TPA

304. In an attempt to fabricate an international claim, Claimant argues that Respondent failed to grant it fair and equitable treatment as required by Article 10.5 of the TPA.

305. Claimant's allegations on this ground are however unavailing. Not only Neustar mischaracterizes the FET standard prescribed by Article 10.5 (which is expressly limited to the customary international minimum standard of treatment) (**a**) but it also fails to establish any violation of this standard by Colombia (**b**).

(a) Claimant mischaracterizes the fair and equitable treatment standard prescribed by Article 10.5 of the TPA

306. The FET standard is not uniformly drafted across investment treaties and agreements. As the tribunal in *Suez v. Argentina* put it, "[t]*he context of the term "fair and equitable" largely depends upon the contents of the treaty in which it is employed*".[467] Understanding the meaning of the FET standard thus requires having due regard to each treaty's specific wording, in accordance with Article 31.1 of the VCLT.[468]

307. Article 10.5 of the TPA explicitly links the FET standard to the minimum standard of protection under customary international law:

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[467] *Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 214 **[RL-076]**.

[468] Vienna Convention on the Law of Treaties, Article 31.1 (which provides that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*") **[RL-010]**.

> *1. **Each Party shall accord to covered investments treatment in accordance with customary international law**, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as **the minimum standard of treatment** to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation **not to deny justice** in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*

308. Three important considerations flow from this wording. First, as highlighted by the United Nations Conference on Trade and Development ("**UNCTAD**") in a 2012 report on which Claimant heavily relies, by explicitly linking the FET standard to the minimum standard of treatment, this wording seeks to prevent "*overexpansive interpretations of the FET standard*".[469] Second, by specifying that the FET standard does not require treatment "*in addition to or beyond that which is required by that* [minimum] *standard*", Article 10.5 of the TPA prescribes that the FET standard cannot be interpreted as an autonomous standard going beyond the minimum standard of treatment: the FET standard under Article 10.5 is limited to the minimum standard of treatment. This direct consequence of the wording of the TPA has been embraced by many tribunals in relation to similar clauses, such as NAFTA Article 1105.[470] Third, the obligation to provide fair and equitable treatment expressly applies only to "*covered investments*" and not to "*investors*", which means that FET claims related to treatment afforded to "*an investor*" rather than to "*an investment*" fall outside the

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[469] UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 28 **[CL-043]**.

[470] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 91 **[CL-027]** (in which the tribunal relevantly noted that, in its 2001 interpretation of the minimum standard of treatment under Article 1105 of the NAFTA, the Free Trade Commission had "[clarified] *that the terms "fair and equitable treatment" and "full protection and security" are references to existing elements of customary international law and are not "additive", that is, they do not add novel elements to that standard*") (NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001 **[RL-077]**); *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 268 **[CL-018]** ("[T]*he Tribunal joins all previous NAFTA tribunals in the view that Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law*"); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 448 **[CL-030]** ("[…] *FET under CAFTA-DR does not require treatment in addition to or beyond what is required by the minimum standard of treatment applicable under customary international law*"); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 745 **[CL-023]** (*"Colombia is under no obligation to exceed this* [minimum standard of treatment] *and, as it is not considering an autonomous treaty standard of FET but a "minimum" standard, the Tribunal further accepts the obligation should not be interpreted expansively*").

scope of Article 10.5 of the TPA. This has been confirmed by the United States on several occasions,[471] including recently in *Seda v. Colombia*:

> *Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example,* ***the Article 10.5 requires the Parties to accord "fair and equitable treatment"*** *and "full protection and security"* ***only to covered investments, not to investors****. In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments.5 In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (i.e., an investor) must establish that a Party's treatment was accorded to the covered investment and violated the relevant obligation.*[472]

309. In its Memorial, given the unambiguous wording of Article 10.5, Neustar accepts that the FET standard that is prescribed under the TPA is limited to the minimum standard of treatment.[473] However, in order to expand its scope, Neustar misleadingly relies on cases where the FET clauses at stake were not linked to the minimum standard.[474] While we will address this in more detail below, it goes without saying that the conclusions reached in such cases have no relevance for the present proceedings.

310. Turning now to the content of the FET requirement under the minimum standard of treatment, it is well established that the threshold for establishing that a State's conduct has breached this standard is particularly high.[475] Neustar conveniently omits this point, yet numerous of the awards it cites recognise this important feature:

- For example, in Waste Management v. Mexico (II), the tribunal found that "*the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is* ***arbitrary, grossly unfair, unjust or***

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471 *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 5 **[RL-078]**; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 21 June 2019, para. 42 **[RL-079]**.

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

473 *See for instance,* Memorial, Section IV(A)(1), p. 79 ("*The Requirement to Grant Fair and Equitable Treatment Under the Customary International Law Minimum Standard of Treatment*") and para. 185 (in which Neustar discusses the "*modern content of the fair and equitable treatment under the customary international law minimum standard*").

474 *See for instance*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award with Dissent, 24 July 2008 **[CL-029]**; *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 **[CL-010]**; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 **[CL-037]**; *Teinver S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017 **[CL-038]**; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 **[CL-039]**; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005 **[CL-045]**; *Deutsche Telekom v. India,* PCA Case No. 2014-10 (UNCITRAL), Interim Award, 13 December 2017 **[CL-068]**; *ADC Affiliate Limited et al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 **[CL-061]**; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 **[CL-062]**.

475 UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 13 **[CL-043]** ("*a reference in an FET clause to the minimum standard of treatment of aliens conveys a clear message that only the very serious acts of maladministration can be seen as violating the treaty*").

***idiosyncratic**, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to **an outcome which offends judicial propriety**–as might be the case with a **manifest** failure of natural justice in judicial proceedings or a **complete** lack of transparency and candour in an administrative process* […]."[476]

- Similarly, in S.D. Myers v. Canada, the tribunal considered that "*a breach of Article 1105 occurs only when it is shown that an investor has been treated **in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective**. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*."[477]

311. The Tribunal should therefore be guided by this high threshold of State responsibility when assessing the Claimant's FET allegations. As noted by the 2021 UNCTAD report, the most cited expression reflecting this high threshold is found in *Neer v. Mexico*,[478] where the Mexican-American Claims Commission provided:

> [T]*he treatment of an alien, in order to constitute an international delinquency, should amount to **an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency**.*[479]

312. In order to circumvent this threshold, Neustar argues that some tribunals, like the one in *ADF v. United States,* have held that the *Neer* standard may have evolved over time.[480] However, this argument is misleading. Notwithstanding any potential evolution of customary international law, as noted by the NAFTA tribunal in *Thunderbird v. Mexico*, "*the threshold for finding a violation of the minimum standard of treatment still remains high*".[481] Moreover, as put by the tribunal in *Glamis*,[482]

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476 *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**.

477 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**. *See also*, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 296 **[CL-018]** (in which the tribunal found that "[t]*o determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive.*").

478 *See for instance*, *Saluka Investments B.V. v. Czech Republic,* PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, para. 295 **[CL-049]**; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, p. 37, fn. 29 **[RL-XXX080**

479 *L.F.H. Neer and Pauline E. Neer v. United Mexican States*, Opinion, 15 October 1926, *United Nations Record of International Arbitral Awards*, Vol. IV pp. 61-62, para. 4 **[RL-091]** (produced as CL-022).

480 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 123 **[CL-024]**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 179 **[CL-025]**.

481 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 194 **[CL-059]**.

482 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 600-615 **[CL-017]**.

it is the Claimant who bears the burden of proving any alleged such evolution of customary international law and in the absence of such proof (which would require demonstrating that such a customary international law rule is required by law in the *opinio juris* of States and constitutes a sufficiently extensive and convincing State practice),[483] the fundamentals of the *Neer* standard are still relevant:

> *The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an **act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons** – so as to fall below accepted international standards and constitute a breach of Article 1105(1).*[484]

313. Accordingly, as highlighted by the NAFTA tribunal in *Thunderbird*, acts that may give rise to a breach of the minimum standard are "*those that weighed against the given factual context , amount to a **gross denial of justice or manifest arbitrariness falling below acceptable international standards**.*"[485]

314. Such interpretation is all the more required in the present case since Article 10.5 of the TPA expressly refers to the "*obligation not to deny justice*" as forming part of the FET minimum standard, thereby indicating that "*only breaches that are equally severe*"[486] may fall withing the scope of this standard.

(b) Colombia's course of action in relation to the 2009 Contract and the attribution of the 2020 Contract complied with the FET standard in Article 10.5 of the TPA

315. In its Memorial, despite the fact that Colombia was under no obligation to renew the 2009 Contract and ultimately .CO Internet was awarded the 2020 Contract, Neustar contends that Respondent did not comply with the FET minimum standard under Article 10.5 of the TPA. Neustar argues that this is because Colombia purportedly engaged in arbitrary conduct; failed to respect due process; and violated Neustar's alleged legitimate expectations.[487]

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[483] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, 12 October 1984, I.C.J. Reports 1984 p. 246, para. 111 **[RL-082]** ("*A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the* opinio juris *of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.*"); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, I.C.J. Reports 1985, para. 27 **[RL-083]** ("[i]*t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and* opinio juris *of States.*").

[484] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 22 and 616 **[CL-017]**.

[485] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 194 **[CL-059]**.

[486] UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 30 **[CL-043]**.

[487] Memorial, paras. 178, 191, 213, 225.

316. However, preliminarily, it should be noted that all of these claims are related to the treatment afforded to Neustar as an "investor" (rather than the treatment accorded to its "*investment*"). Therefore, they do not fall within the scope of Article 10.5 of the TPA and should be rejected on this basis alone (**i**).

317. In any event, Neustar's FET claims regarding arbitrariness (**ii**), due process (**iii**) and Neustar's alleged expectations (**iv**) are bound to fail as they are devoid of any merit and fall far short of meeting the threshold prescribed under Article 10.5 of the TPA.

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

318. Considering that Article 10.5 is expressly limited to the treatment accorded to "*covered investments*", Neustar's claims should immediately be rejected as they relate to treatment afforded to Neustar as an investor (rather than to its investment).

319. Indeed, it is telling that none of the FET claims brought by Neustar concern the treatment afforded to its shareholding in .CO Internet, which was Neustar's primary investment. This is however unsurprising as at no point in time Colombia deprived Neustar's of its shares in .CO Internet. Quite to the contrary, it was Neustar which decided to dispose of its shareholding and sell it to GoDaddy.

320. Moreover, an examination of the FET claims brought by Neustar shows that Neustar is effectively seeking protection as a purported "*investor*" and not on the basis of a "*covered investment*":

- For example, regarding arbitrariness, Neustar alleges that Respondent violated Article 10.5 of the TPA because "*it refused to even negotiate **with Neustar** regarding the extension and provided no good faith basis for refusing to negotiate*"[488] and because "***Neustar was discriminated against** as compared with domestic and investors from third countries*"[489];

- Regarding due process, Neustar alleges that "*Colombia Failed to Afford Due Process <u>to</u> **Neustar***"[490] because, for example, "*Respondent never provided a good faith rationale for refusing to even negotiate **with Neustar***" and "*Respondent had the obligation to consult **with Neustar and .CO Internet and to give them the opportunity to address any issues of concern***".[491]

- As regards its claims that "*Colombia Violated **Neustar's legitimate Expectations***"[492], by definition these necessarily relate to the treatment accorded to Neustar as an investor. An investment can certainly not have legitimate expectations.

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[488] Memorial, para. 200.
[489] Memorial, para. 204.
[490] Memorial, para. 213.
[491] Memorial, paras. 219, 223.
[492] Memorial, para. 225.

321. Accordingly, Neustar's FET claims fall outside the scope of Article 10.5 of the TPA and should be rejected without further examination.

(ii) ***Colombia's actions were not 'manifestly' arbitrary***

322. A closer examination of Neustar's claims would in any event lead to their dismissal. Neustar argues that a number of 'indicia' show that Colombia acted in an arbitrary manner in breach of Article 10.5 of the TPA. In particular it argues that Colombia's refusal to negotiate and renew the 2009 Contract was irrational (**1**), that by doing so Colombia sought to favour another operator and discriminated against Neustar (**2**) and that Colombia acted in bad faith (**3**). The record shows, however, that these unsubstantiated allegations do not hold water and that Colombia's actions were compliant with the FET standard under Article 10.5 of the TPA.

(1) *Colombia's conduct was justified*

323. In order to claim that Colombia acted arbitrarily and thereby breached the FET minimum standard under the TPA, Neustar argues that Colombia's refusal to renew the 2009 Contract "*was not rationally connected to any legitimate policy objective*".[493] This allegation however fails on multiple levels.

324. *First*, it should be noted that in relation to the FET minimum standard of treatment "*the threshold to establish a finding of arbitrariness has been consistently high*".[494] Tribunals commonly require the proof of "*manifest arbitrariness*" for an act to give rise to a breach of this standard.[495] Indeed, in the landmark decision on the meaning of arbitrariness in the *ELSI* case – which has been widely adopted by investment tribunals – the ICJ defined the concept in the following terms: "*unlawfulness cannot be said to amount to arbitrariness* […] [arbitrariness] *is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[496] Accordingly, Neustar's attempts to circumvent this standard by introducing other academic tests, such as the one proposed by Dr. Heiskanen,[497] should be dismissed.

325. *Second*, that Colombia's refusal to renew the 2009 Contract could in itself give rise to a claim for arbitrariness is highly questionable. Indeed, as explained above, under the 2009 Contract the parties had the faculty to renew or not to renew the contract after its term and this was at their discretion. Yet, Neustar fails to explain how the concept of arbitrariness could apply to a

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493 Memorial, para. 194.

494 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. 203 **[RL-084]**.

495 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 194 **[CL-059]**; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 626 **[CL-017]**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, paras. 492 and 642 **[CL-030]**; *Eli Lilly and Company v. Canada,* ICSID Case No. UNCT/14/2 (UNCITRAL), Final Award, 16 March 2017, paras. 222 and 223 **[RL-085]**.

496 *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, 20 July 1989, I.C.J. Reports 1989 p. 15, para. 128 **[RL-032]**.

497 Memorial, para. 198.

discretionary contractual prerogative. There is nothing « shocking » in one party refusing to renew a contract (or even refusing to negotiate a renewal) when it has the possibility to do so, and arguing otherwise would in fact be contrary to the practice of everyday business transactions. The fact that the party to the 2009 Contract which did not wish to renew the contract was MinTIC does not change this conclusion, in spite of Neustar's insinuations throughout its Memorial. Tellingly, even when analysing an autonomous – and thus even broader – FET standard, the tribunal in *EDF (Services) Limited v. Romania* refused to find a violation of the standard on the basis of a refusal to respect an actual contractual obligation – and not a mere possibility – to extend the relevant contract.[498] It thus seems difficult to fathom how Colombia's decision not to exercise a mere contractual prerogative could amount to "*manifest arbitrariness*" in breach of an even more stringent FET minimum standard.[499]

326. *Third*, Neustar's allegation is in any event totally unsubstantiated. Neustar merely claims with no support that there was "*no apparent legitimate purpose*" for the non-renewal, but fails to adduce any evidence showing that Colombia was not following a legitimate purpose when it decided not to renew the 2009 Contract. Evidently such an unsubstantiated allegation cannot be sufficient to establish an arbitrary conduct, let alone *"manifest arbitrariness*" under the minimum standard of treatment of Article 10.5 of the TPA. Being well aware of this, Neustar tries to muddy the waters by claiming that as per the tribunal's finding in *Lemire v. Ukraine*, "*the impossibility of verifying the reasons for the rejection of the extension* […] *demonstrates that the decision was arbitrary*".[500] Such allegation is however meritless. MinTIC informed .CO Internet of its decision through two communications,[501] and the minutes of the Advisory Committee's meeting of 18 March 2019 (during which the non-renewal of the 2009 Contract was discussed[502]) were made available to Neustar,[503] which was able to review the specific reasons underlying Colombia's decision – despite the fact that, as explained above, Colombia had full discretion under the 2009 Contract to refuse to renew the same. If that was not enough, as seen above Colombia acceded to .CO Internet's subsequent requests for meetings, and responded in detail to .CO Internet's communications, explaining the basis for its decision under the .co domain regulatory framework and the 2009 Contract itself.[504] Colombia also made the ITU Report, which set out the reasons underlying Colombia's decision to

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498 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 242 and 247 **[CL-037]** (the renewal of the contract was clearly drafted as an obligation: "[the initial period] *will be extended for further ten (10) year periods with the agreement of the General Assembly*"; failure to respect this obligation, the tribunal found, remained contractual and did not "*rise* […] *to the level of a treaty claim for breach of the FET obligation*").

499 In fact, Tribunals have consistently held that a mere contractual breach does not amount to an arbitrary act in principle. *See*, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115 **[CL-027]**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 381 **[CL-063]**; *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, para. 101 **[CL-034]**.

500 Memorial, para. 195.

501 Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**; Letter from MinTIC to .CO Internet of 21 June 2019 **[C-0072]**.

502 Minutes of the Advisory Committee session of 18 March 2019 **[C-0039]**.

503 Memorial, para. 79.

504 *See* Section 2.8(a) *supra*. *See also*, First Witness Statement of Iván Darío Castaño Pérez, paras. 21-23 **[RWS-02]**.

proceed with a new tender process, publicly available.[505] In any event, the facts of the *Lemire* arbitration (which was not based on a treaty linking the FET to the minimum standard) were entirely different from the case at hand. In *Lemire*, the investor had submitted in six years more than 200 applications for the licensing several types of frequencies and was only able to secure one single licence.[506] In the present case the only two contracts that Colombia has entered into with a private operator to operate the .co domain were both granted to .CO Internet, Neustar's former subsidiary.

327. Finally, an analysis of the facts in any event confirms that Colombia's decision had a legitimate policy objective:

- As seen above,[507] the July 2018 Report already emphasized the need for Colombia to obtain better economic conditions,[508] and set out the different options available to the Colombian State, consisting of either a renegotiation of the 2009 Contract or the undertaking of a new selection process.[509] However, contrary to Neustar's disingenuous presentation of this document, it did not specify that Colombia was under an obligation to negotiate a renewal with .CO Internet first,[510] or that such a renewal was 'desirable'.[511] On the contrary, this Report highlighted the potential difficulties associated with negotiations for a renewal:

  It is therefore essential to emphasize the necessity that any renewal of the current concession contract would be advisable and reasonable if it goes hand in hand with an economic renegotiation that leads to a significant modification of the consideration paid by the Concessionaire to MINTIC/FONTIC. It is important to take into account that this modification scenario ***could imply a long and complex negotiation period****, given that the consideration offered [by the proponents] was one of the determining factors at the time of choosing between the proposals, so the concessionaire would undoubtedly request a series of additional modifications to the contract* ***that could eventually be subject to questions regarding*** [compliance with] ***the principle of transparency in the current concession.***[512]

- The July 2018 Report therefore concluded that, from a legal perspective, it would be rather advisable to initiate a new tender process:

[505] This is proved by the fact that it is Neustar which produced this report in the context of the present proceedings. *See* ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

[506] *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 319-320 **[CL-036]**.

[507] *See* Section 2.5(a) *supra.*

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

[509] MinTIC (Vice Ministry of Digital Economy), *Analysis of the administration, promotion, technical operation and maintenance of the .co domain in Colombia*, July 2018, p. 8 **[C-0027]**.

[510] Memorial, para. 65.

[511] Memorial, para. 100.

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

> [T]*he best option* [would be] *to initiate a new public contracting process which would result in a new concession contract.*[513]

- As evidenced by the initial investigations carried out by MinTIC,[514] the market conditions for the operation of domain names (and specifically ccTLDs) had changed drastically during the ten-year term of the 2009 Contract: the conditions of this contract were therefore far from aligned with market conditions not only regarding Colombia's share of proceeds, but also in relation to technical and operating aspects.[515] Further, the ten-year term of the 2009 Contract itself was not in line with best practices.[516]

- In addition, the ITU Report confirmed Colombia's preliminary findings and recommended that Colombia take on a more active role vis-à-vis ICANN, develop its internal expertise through increased participation in the administration of the .co domain, and negotiate better economic conditions to align with market practice.[517]

- Colombia's decision not to renew the 2009 Contract was also based on Colombia's assessment of the legal risks associated with concluding a renewal: as explained above, agreeing to renew the 2009 Contract while making material changes to its financial conditions (as per .CO Internet's proposals[518]) could breach fundamental principles of Colombian administrative law, such as transparency and equality.[519]

- If that were not enough, as seen at Section 2.7 above, the first years of operation of the 2020 Contract have confirmed that Colombia's decision was the appropriate one to preserve and foster Colombia's public interest, as (i) the conditions of operation of the .co domain have been adjusted to international best practices, (ii) the number of domains registered on the .co ccTLD has resumed its growth, and (iii) MinTIC has already perceived more proceeds than during the full 10-year term of the 2009 Contract.

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

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

514 First Witness Statement of Iván Darío Castaño Pérez, paras. 17-18 **[RWS-02]**; First Witness Statement of Sylvia Constaín, paras. 8-10 **[RWS-01]**. These initial investigations were notably aimed at supplementing the initial findings of the July 2018 Report.

515 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

516 With other ccTLDs being operated under four to five-year contracts maximum. *See* First Witness Statement of Iván Darío Castaño Pérez, para. 9 **[RWS-02]**; ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**.

517 ITU (J. Prendergast, M. Palage, A. García Zaballos, O. Cavalli), *Consultancy services related to the .co domain*, May 2019 **[C-0067]**. *See* para. 117 *supra*.

518 Letter from .CO Internet to MinTIC of 21 May 2019 **[C-0069]**.

519 *See* para. 106 *supra. See also*, Constitution of Colombia, 1991, Art. 209 **[C-0111]**; Law 80 of 28 October 1993, Art. 23 **[C-0112]**; Law 1437 of 18 January 2011 enacting the Code of Administrative Procedure, Art. 3 **[C-0113]**; Council of State, Decision of 31 August 2011 (case No. 18080), p. 38 and fn. 16 **[R-0036]**; Council of State, Decision of 28 June 2012 (case No. 23966), pp. 19 *et seq.* **[R-0037]**.

328. Neustar further claims that Colombia's conduct was arbitrary as it was allegedly not based on legal standards and was discriminatory. More specifically, Neustar alleges that Colombia's refusal to renew the 2009 Contract was motivated by its desire to favour another operator, Afilias, hence constituting "*targeted discrimination*",[520] and that it was further discriminatory because renewals are negotiated and given to others investors in the telecommunications sectors and others.[521] These allegations are bound to fail.

329. *First*, contrary to Neustar's allegations, the question of whether the FET minimum standard of treatment covers non-nationality based discriminations such as those it alleges is not the subject of a wide consensus – rather "*case law is unsettled on this point*".[522] To prove that such discrimination is protected under the standard, it would be necessary to show that it constitutes a rule in customary international law in the *opinio juris* of States and constituting State practice.[523] As Neustar has not even attempted to demonstrate that the FET minimum standard under customary international could cover non-nationality based discriminations, its allegations on this point fail on this basis alone.[524]

330. *Second*, even if non-nationality based discriminations could fall under the scope of Article 10.5 of the TPA, the threshold for finding a breach on this basis would still be high. As, noted by the tribunal in *Glamis Gold*, only an "*evident discrimination*"[525] could potentially lead to liability . This would not occur as a result of a simple discriminatory conduct but would in fact require "*sectional or racial prejudice*".[526] The 2012 UNCTAD Report, itself, on which Claimant heavily relies, specifies, in

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[520] Memorial, paras. 201-203.

[521] Memorial, paras. 206-209.

[522] 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]** (in which the tribunal found that Article 1105 does not cover discrimination: "[e]*lsewhere, when the NAFTA Parties wished to incorporate a norm of non-discrimination, they did so - as one finds in Article 1110(1)(b) which requires that a lawful expropriation must, among other requirements be effected "on a non-discriminatory basis". But Article 1110(1)(c) makes clear that the NAFTA Parties did not intend to include discrimination in Article 1105(1). Article 1110(1)(c) establishes that another requirement for a lawful expropriation is that it be effected "in accordance with due process of law and Article 1105(1)". If Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)'s due process requirement.*").

[523] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, 12 October 1984, I.C.J. Reports 1984 p. 246, para. 111 **[RL-082]**; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, I.C.J. Reports 1985 p. 13, para. 27 **[RL-083]**.

[524] Tellingly, none of the authorities cited by Neustar have demonstrated that protection against so-called "targeted discrimination" under the FET minimum standard stands as a rule in customary international law: *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4,* Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152 **[RL-86]** (produced as CL-019); *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, para. 187 **[CL-033]**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 454 **[CL-030]**; *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 156 **[CL-024]**; *Cargill Inc. v. Mexico,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paras. 548 *et seq.* **[CL-018]**; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, p. 232, fn. 1087 **[CL-017]**. In fact, some references to findings cited by Neustar do not discuss discrimination at all: *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, para. 94 **[CL-034]**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 **[CL-032]**.

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

[526] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**.

relation to the general concept of FET, that "*the non-discrimination requirement appears to prohibits discrimination in the sense of specific targeting of a foreign investor* ***on other manifestly wrongful grounds such as gender, race or religious belief***".[527] Yet, in its Memorial, Neustar overlooks this high threshold and does not even attempt to explain how it would be met in this case, much less how it would have been "*specifically targeted*" and on which "*manifestly wrongful grounds*".

331. *Third*, there was no discrimination in this case, let alone an "*evident*" one which could lead to a finding that the FET standard under Article 10.5 was breached by Colombia.

332. Neustar's allegation that it was discriminated against because Colombia was allegedly seeking to favour Afilias does not hold water.

333. First of all, this allegation is purely speculative and factually incorrect:[528] as detailed at paragraph 124 *supra.*, all of the allegedly discriminatory provisions in the 2020 Terms of Reference were included on the basis of express and reasoned recommendations from the ITU experts, contained in the ITU Report which was available to Neustar. While, as Ms. Luisa Trujillo explains, Colombia wanted to ensure that the technical requirements would be high in order to ensure that the proponents would have adequate experience operating a domain as large as the .co domain, it also wished to ensure participation and equality of opportunities.[529] In line with Colombian public procurement law, MinTIC therefore progressively adapted these requirements throughout the 2020 Tender Process, including in response to reasoned requests from the proponents, including .CO Internet.[530] Further, contrary to Neustar's allegations, Ms. Constaín did not hold secret meetings with Afilias in the context of the 2020 Tender Process in order to favour them: as she confirms herself, she "*did not meet specifically with AFILIAS and certainly did not discuss details of the tender process at any stage*."[531]

334. Moreover, the facts blatantly show that there was no targeting of Neustar and that it was treated in the same manner as the other operators that were interested in the operation of the .co domain. Indeed, Colombia's decision not to renew the 2009 Contract was followed by a public tender for the 2020 Contract in which .CO Internet was given the opportunity to participate, on an equal footing as all the other interested candidates.[532]

335. Last but not least, any possibility of discrimination is categorically ruled out by the fact that ultimately .CO Internet was awarded the 2020 Contract, with Neustar representatives going as far as

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527 UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), pp. xv-xvi **[CL-043]**.

528 Memorial, para. 201.

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

530 First Witness Statement of Luisa Fernanda Trujillo Bernal, para. 21 **[RWS-03]**.

531 First Witness Statement of Sylvia Constaín, para. 21 **[RWS-01]**.

532 *See* paras. 131 *supra.*

expressing their satisfaction regarding the carrying out of the 2020 Tender Process[533] - Neustar's conspiracy allegations are thus nothing more than red herrings and have to be dismissed.

336. Neustar's second allegation that it was discriminated because renewals are generally negotiated and given to others in the telecommunication sectors and others is equally baseless. Indeed, this allegation is based on the misconception that Colombia was under an obligation to negotiate with Neustar and renew the 2009 Contract for an additional 10 year period. There is however no ambiguity under the 2009 Contract that the renewal of this contract was only a faculty at the discretion of the parties, Article 4 providing explicitly that " [t]*he term agreed* ***may*** *be extended*".[534] No discrimination can arise in these circumstances. Moreover, in any event Neustar has failed to demonstrate that the three prong test that tribunals widely use to establish discriminatory conduct is met in this case,[535] i.e. that (i) Neustar was in like circumstances as the other concessionaires; (ii) that it was treated differently; and (iii) that this was without reasonable justification. As explained in Section 4.2(c) below, the examples of renewed concessions provided by Neustar cannot be compared to the 2009 Contract and, in all cases, Colombia's decision not to renew the Contract was plainly justified.

337. Accordingly, for all the reasons set out above Neustar's allegations that Colombia's conduct was discriminatory should be dismissed.

(3) *Colombia acted in good faith throughout the process of non-renewal of the 2009 Contract and attribution of the 2020 Contract*

338. In support of its claim that Colombia's conduct was arbitrary, Neustar further alleges that Colombia acted in bad faith.[536] This allegation could not be further from the truth and is untenable.

339. *First*, to support this allegation Neustar repeats its speculative arguments that Colombia's refusal to renew the 2009 Contract was due to an alleged intention to install Afilias as the new operator. However, as seen above, this contention is plainly incorrect and is all the more disproved by the fact that .CO Internet was ultimately awarded the 2020 Contract following a transparent public tender process.

340. *Second*, here again Neustar conveniently overlooks that the standard of proof to establish a breach of good faith is particularly high and the fact that it is the party which alleges bad faith (in this case Neustar) that bears the burden of proof. As noted by the tribunal in *Micula v. Romania*, "*allegations of bad faith require a high standard of proof, particularly where, as the Claimants point out, its*

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

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

535 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 778 **[CL-017]**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 616 **[RL-087]**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case No. 118/2001, Arbitral Award, 16 December 2003, p. 34 **[RL-088]**.

536 Memorial, paras. 193 and 194.

argument is based on Romania's "state of mind."[537] Neustar allegations that Colombia's bad faith can be "*inferred"* from the fact that "*other concessionaires received extensions whereas it was refused for Neustar*" and there was "*no rational reason for such a distinction"* without any substantiation fail to meet this standard.[538] Leaving aside the fact that the comparison with these alleged concessionaires is inapposite, and that Colombia had legitimate reasons not to renew the 2009 Contract,[539] there is a wide consensus that bad faith cannot be presumed.[540] Alleging that bad faith must be "*inferred*" can on no counts be a proof of bad faith. Indeed, in the words of an academic, "*one should not rush to employ good faith as a ubiquitous shortcut to the conclusion of the legal argument, merely because the mundane exercise of competently identifying and applying the small print of international law turns out to be more vexing than expected*".[541]

341. Claimant's allegations regarding a lack of good faith from Colombia must therefore be dismissed.

(iii) ***Colombia's actions respected due process***

342. Claimant also alleges that Colombia breached the FET standard in Article 10.5 of the TPA by failing to afford it due process.

343. In a rather convoluted explanation, Claimant relies on three factors, namely that: (i) the administrative powers were misused for improper purposes; (ii) Colombia failed to act in a transparent and candid manner when refusing to renew the 2009 Contract and during the 2020 Tender process; and (iii) Colombia failed to implement a mechanism which would have granted Neustar the opportunity to convey its concerns.[542]

344. We examine below the legal standard in light of which these allegations must be assessed (**1**), before dismissing them (**2 – 4**).

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[537] *Ioan Micula et al. v. Romania (II)*, ICSID Case No. ARB/05/20, Award, 5 March 2020, para. 378 **[RL-089]**.

[538] Memorial, para. 212.

[539] *See* para. 104 *supra*.

[540] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 138 and 139 **[CL-027]** ("*A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means. […] But such an allegation needs to be proved, and the Claimant has not proved it.*"); *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, PCA Case No. 2008-01 (UNCITRAL), 2 August 2010, para. 137 **[CL-048]** ("*Although the Claimant has avoided formulating this allegation in such terms, the underlying idea is that the PMRA acted in bad faith and launched a review process for reasons unrelated to its mandate and to the international obligations of Canada. The burden of proving these facts rests on the Claimant, in accordance with well-established principles on the allocation of the burden of proof, and the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one.*"); *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 465 **[CL-030]** ("*There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.*").

[541] M. Paparinskis, 'Good faith and Fair and Equitable Treatment in International Investment Law', in A. Mitchell, M. Sornarajah, and T. Voon (eds.), *Good Faith and International Economic Law*, Oxford University Press (2015), p. 5 **[RL-090]**.

[542] Memorial, para. 215.

(1) *The due process standard under Article 10.5 of the TPA*

345. As per the wording of the TPA, a breach of due process can only amount to a breach of the FET standard when it results in a denial of justice. Indeed, Article 10.5 of the TPA explicitly links the FET under the treaty and the "*obligation not to deny justice in criminal, civil, or administrative adjudicatory proceeding in accordance with the principle of due process*".[543] This has been confirmed by the tribunal in *Aven v. Costa Rica*, which interpreted a provision identical to that in Article 10.5.2(a) of the TPA as follows:

> *Therefore, the claimant investor alleging the breach of the obligation to afford fair and equitable treatment* ***has the burden of proof to show denial of justice****, insofar as Article 10.5.2.(a) DR-CAFTA may be applicable. The investor may not be released of such burden invoking that DR-CAFTA does not require the prior exhaustion of domestic remedies to have access to arbitration, because what is at play is not the admissibility of the claim but the merit of the claim. Certainly, for the admissibility of a claim within DR-CAFTA, it is not necessary to have exhausted domestic remedies, but to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty,* ***access to justice and due process for the resolution*** *of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards.*[544]

346. For an investor to prevail on a claim for denial of justice, "*a very high threshold is required*".[545] Accordingly, investment tribunals have held that denial of justice requires a "*systemic failure of the State's justice system*".[546] In light of this very high threshold, it is not surprising that Neustar has not attempted to allege a denial of justice but only claims that due process was breached. Its claim that Colombia breached the fair and equitable standard under the TPA due to an alleged breach of due process should therefore be dismissed on this ground alone.

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[543] TPA, Article 10.5.2(a) **[C-0002]**.

[544] *Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 357 **[RL-011]**.

[545] *Staur Eiendom AS et al. v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, para. 472 **[RL-091]**. *See also*, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 10.4.8 **[RL-092]** ("*It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice*"); *Philip Morris Brand SARL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 499 **[RL-093]** ("*An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such*"). The United States have also set the threshold for denial of justice very high. *See for instance*, *Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 13 **[RL-011]** (in which the tribunal summarised the United States' Submission as Non-Disputing Party in *Spence International Investments* as establishing that "*denial of justice arises, for example, when a State's judiciary administers justice to aliens in a "notoriously unjust" or "egregious" manner "which offends a sense of judicial propriety*"" – see *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction, 25 October 2016, para. 160 **[RL-094]**).

[546] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 254 **[RL-095]**; *See also, Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 273 **[RL-096]**.

347. Even if it were to be considered that the due process standard under Article 10.5 of the TPA is not limited to scenarios of denial of justice, tribunals have consistently applied a very high threshold to appreciate whether the conduct of a State may amount to a violation of due process.[547] For instance, the tribunal in *Al Tamimi v. Oman* found that it was necessary to assess whether the host State had acted "*with a **gross or flagrant disregard** for the basic principles of fairness, consistency, even-handedness, due process or natural justice expected by and of all States under customary international law*".[548]

348. Accordingly, tribunals have held that not any procedural irregularity amounts to a breach of due process. As further noted by the tribunal in *Al Tamimi v. Oman,* the violation of the due process requirement "*requires **more than that the Claimant point to some inconsistency or inadequacy in*** [the host State's] *regulation of its internal affairs*".[549]

349. Therefore, in order to constitute a breach of the FET standard, a due process irregularity has to lead to an outcome "*which offends judicial propriety*", as acknowledged by the tribunals in *TECO v. Guatemala*,[550] *Waste Management v. Mexico*,[551] and *Railroad v. Guatemala*,[552] all cited by the Claimant.

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[547] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 200 **[CL-059]** ("*The administrative due process requirement is lower than that of a judicial process. Hence, for instance, even if one views the absence of Lic. Aguilar Coronado […] at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the NAFTA under the circumstances.*"); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 132 **[CL-047]** ("*Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough* […]."); *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]** *("[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimant if the conduct attributable to the State and harmful to Claimant […] involves a lack of due process leading to an outcome which offends judicial propriety— as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."); Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 219 **[CL-060]** (in which the tribunal adopted the *Waste Management (II)* tribunal's stringent test for violations of due process); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, para. 508 **[RL-026]** *("The Tribunal finds that the decisions of the Mexican Courts repeatedly denying Lion the right to present relevant and material evidence to defend its case, amount to an improper and egregious procedural conduct, which does not meet the basic internationally accepted standard of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.")*.

[548] *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390 **[RL-097]**.

[549] *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390 **[RL-097]**.

[550] *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 454 **[CL-030]**: "[T]*he minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct … involves a lack of due process leading to an outcome which offends judicial propriety.*"

[551] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**.

[552] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 219 **[CL-060]**.

(2) *Neustar's allegations on a misuse of administrative powers are meritless and cannot amount to a breach of due process*

350. Applying the above standard, Neustar's allegations on an alleged misuse of administrative powers which would amount to a breach of dues process should be dismissed.

351. *First*, as stated above, the due process requirement under Article 10.5 of the TPA is limited to instances of denial of justice. On their face, Neustar's allegations that there was a misuse of administrative powers have nothing to do with a denial of justice and therefore cannot amount to a breach of due process.

352. *Second*, even if the due process requirement under the FET standard of the TPA could apply to other procedural irregularities than denial of justice, Neustar's allegations would still fail. A breach of due process requires an outcome which offends judicial propriety. Yet Neustar provides no explanation as to how the alleged misuse of administrative powers it complains about has led to such an outcome.[553] This is unsurprising - Neustar itself does not seem to believe that there was a misuse at all. Indeed, Neustar's allegation on this point is that "***if it could*** *be said that the refusal to negotiate and extend the Concession was an administrative action, such action was used for improper purposes*."[554] However, such a refusal is clearly not an administrative action but only contractual faculty as per the terms of the 2009 Contract: 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.*"[555] As seen above, the decision not to renew was a purely contractual act, which did not involve the use of State powers and therefore did not entail the adoption of a specific administrative act.[556]

(3) *Neustar's allegations that Colombia failed to act in a transparent and candid manner are baseless*

353. Neustar's allegations that Colombia failed to act in a transparent and candid manner are equally baseless.

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553 Tellingly, the awards relied on by Claimant in relation to purported misuses of administrative powers were not rendered in relation to due process claims under the FET standard: *ADC Affiliate Limited et al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 **[CL-061]** (the award was rendered in relation to expropriation allegations, as recognised by Claimant itself in its Memorial at p. 102, fn. 303); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 **[CL-044]** (in the words of the tribunal in *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1 (UNCITRAL), Final Award, 5 June 2020, para. 359 **[RL-098]**: the *Metalclad* tribunal "*did not expressly examine a lack of due process claim*", but rather considered that Mexico had breached the FET for failing to ensure a "*transparent and predictable framework*" to the investor); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 28 July 2000 **[CL-058]** (in which the tribunal analysed the government's alleged misuse of powers in relation to the claimant's "*fair expectations*" and not in relation to due process).

554 Memorial, para. 216.

555 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 17 **[C-0017]**.

556 Neustar also seems to suggest that it was improper that the decision not to renew the 2009 Contract be taken by the President rather than MinTIC (Memorial, para. 216). However, this allegation is factually incorrect since, as evidenced in Section 4.1(b)(ii)(2) *supra*, the decision was taken by the MinTIC.

354. *First*, the concept of transparency is not part of the minimum standard of treatment. Not only is the TPA limited to instances of denial of justice, but numerous tribunals assessing claims under the minimum standard of protection have reached this conclusion. For instance, in *Cargill*, the tribunal discarded allegations that the FET minimum standard encompasses a general duty of transparency, being unconvinced that the claimant had shown the concept constituted "*an independent duty under customary international law*".[557] Similarly, a 2004 OECD Working Paper specified that "*transparency was a relatively new concept not generally considered a customary international law standard*"[558]. The 2012 UNCTAD Report on the FET standard likewise recognized that the attempt to include transparency within the scope of the standard has generated "*concern and criticism*" and that the concept may not be said "*to have materialized into the content of fair and equitable treatment with a sufficient degree of support*".[559] Therefore, Neustar's "transparency" allegations should be dismissed on this basis alone.[560]

355. *Second*, even assuming (*quod non*) that the concept of transparency would fall within the scope of the FET standard of Article 10.5, Neustar's allegations would still need to be rejected. Indeed, contrary to Neustar's suggestions that there exists a "*broad obligation of transparency*"[561], investment tribunals having applied or referred to this concept have set out a high threshold.[562] Only a 'manifest' or 'complete' lack of transparency could amount to a breach of the standard.[563] For example, the tribunal in *Saluka v. Czech Republic* stated that the investor could expect that the host State shall not "*manifestly violate*" the requirement of transparency.[564] Similarly, in *RWE v.*

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557 *Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 294 **[CL-018]**. *See also*, *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, para. 231 **[CL-033]** (in which the tribunal found that "*a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of Metalclad rightly concluded*").

558 OECD, 'Fair and Equitable Treatment Standard in International Investment Law', *OECD Working Papers on International Investment 2004/03* (2004), p. 37 **[RL-099]**.

559 UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 63 **[CL-043]**.

560 Neustar misleadingly attempts to rely on *Metalclad* to suggest that such obligation exists. However, the component of the award on this point was set aside in judicial review: *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision of the Supreme Court of British Colombia on the challenge by the Petitioner 2001 BSC 664, 2 May 2001, paras. 68-71 **[RL-100]**. Moreover, Neustar's account of the tribunal's finding in *Windstream* is distorted. Whilst the tribunal accepted that the host State's actions could have been more transparent, it found this insufficient on its own to breach the FET standard (*Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22 (UNCITRAL), Award, 27 September 2016, para. 376 **[CL-031]**: "[W]*hile the conduct of the Ontario Government during the period leading up to the moratorium could have been more transparent, and although Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project, the Government's evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects*.").

561 Memorial, para. 220.

562 C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles (Second Edition)*, Chapter 7: 'Treatment of investors' (2017), para. 7.207 **[CL-056]** (in which the authors explain that tribunals must seek to identify whether the State's failure to act transparently "*is fundamental, in the sense that it is indicative of either a larger failure in the fair operation of the regulatory system or a lack of good faith or arbitrary decision-making directed against the particular investor*").

563 *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**.

564 *Saluka Investments B.V. v. Czech Republic,* PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, para. 307 **[CL-049]**.

Spain, the tribunal saw no reason why a lower threshold would apply in the context of transparency, since the applicable treaty imposed a high threshold for breaches of the FET standard.[565]

356. In line with this, tribunals have considered that transparency entails basic transparency requirements, such as that documents and regulations be readily accessible.[566] However, this concept does not require host States to act under "*complete disclosure*". As explained by the tribunal in *Urbaser v. Argentina*:

> *The host State's handling of matters in transparency cannot mean that it has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities. Investors must have trust in the host State's best efforts to sustain their operation on this State's territory.*[567]

357. In light of this standard, Neustar's allegations that Colombia lacked transparency during its decision not to renew the 2009 Contract or the 2020 Tender Process cannot be reasonably sustained.

358. Indeed, the record shows that here was no lack of transparency (let alone a "*complete one*") in relation to the decision not to renew the 2009 Contract. Following Neustar's initial request to have the contract renewed, Colombia clarified to Neustar that the renewal of the 2009 Contract was only an option (and not an obligation) and that it was also considering launching a public tender process.[568] Colombia exchanged numerous communications with .CO Internet (more than 15 official letters from .CO Internet's initial request of 20 September 2018) and had various meetings on the question with .CO Internet and/or Neustar throughout the process: notably, on 11 February 2019, MinTIC officials met with .CO Internet and Neustar representatives, and clearly explained that "*the potential renewal contemplated by the current contract is only one of the alternatives that this Ministry is in the process of analysing with the goal of securing the Nation's best interest.*"[569] Once the decision not to renew the 2009 Contract was formalized, following the Advisory Committee's meeting of 18 March 2019,[570] it was communicated to .CO Internet through an official MinTIC communication of 10 April 2019.[571] While, as a reminder, the decision not to extend was Colombia's clear contractual prerogative under the 2009 Contract, the supporting documents for Colombia's decision, including the Advisory Committee minutes, were still made available to .CO Internet. Similarly, the ITU Report, which confirmed Colombia's decision and served as a basis for

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565 *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 660 **[RL-101]**.

566 *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, para. 164 **[RL-102]**.

567 *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 628 **[RL-103]**.

568 Letter from MinTIC to .CO Internet of 22 November 2018 **[C-0029]**; Letter from MinTIC to .CO Internet of 15 February 2019 **[C-0031]**; Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007]**; First Witness Statement of Iván Darío Castaño Pérez, para. 32 **[RWS-02]**.

569 Email chain between MinTIC and .CO Internet of 6 March 2019 **[R-0007].**

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

571 Letter from MinTIC to .CO Internet of 10 April 2014 **[C-0044]**.

the preparation of the 2020 Tender Process, was made publicly available by MinTIC. Neustar's allegations that it was kept on the dark during this process must therefore be dismissed.

359. The same conclusion can be reached as regards the 2020 Tender Process. As described above,[572] Neustar's speculative allegations that the Minister was having secret meetings with Afilias to favour them in the process and that the 2020 Terms of Reference were tailor-made for Afilias are plainly inaccurate and constitute merely an attempt from Neustar to try to cast doubt on Colombia's actions and fabricate its claim. Indeed, the record shows that the 2020 Tender Process was carried out transparently throughout.

360. As Ms. Luisa Trujillo, who was directly in charge of overseeing the 2020 Tender Process, confirms, a public procurement process such as the one at hand is highly regulated, and notably involves extensive back-and-forth with the proponents who have ample opportunity to submit comments to the tender documents.[573] As seen above, MinTIC responded comprehensively to the several rounds observations submitted by all interested parties. In fact, .CO Internet itself engaged fully in the process, *inter alia* by submitting several rounds of observations to the tender documents, several of which were taken into account by MinTIC.[574] Further, all corresponding documents and actions taken by MinTIC or interested individuals in relation to the 2020 Tender Process were logged on a comprehensive State procurement platform, SECOP II, to which .CO Internet and other proponents had full access at all relevant times.[575]

361. Accordingly, Neustar's allegations that Colombia lacked transparency must fail.

(4) *Neustar's allegation that Colombia failed to implement a mechanism which would have given Neustar the opportunity to convey its concerns is groundless*

362. Claimant claims that Respondent failed to "*consult with Neustar and .CO Internet and to give them the opportunity to address any issues of concern*" in relation to Respondent's refusal to negotiate and the tender.[576] On this basis, Neustar contends that Colombia failed to comply with its obligation to establish a mechanism to raise claims against actions taken or about to be taken by a host State, and thus violated due process.[577]

363. Again, these allegations are untenable.

364. *First*, Claimant misrepresents what the requirement of due process entails. The cases on which it relies specify that what this standard requires is only for the State to make available legal

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572 *See* paras. 129 *supra.*
573 First Witness Statement of Luisa Trujillo, para. 29 **[RWS-02]**.
574 *See* paras. 132 *supra.*
575 First Witness Statement of Luisa Trujillo, para. 30 **[RWS-02]**. *See also*, paras. 135 *supra.*
576 Memorial, para. 223.
577 Memorial, paras. 222 and 223.

mechanisms that would allow an investor to challenge its actions. It does not entail for the State to have endless discussions with the investor as Neustar seems to imply. For example, in *ADC v. Hungary*[578] the tribunal only referred to the need to provide "*some basic legal mechanisms*" to investors.[579] Likewise, the tribunal in *Thunderbird v. Mexico*[580] noted that basic legal mechanisms had been provided to the investor.[581] In fact, it even found that "[t]*he administrative due process requirement is lower than that of a judicial process*",[582] and that therefore irregularities in administrative mechanisms do not suffice to constitute a violation of due process, in the absence of evidence that they are "*so manifestly arbitrary or unfair as to violate the minimum standard of treatment*".[583]

365. *Second,* there were legal mechanisms available to Neustar or .CO Internet to raise claims in relation to both the decision not to renew the 2009 Contract and the 2020 Tender.

366. Regarding the decision not to renew the contract, if Neustar wished to challenge it because it considered that the MinTIC had an obligation to negotiate and renew the Contract, it had contractual avenues available. First, .CO Internet could have brought commercial arbitration proceedings under the arbitration clause of the 2009 Contract;[584] however, it decided not to do so, presumably as any contractual claims were bound to fail in light of the unambiguous language of the contract itself. Similarly, in the present proceedings, Neustar decided to drop its claims based on the 2009 Contract (which it originally alleged constituted an "*investment agreement*" under the TPA). Moreover, Neustar also fails to mention that it did try to challenge the decision through the Council of State proceedings.[585]

367. As regards the 2020 Tender Process, Neustar's allegations are equally surprising: Neustar had ample opportunities to submit comments to MinTIC regarding the conduct of the tender process, which it did, and its observations were responded to comprehensively by MinTIC. What is more, as seen above MinTIC actually proceeded to implement some of Neustar's suggested amendments to the tender documents, including first and foremost the 2020 Terms of Reference.[586] In any event, Neustar also had numerous legal mechanisms available if it had wished to challenge the results of the 2020 Tender Process under Colombian law. However, Neustar chose not make use of these

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[578] Cited at Memorial, para. 222.

[579] *ADC Affiliate Limited et al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 435 **[CL-061]**.

[580] Cited at Memorial, para. 223.

[581] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 198 **[CL-059]**. Contrary to Claimant's allegations at para. 223 of the Memorial, in this finding the *Thunderbird* tribunal did not hold that the host State "must" give an investor "*full opportunity to be heard and to present evidence*" – it only noted that this had effectively been done on the facts.

[582] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006**,** para. 200 **[CL-059]**.

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

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

[585] *See* Section 2.8(b) *supra*.

[586] *See* para. 126 *supra*.

mechanisms; rather, it even expressed its satisfaction with the results of the 2020 Tender Process when it concluded with the award of the 2020 Contract to .CO Internet.[587]

368. In conclusion, for all the above reasons Neustar's allegations must fail.

(iv) ***Neustar's claims based on alleged legitimate expectations go beyond the minimum standard and are in any event groundless***

369. Claimant further alleges that Respondent violated its obligation to grant FET under the minimum standard of treatment due to a violation of its alleged legitimate expectations that Colombia would negotiate and renew the 2009 Contract.[588] These allegations must however fail as they are out of the scope of the minimum standard of treatment (**1**) and Colombia's conduct could not have given rise to any such legitimate expectations (**2**).

(1) *Neustar's claims based on alleged legitimate expectations go beyond the minimum standard of treatment*

370. Preliminarily, Neustar's claims regarding its alleged legitimate expectations must fail as they do not fall within the limited scope of Article 10.5 of the TPA.

371. As stated above, this article expressly limits the standard of FET to the minimum standard of treatment under customary international law. Yet, the concept of legitimate expectations is not a component element of the customary minimum standard of treatment that can give rise to an independent host State obligation.[589] As noted by the United States in *Eli Lily v. Canada*:

> *The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.*[590]

372. Tellingly, as of today no NAFTA tribunal has found a breach of the minimum standard of treatment on the sole basis of a repudiation of legitimate expectations.[591] In fact, the United States have

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

588 Memorial, para. 225.

589 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152 **[RL-086]** (produced as CL-019 – in which the tribunal clearly explained that representations by the host State were only a "*relevant factor*" to assess whether treatment breaches the FET minimum standard); *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]** (in which the tribunal found that "*in applying* [the FET] standard it is relevant that the treatment is in breach of representations made by the host State"); *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17 (UNCITRAL), Award, 24 March 2016, para. 502 **[CL-020]** (in which the tribunal "[shared] *the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.*").

590 *Eli Lilly and Company v. Canada,* ICSID Case No. UNCT/14/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 18 March 2016, para. 13 **[RL-104]**.

591 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), Chapter 3: 'The Substantive Content of Article 1105', pp. 159-160 **[RL-84]**.

consistently stated that they are "*aware of no general and consistent State practice and* opinio juris *establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations*".[592] It can therefore concluded that "*there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations*".[593]

373. Accordingly, the investor's expectations about its investment can impose no obligations on the State under the minimum standard of treatment. As noted by the ad hoc Committee in *MTD v. Chile*, the host State's obligations are limited to those set out in the applicable treaty and do not derive from any expectations the investor may have had:

> [T]*he TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.*[594]

374. This conclusion is all the more justified in the present case that Article 10.5 of the TPA expressly provides that the concept of FET under the treaty i) does "*not create additional substantive rights*" and ii) only extends to the treatment accorded to covered investments (and not investors). By definition, an investment cannot have any legitimate expectations only an investor can.

375. Accordingly, Neustar's allegations that Colombia breached the FET standard under the treaty by frustrating its legitimate expectations must be discarded from the outset as they go beyond the scope of Article 10.5 of the TPA.

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592 *See notably*, *Eli Lilly and Company v. Canada,* ICSID Case No. UNCT/14/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 18 March 2016, para. 13 **[RL-104]**; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 21 June 2019, para. 38 **[RL-079]**; *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 40 **[RL-078]**; *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020, para. 24 **[RL-105]**. In these sets of submissions, the United States add that "*an investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.*" In *Grammercy* and *Omega*, the United States further add that "*the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result*". (*Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (UNCITRAL), Submission of the United States of America as Non-Disputing Party, 21 June 2019, para. 38 **[RL-079]**; *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020, para. 24 **[RL-105]**).

593 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. 160 **[RL-084]**.

594 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67 **[RL-106]**.

376. In order to circumvent this hurdle, Neustar misleadingly tries to rely on a number of cases to suggest that tribunals applying the minimum standard have "*consistently recognized*" considered that a State's repudiation of reasonable expectations could amount to a breach this standard.[595] However, an examination of these cases shows that such presentation is plainly incorrect:

- Neustar cites *BG v Argentina*[596] and *CMS v. Czech Republic,*[597] but these cases are of no relevance since the treaties in question did not link the FET to the minimum standard of treatment;

- In *Mobil*[598] and *Waste Management (II)*,[599] the tribunals did not consider that legitimate expectations were a standalone component of the FET minimum standard under NAFTA – they only considered that legitimate expectations could be a potential "*relevant factor*" against which other breaches may be analysed;

- In *Metalclad v. Mexico*,[600] the award was issued before the authoritative NAFTA Free Trade Commission's 2001 note of interpretation,[601] which explicitly stated that the obligation to grant FET under the minimum standard of treatment does not go beyond the content of the customary international law minimum standard of treatment – as such, *Metalclad* is irrelevant to determine whether the repudiation of legitimate expectations can suffice to breach the NAFTA's FET standard;

- In *Glamis Gold*,the tribunal presented the failure to protect an investor's expectations as a way to "exhibit" breaches relating to actual components of the FET as laid down in *Neer*, such as denial of justice or protection against arbitrariness.[602] This award can therefore hardly be relied on to claim that tribunals have consistently found legitimate expectations to be a standalone component of the FET minimum standard.[603]

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[595] Memorial, para. 226.

[596] *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, UNCITRAL, 24 December 2007 **[CL-062]**, cited at Memorial, para. 226.

[597] *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2004 **[CL-065]**, cited at Memorial, para. 228.

[598] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4,* Decision on Liability and on Principles of Quantum, 22 May 2012*,* para. 152 **[RL-086]** (produced as CL-019), cited at Memorial, paras. 226 and 229.

[599] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**, cited at Memorial, para. 226.

[600] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 99-100 **[CL-044]**, cited at Memorial, para. 229.

[601] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001 **[RL-077]**.

[602] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 621 **[CL-017]**, cited at Memorial, para. 266.

[603] *Chemtura* and *Merrill & Ring* (both cited at Memorial, para. 229) are also irrelevant to claim that the repudiation of legitimate expectations can amount to a breach of the FET minimum standard. In *Chemtura*, the tribunal relevantly found no breach of Article 1105 of the NAFTA despite the many "legitimate expectations" invoked by the claimant (*Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, PCA Case No. 2008-01 (UNCITRAL), 2 August 2010, paras. 112, 164, 194 **[CL-048]**). This is not shocking, since the tribunal expressly stated that its analysis of the facts would be made in light of the customary international law minimum standard of treatment (*Chemtura*, para. 121), which does not include legitimate expectations as a standalone component of the FET. As regards *Merrill & Ring*, the tribunal did not discuss whether such expectations were sufficient on their own to amount to a breach of the FET

377. Therefore, since legitimate expectations are not a component of the FET minimum standard that can give rise to an independent obligation from Colombia under Article 10.5 of the TPA (and Neustar has not proven otherwise), Claimant's claim in relation to alleged legitimate expectations must be rejected without further consideration.

(2) *In any event, Colombia's conduct did not create legitimate expectations on which Claimant could now rely*

378. Even assuming, *quod non*, that legitimate expectations could be part of the FET standard under the TPA, Neustar's claim would still fail.

379. Neustar tellingly omits to set out all of the conditions that have to be met by an investor for its alleged expectations to be granted protection.

380. *First*, it is well established that only legitimate expectations resulting from a clear and specific conduct of the State towards the investor could be taken into account.[604]

381. *Second*, the investor must prove that it relied on such conduct when making its investment and that such expectations were objectively legitimate and reasonable.[605]

382. *Third*, the investor must show that the host State subsequently repudiated these representations thereby causing damages to the investor.[606]

383. In the present case, Claimant fails to fulfil any of the first two elements and therefore its claims on an alleged legitimate expectations must fail at this stage of the proceedings, thereby discrediting

minimum standard – in fact, it found no breach of the standard at all, be it on the basis of a lower threshold in favour of the investor or of a higher threshold in favour of the host State (*Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, paras. 219 and 266 **[CL-033]**).

604 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 799 and 802 **[CL-017]** (in which the tribunal sought to find "*the type of specific inducement necessary to create the duty that is a prerequisite to any breach of Article 1105 by repudiation of investor expectations*"); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 547 **[RL-087]** (in which the tribunal found that, to be able to give rise to legitimate expectations, a "*promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form.*"); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 217 **[CL-037]**; *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04 (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015, para. 589 **[CL-026]**.

605 *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]** ("*which were reasonably relied on by the claimant*"); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 (produced as CL-019), para. 152 **[RL-086]** (in which the tribunal sought to find out whether the host State had made representations which "*by reference to an objective standard, reasonably relied on by the investor*"); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340 **[CL-063]** ("*To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment*").

606 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, paras. 152 and 154 **[RL-086]** (produced as CL-019); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 22, 802 and 811 **[CL-017]**; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 688 **[CL-077]**.

any attempt by Neustar to demonstrate damages caused by the purported repudiation of its 'expectations' later on,[607] as set out in sections (**i**) and (**ii**) below.

i. Neustar fails to show that Colombia engaged in specific conduct or representations showing that the 2009 Contract would be renegotiated and renewed

384. Investment tribunals (including those on which Neustar seeks to rely) have continuously held that legitimate expectations must be based on specific commitments or assurances from the host State to the investor.[608] As noted by the tribunal in in *Infracapital v. Spain*, the host State's assurances or representations "*must be **clear and specific** in order to generate an **objective expectation** and **not a subjective perception** of the content and scope of a purported legal commitment applicable to a plurality of people*".[609]

385. Therefore only commitments "*generated by **specific undertakings** made by a host State to induce a specific investor to make an investment*" can lead to a breach of legitimate expectations while "*commitments based on **legislation of general application***" cannot.[610]

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607 If, *par extraordinaire*, these proceedings were to reach a damages phase, Respondent notes that, contrary to Claimant's allegations, Claimant will have to go through the process of establishing causation between its specific alleged harm and Respondent's alleged omissions/actions (be it in relation to legitimate expectations or other alleged breaches). Neustar cannot evade this requirement simply by making unsubstantiated declarations that "*causation for these wrongful actions are demonstrated in full. Rather than have an extension of the ten-year concession on terms somewhat similar to the existing Concession, Neustar was forced to submit an unfavorable bid for a five-year Concession*" (Memorial, para. 237).

608 *Infracapital F1 S.A.R.L. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 572 **[RL-107]**; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 799, 802 **[CL-017]**; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 688 **[CL-077]**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 547 **[RL-87]**; *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, para. 150 **[CL-033]**; *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 241 **[RL-108]**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 361 **[CL-063]**; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 9.10 **[CL-064]**; *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04 (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015, para. 589 **[CL-026]**; *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 217 **[CL-37]**.

609 *Infracapital F1 S.A.R.L. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 572 **[RL-107]**.

610 *Infracapital F1 S.A.R.L. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 565 **[RL-107]**. In order to avoid the hurdle of demonstrating a specific commitment, Neustar refers to a finding in *Merrill & Ring*, in which the tribunal noted that an investor may "*have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives"* without representations by the government (*Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, para. 233 **[CL-033]**, cited at Memorial, para. 227). However, this assertion was only made in one of the two scenarios (the lower threshold scenario) analysed by the tribunal when discussing legitimate expectations (*Merrill & Ring,* para. 246). In the higher threshold scenario, the tribunal made no conclusions, as it was "*faced with a complete absence of evidence of any representation by Canada to the Investor*" (*Merrill & Ring,* para. 242). Since the tribunal decided not to side with either one of these scenarios in the absence of proven damages, the finding in the first scenario on which Claimant seeks to rely is entirely inconclusive (*Merrill & Ring,* para. 266). Neustar's further attempts to rely on *Metalclad* and *Chemtura* (Memorial, para. 229) to avoid having to show a specific commitment by Colombia must also fail. As already stated, *Metalclad* is irrelevant since it was rendered before the NAFTA Free Trade Commission's 2001 note (NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001 **[RL-077]**). Moreover and in any event, the tribunal in *Metalclad* specifically referred to "*representations of federal officials*" and direct

386. It is thus clear that, to establish conduct or representations capable of generating legitimate expectations, Neustar would need show that Colombia engaged in specific commitments that a renewal of the 2009 Concession would be renegotiated and granted. However, Neustar has blatantly failed to establish any such commitment from Colombia.

387. Indeed, none of the three factors invoked by Neustar to explain the basis of its purported expectations constitute a specific and unambiguous commitment from Colombia to renew the 2009 Contract:

- *First*, Claimant refers to an alleged practice from Colombia to renew concessions. Even leaving aside that this alleged practice cannot trump the clear contractual terms of the 2009 Contract, it will be demonstrated below at Section 4.2(b) that the comparators that Neustar points to are not in 'like circumstances' to Neustar, and that in any event there was no such discriminatory treatment. Additionally, in *ADF v. United States*, the tribunal ruled that the refusal by the US government to follow pre-existing case law and apply it to the investor could not amount to an unfair or unreasonable treatment.[611] If an established legal practice (such as case law in a Common Law precedent-based jurisdiction) did not suffice to generate legitimate expectations, it seems only logical that an alleged factual practice does not amount to specific conduct likely to give rise to legitimate expectations.

- *Second*, Claimant refers to Article 2 of Law 1065 of 2006. Claimant's allegations on this point are however particularly surprising as on its face this article does not provide that such a contract "*shall*" be renewed; it only provides that "*the duration of the contract may be up to 10 years, extendable only once, for a period equal to the initial one*".[612] Further, as seen above, automatic renewal of public contracts has long been prohibited under Colombian law, notably in light of the general principles of transparency and equality.[613]

- *Third*, Neustar refers to the terms of the 2009 Contract. However, a cursory examination of Article 4 suffices to establish that Colombia did not make any specific commitment to renew the contract. On its face this clause only provides that "*the agreed duration **may** be extended*"[614].

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discussions between the investor and federal officials (*Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 88 and 89 **[CL-044]**). As regards *Chemtura,* Claimant conveniently omits that the investor's legitimate expectations claims were analysed in light of specific representations made by the respondent, such as letters key elements in a Withdrawal Agreement and discussions (*Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, PCA Case No. 2008-01 (UNCITRAL), 2 August 2010, paras. 20, 166 and 164 **[CL-048]**).

611 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 189 **[CL-025]**.

612 Law 1065 of 29 July 2006, Art. 2 **[C-0009]**.

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

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

388. As Claimant has entirely failed to show any specific commitment from Colombia, its allegations that Colombia's conduct generated an expectation that the 2009 Contract would be renewed (and thus that such a renewal would be negotiated) must be dismissed. This is all the more so that, as explained above, Neustar's disappointment of not having the 2009 Contract renewed might in reality result from the transaction it passed with Arcelandia in 2014. However, these dealings are unconnected to Colombia and the present proceedings should not be used by Neustar as a tool to make up for this arrangement.

ii. Neustar fails to show that it reasonably relied on Colombia's alleged conduct or representations when it made its investment

389. Even if the above factors could have generated an expectation, *quod non*, Neustar would still need to show that it relied on such conduct at the time of its investment and that its expectations were objectively legitimate and reasonable.[615] As stated by the tribunal in *Investmart v. Czech Republic*:

> [A]*lthough an investor's expectation is subjective, i.e., what the investor believed to be the import of its dealings with government officials on which it claims to have relied, for the Tribunal,* ***the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances****. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim.*[616]

390. In the present case, Neustar has provided no evidence that it relied on the possibility of renewing the 2009 Contract when it decided to enter the contract – its legitimate expectations claim can thus be dismissed on this sole basis. Quite to the contrary, it appears that Neustar was well aware that the renewal was only a possibility.[617]

391. If that were not enough, Neustar claim would also in any event have to be rejected as Colombia's conduct could not have given rise to a reasonable or legitimate expectation.

392. As noted by the 2012 UNCTAD Report, "[i]*n order to avoid an overbroad reading of the FET standard by reference to legitimate expectations, several awards have sought to identify factors*

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615 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paras. 621, 627 and 799 **[CL-017]**; *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 217 **[CL-037]**; *Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 228 **[RL-076]**; *Invesmart B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 250 **[RL-109]**; *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 **[CL-027]**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152 **[RL-086]** (produced as CL-019); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340 **[CL-063]**.

616 *Invesmart B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 250 **[RL-109]** (emphasis added).

617 *See* Section 2.2(c)(ii) *supra. See also*, H. Zamora, 'The more than USD 350 million fight for the .co domain', *El Tiempo*, 25 November 2019 **[R-0005]**.

that delimit the scope of such expectations".[618] To be legitimate and reasonable, the expectations of an investor must "*be grounded in reality, experience and context*".[619]

393. In this sense, when assessing the reasonableness of the investor's reliance on alleged expectations, the tribunal in *Duke Energy v. Ecuador* notably stressed the need to consider all the circumstances:

> *To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.*[620]

394. In the present case, it would not have been reasonable for Neustar, a sophisticated foreign investor, to expect at the time it made its investment that the 2009 Contract would have been renewed (and thus that the MinTIC would have negotiated such renewal). This is evidenced by the following compelling facts:

- *First*, as already demonstrated Law 1065 and the 2009 Contract unambiguously provide that the renewal was only a possibility, not an obligation.[621]

- *Second*, it would not have been reasonable to expect such a renewal of the 2009 Contract in light of the fact that automatic renewals are prohibited under Colombian law and this was already the case when Neustar made its investment in 2009 and 2014.[622] In fact, this is recognised in the legal opinion that the Claimant itself provided to the MinTIC on 27 December 2019.[623]

- *Third*, such expectation would not have been reasonable in light of the clear imbalance between the royalties perceived by Neustar (93% of the proceeds) and the revenues perceived by Colombia (7% of the proceeds), especially in relation to a public interest asset which proved to be increasingly profitable over the years. The record shows that Claimant was perfectly aware of this, particularly when it acknowledged that the terms of the 2009

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618 UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 67 **[CL-043]**.

619 UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012), p. 67 **[CL-043]**.

620 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340 **[CL-063]**.

621 Law 1065 of 29 July 2006, Art. 2 **[C-0009]**; Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 4 **[C-0017]**.

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

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

Contract would in any event need to be renegotiated in light of the dynamism of the domain name industry.[624]

395. Accordingly, Colombia's actions could not have given rise to a reasonable and legitimate expectation and Neustar's claims must also be dismissed on this basis.

396. More generally, Claimant has failed to show any violation of Respondent's obligation to grant FET under Article 10.5 of the TPA and therefore its claims must be entirely rejected.

4.2 Claimant fails to state a viable claim for discriminatory treatment under Articles 10.3 and 10.4 of the TPA

397. In its Memorial, Neustar alleges that it was treated less favourably than other domestic and foreign investors in that it was not able to negotiate and obtain a renewal of the 2009 Contract.[625] Based upon an alleged practice by Colombia of renewing concessions, Neustar claims that it was discriminated against and that Colombia breached Articles 10.3 and 10.4 of the TPA.

398. Investment treaties typically prohibit nationality-based discrimination of investors through two types of clauses: National Treatment and most-favoured nation ("**MFN**") clauses.[626] Both are aimed at protecting against discrimination between either foreign investors and local investors, or between foreign investors of different nationalities, respectively, and both can be found in the TPA.

399. Article 10.3 of the TPA provides for National Treatment protection as follows:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.*

400. Article 10.4 of the TPA provides for MFN protection in almost identical terms:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition,*

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

625 Memorial, para. 253.

626 A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), Chapter 5: 'Most-Favoured-Nation Treatment', para. 5.1 **[RL-110]**.

> *expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

401. As correctly observed by the United States in their non-disputing party submission in *Seda v. Colombia*, it follows from the above-cited provisions that "[t]*he requirements for establishing a breach of Most-Favored-Nation Treatment ("MFN") under Article 10.4 (of the TPA) are the same as for establishing a National Treatment breach under Article 10.3 (of the TPA), except that the applicable comparators are investors or investments of non-Parties*."[627]

402. Thus, for all relevant purposes, and in line with the approach taken by Neustar in its Memorial,[628] the below analysis applies to both the National Treatment and MFN claims, except where expressly stated otherwise.

403. The starting point for analysis is the subject matter – and effective scope - of the MFN and National Treatment clauses. As will be explained below, Neustar's claims do not qualify under Articles 10.3 and 10.4 of the TPA altogether and should be dismissed on this basis alone (**a**).

404. Even assuming that Neustar's claims did fall within the purview of said articles, Neustar would still have to meet all the requirements for establishing discriminatory treatment under the TPA. These uncontroversial requirements (purportedly relied upon by Neustar) make up the following three-limb test: the discriminatory treatment claim must be based on a comparison with other investors or investments "in like circumstances" (**b**); claimant must have been afforded less favourable treatment as a result of its nationality, whether *de jure* or *de facto* (**c**); and the treatment afforded must not be justified by a rational public policy objective (**d**).[629]

405. Claimant plainly fails on each of these limbs.

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627 *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 55 **[RL-78]**.

628 Memorial, pp. 109-119.

629 *See for instance, Archer Daniels v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, paras. 196, 205 **[CL-071]**; *Total v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 212 **[RL-111]**; *United Parcel Service v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, paras. 184, 187 **[CL-076]**.

(a) Claimant's allegations do not fall within the MFN or National Treatment clauses of the TPA

406. Similar to the general requirement that a State measure be "*adopted or maintained*" by a Party for Chapter 10 of the TPA to apply in the first place,[630] there can be no breach of Article 10.3 or Article 10.4 of the TPA without a qualifying "*treatment*".[631]

407. The authorities cited by Claimant itself emphasize that "[n]*ot all treatment given by a host country to foreign investors falls under the scope of the MFN provision. In order to be covered by the MFN clause, the treatment has to be the* ***general treatment usually provided*** *to investors from a given foreign country.*" Similarly, "treatment" for purposes of MFN and national treatment clauses has been equated to "*the* ***aggregate of all the regulatory measures*** *applied to (an investor)*".[632]

408. This restriction on the meaning of "treatment" is axiomatic to the purpose of the MFN and national treatment clauses, which is to "*prohibit nationality-based discrimination and ensure effective* ***equality of competitive opportunities***".[633] These clauses have thus clearly not been conceived as targeting individual decisions taken by a State in a contractual capacity.

409. Practically speaking, this means for example that "*if a host country granted special privileges or incentives to an individual investor in an investment contract between it and the host country (so-called "one-off" deals), there would be no obligation under the MFN clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract*".[634]

410. It is therefore not surprising that, among all the cases cited by Neustar, virtually none involves decisions similar to the ones complained of by Neustar (i.e. purely contractual decisions). Rather, the "treatment" targeted under said case law is, in most cases, a tax measure or the passing of a law.[635]

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[630] TPA, Article 10.1 **[C-0002]**.

[631] *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 49 **[RL-78]** ("*To establish a breach of national treatment under Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"*"). *See also, Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020, para. 6 (which contains the same wording) **[RL-105]**.

[632] *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award, 31 March 2010, para. 79 **[CL-033]**.

[633] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), Chapter 4: 'National Treatment', p. 188 **[RL-112]**.

[634] UNCTAD, 'Most-Favoured-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements,* UNCTAD/ITE/IIT/10 Vol. III (1998), p. 12 **[CL-072]**.

[635] *Archer Daniels* involved a tax exemption on domestic products (*Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 **[CL-071]**); *Feldman* involved the granting of tax rebates to local producers (*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 **[CL-070]**); *Methanex* involved California's ban on a toxic product (*Methanex Corporation v. United States of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 **[CL-050]**); both *Cargill* and *Corn Products* involved taxes imposed by the Mexican authorities (*Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 **[CL-018]**; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 **[CL-074]**).

411. In the present case, Neustar expressly takes issue with Colombia's individual decision not to renew the 2009 Contract and to launch a new tender process. However, as already demonstrated above, such a decision was within the contractual prerogatives of MinTIC, which had the option of deciding either to renew the 2009 Contract or to launch a new tender process.[636]

412. It is thus clear that there is no "*treatment*" actionable under a discrimination claim. Neustar's allegations should be dismissed without further consideration as they do not fall within the scope of either Articles 10.3 or 10.4 of the TPA.

(b) **Claimant and its investments are not in "*like circumstances*" with the foreign and domestic investors cited by Claimant**

413. Even assuming, *quod non*, that a mere decision to renew or not an individual contract could be deemed as a "*treatment*" relevant to ensuring equality of competitive opportunities between foreign investors, Neustar would still have to meet the requirements for a finding of a discriminatory treatment under Articles 10.3 and 10.4 of the TPA.

414. It is not mandatory – or in fact, possible – for a State to treat all investors identically. There is, however, a simple expectation that investors "in like circumstances" should be afforded, to the extent possible, the same general treatment. As stated by the United States in its non-disputing party submission in *Omega v. Panama*,[637] this is a key element under a discriminatory treatment claim, and "*ignoring the 'in like circumstances' requirement would serve impermissibly to excise key words from the Agreement.*"[638]

415. The assessment of 'like circumstances' is evidently a fact-specific inquiry. As stated by the tribunal in the *Pope & Talbot* case with respect to the identically-worded MFN clause in NAFTA: "[i]*t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations.*" Accordingly, "*the application of the like circumstances standard will require evaluation of the entire fact setting surrounding.*"[639]

416. As acknowledged by Claimant,[640] investment tribunals have typically considered three criteria towards the assessment of "like circumstances":

- Whether the investor and the comparators are in the same "*business sector*".[641] For example, in *Archer v. United Mexican States*, the tribunal reached its conclusion that the

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636 *See* para. 82 *supra*.
637 The case is still pending.
638 *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020, para. 9 **[RL-105]**.
639 *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 75 **[RL-113]**.
640 Memorial, para. 246.
641 *See for instance, S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award, 13 November 2000, para. 250 **[CL-032]**.

claimant and the comparators were in like circumstances because "[b]*oth are* ***part of the same sector,*** *competing face to face in supplying sweeteners to the soft drink and processed food markets.*"[642]

- Whether there is a competitive relationship between the investor and the comparators.[643] For example, in its finding of like circumstances, the tribunal in the *Corn Products v. Mexico* case highlighted that "*when it came to supplying sweeteners to the soft drinks industry, their products were in* ***direct competition*** *with one another, treated both by customers and by Mexican law as being* ***interchangeable****. The purpose of the HFCS tax was avowedly to* ***alter the terms of competition*** *between them*".[644]

- Whether there is an identity of legal regime applicable to the investor and the comparators. As conceded by Neustar itself and by the United States in the *Seda v. Colombia* case,[645] "*identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the* ***regulatory framework and policy objectives****, among other possible relevant characteristics*".[646] Similarly, the tribunal in *S.D. Myers v. Canada* noted that " [t]*he assessment of 'like circumstances' must also take into account* ***circumstances that would justify governmental regulations*** *that treat (investors) differently in order to protect the public interest*".[647]

417. In the instant case, while Neustar correctly lists the criteria to be taken into account towards an assessment of "*like circumstances*", it falls far short of proving that the alleged comparators it refers to meet any of the above criteria,[648] and its claim should therefore be rejected on this basis alone.

418. *First*, Neustar's alleged comparators do not operate in the same "*economic sector*" as .CO Internet. In this regard, Neustar limits itself to arguing that it operates "*with other businesses in the telecommunications sector.*"[649] However, a more detailed analysis of the various concessions cited

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642 *Archer Daniels v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 201 **[CL-071]** (emphasis added).

643 *Archer Daniels v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, paras. 199 and 201 **[CL-071]**.

644 *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para. 120 **[CL-074]**.

645 Memorial, paras. 256 and 259.

646 *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 52 **[RL-078]**.

647 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 250 **[CL-032]**. *See also*, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 166 **[CL-073]** ("*In this regard, NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in "like circumstances under Articles 1102 or 1103*").

648 In fact, Neustar only devotes one paragraph in its entire Memorial to arguing that the comparators it has cited to meet the criteria to be considered in "like circumstances" to its investments, and provides absolutely no evidence in support of their allegations. *See* Memorial, para. 250.

649 Memorial, para. 250.

by Neustar in its Memorial reveals that these were concluded for entirely different services, which are not comparable to the service provided by .CO Internet under the 2009 Contract:

- Neustar refers to two concessions concluded by MinTIC for the operation and exploitation of national television channels, namely 'Caracol Televisión S.A.' and 'RCN Televisión S.A.',[650] as well as two concessions concluded for the provision of commercial radio broadcasting services (Cadena Melodia and Erica Alejandra Restrepo).[651] However, these are from a different "*business sector*" to domain name registry:
    - Television or radio broadcasting cannot be equated with the provision of services for the administration and operation of an internet TLD such as the .co domain. While the television services provided by the concessionaires under the contracts cited by Claimant entail the provision of content to passive end consumers, .CO Internet provides the technical infrastructure enabling end users to *register* domain names online, and therefore identify their domain names. In turn, this enables users to become content providers online.[652]
    - In addition, from a financial point of view, the business model of radio or television broadcasting and domain name administration and operation are intrinsically different: while radio or television channels mainly generate income through the sale of advertising to companies, a domain name registry derives its income from the sale of domain names to wholesalers (the registrars) or directly the end users, and the payment of a yearly fee for the continuity of the domain.[653] This fundamental difference is reflected in the financial model of the respective concessions: while for the .co domain, the State receives a share of the proceeds from the sale of domain names,[654] the different radio or television broadcasting concessions cited by Neustar all provide for a fixed payment by the concessionaire to the State.[655]

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650 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 8 **[C-0045]**; Amendment No. 4 to Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 21 January 2009 **[C-0047]**; Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Art. 8 **[C-0048]**; Amendment No. 8 to Concession No. 140 between the National Television Commission and RCN Televisión S.A., 29 October 2009 **[C-0049]**.

651 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021 **[C-0052]**.

652 *See* OECD, *Working Party on Telecommunications and Information Services: Evolution in the Management of Country Code Top Level Domain names*, 17 November 2006, p. 15 **[R-0086]**.

653 *See* OECD, *Working Party on Telecommunications and Information Services: Evolution in the Management of Country Code Top Level Domain names*, 17 November 2006, p. 15 **[R-0086]**.

654 Contract 19 between MinTIC and .CO Internet of 3 September 2009, Art. 5 **[C-0017]**; 2009 Terms of Reference (final version), Art. 4.7.3.4 **[C-0009]**.

655 Concession No. 140 between the National Television Commission and RCN Televisión S.A., 26 December 1997, Art. 8 **[C-0048]**; Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 8 **[C-0045]**, Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021, Art. 8 **[C-0052]**; Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A, Art. 6 **[C-0050]**.

- Neustar refers to two further MinTIC concessions, concluded respectively with INRED (an engineering network) for the execution of the "*sustainable universal access*" project (a social connectivity program), and Computadores para Educar (a public institution tasked with fostering connectivity in Colombia) for the implementation of digital transformation projects.[656] Leaving aside the fact that the contract with Computadores para Educar is not a concession but an agreement between two administrative institutions, it is readily apparent from the very purpose of these contracts and the nature of MinTIC's counterparties in these contracts that the selected comparators do not operate in the same business sector.

- Finally, Neustar refers to several concessions in the mining and port sectors, "*by way of further example.*"[657] Neustar however does not explain how comparators in the mining or port sector could possibly share the same business or even economic sector as internet infrastructure and services providers such as .CO Internet. This is because they are not: the services provided by these concessionaires and economic sector in which these different concessionaires operate do not have any similarities.

419. *Second*, there is no competitive relationship between the comparators cited by Neustar and .CO Internet: it is apparent from the fact that these comparators do not operate in the same "*business sector*" that the services they provide cannot be mutually replaced due to their fundamentally different nature. As seen above, the tribunal in *Corn Products* took into account the fact that the measure at issue "*alter*[ed] *the terms of competition*" between the investor and the comparators.[658] However, in the case at hand none of the alleged comparators even competed for the awarding of the .co domain operation contract. It follows that there is no actual nor hypothetical competition between .CO Internet and the alleged comparators, and Colombia's decision not to renew the 2009 Contract had no impact on the "*terms of competition*" between them.

420. *Third*, the regulatory framework of the .co domain in which .CO Internet operates is substantially different from that of the alleged comparators:

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[656] Concession No. 618 between MinTIC's Information Technology Fund and Comunicaciones and Red de Ingenierías S.A.S ("INRED"), 18 June 2019, pp. 1-2 **[C-0054]**; Amendment No. 2 and Extension No. 1 to Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar, 20 December 2019, Arts. 1-3 **[C-0056]**.

[657] Memorial, paras. 93-95, citing Addendum No. 15 to Concession No. 78-88 between CARBOCOL and Drummond, 22 January 2019 **[C-0058]**; Addendum No. 9 to Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 11 July 2016 **[C-0059]**; Amendment No. 4 to Concession No. 051-96M between the National Mining Agency and Cerro Matoso S.A., 27 December 2012 **[C-0060]**; Amendment No. 3 to Concession No. 070-89 between the National Mining Agency and Minas Paz del Río, 27 December 2012 **[C-0061]**; Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., 7 June 1993 **[C-0062]**; Addendum No. 1 to Concession No. 009 to Sociedad Portuaria Puerto Brisa S.A, 7 May 2014 **[C-0063]**; Addendum No. 4 to Concession No. 002 to Sociedad Portuaria American Port Company INC., 5 December 2013 **[C-0064]**.

[658] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para. 120 **[CL-074]**.

- In light of the uniqueness and specific features of the .co domain, it is subject to specific regulation not applicable to other economic sectors, including sectors within the broader telecommunications industry. In particular, as seen above, the 2009 Contract was concluded within the framework of a specific .co domain regulatory system, constituted chiefly of Law 1065 of 2006 (which exclusively regulates the .co domain operation, to the exclusion of any other telecommunications services),[659] completed by a series of resolutions which set out the exact administration, operation, and financial model for the .co domain.[660]

- To the contrary, other telecommunications activities are regulated by specific sectorial laws or regulations, such as Law 182 of 2005 for the television sector.[661] The Colombian regulatory framework also mentions that television and radio broadcasting activities take place through the use of the electromagnetic spectrum, unlike the .co domain which is a self-standing communication medium and infrastructure.[662]

421. In an attempt to distract from the shortcomings of its claim, Neustar argues that "*the Tribunal should find the most apt comparators where possible*."[663] However, resorting to less like comparators is only possible "*if the overall circumstances of the case suggest that they are in like circumstances*",[664] and does not in any way obviate the necessity for Claimant to satisfy their burden of identifying appropriate comparators which meet the three above criteria. In other words, the role of the tribunal is not to find, amongst all investors in a given state, what other investors are in the most like – or least unlike – circumstances, but rather to assess whether the claimant has identified valid comparators altogether, which could support a claim for discrimination.[665]

422. It follows inevitably – and essentially – from the above that "[i]*f the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established*."[666]

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[659] Law 1065 of 29 July 2006 **[C-0009]**.

[660] *See, inter alia*, Resolution 284 of 21 February 2008 (original version) **[R-0001]**; Resolution 1652 of 30 July 2008 (original version) **[R-0025]**. *See also*, Law 1341 of 30 July 2009, Art. 18, para. 20 **[C-0013]**.

[661] Law 182 of 20 January 1995, Arts. 48, 50 **[R-0087]**. For radio broadcasting, it should be noted that Law 1341 of 2009, which was a framework law for MinTIC, provided for a specific regime. *See* Law 1341 of 30 July 2009, Arts. 2, 57, Title VIII **[C-0013]**.

[662] Law 1341 of 30 July 2009 **[C-0013]**.

[663] Memorial, para. 245.

[664] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 202 **[CL-071]**.

[665] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, para. 210 **[RL-111]** (*"In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation*").

[666] *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 51 **[RL-78]**. *See also*, *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States as Non-Disputing Party, 3 February 2020, para. 5 **[RL-105]** (*"If the claimant does not identify any third-State investor or investment as allegedly being in like circumstances, no violation of Article 10.4 can be established.*").

423. Here, as seen above, Neustar fails in proving any single factor bearing upon the existence of "*like circumstances*": its claims of discriminatory treatment under Articles 10.3 and 10.4 of the TPA fail for this reason alone.

(c) Claimant was not afforded "*less favourable treatment*" than its alleged US and Colombian comparators

424. Even if, *par extraordinaire*, the various concessionaires cited by Neustar would considered to be valid comparators, Neustar would still have to demonstrate that it was, in comparison thereto, treated less favourably on the basis of nationality, whether *de jure* or *de facto*. Neustar fails to state a valid cause of action, even *prima facie,* because it does not even allege (**i**), and even less so prove (**ii**), that the decisions of Colombia afforded to it less favourable treatment than that afforded to relevant comparators as a result of its nationality.

(i) *Prime facie, there is no cause of action for discriminatory treatment, whether de jure or de facto*

425. The very purpose and *raison d'être* of MFN and national treatment obligations is to "*prohibit **nationality-based discrimination** by the host state between the host states' investors and investments and those of another*"[667]

426. Neustar itself acknowledges this overarching requirement.[668]

427. As stated by the United States in its non-disputing party submission in *Seda v. Colombia*:[669]

> *"Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in "like circumstances." It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality."*[670]

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[667] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), Chapter 4: 'National Treatment', pp. 147-151 **[RL-112]** *("International economic treaties limit nationality-based discrimination through two distinct non-discrimination treatment obligations: national and most-favoured-nation (MFN) treatment*"). *See also*, UNCTAD, 'Most-Favoured-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements,* UNCTAD/ITE/IIT/10 Vol. III (1998), p. 10 **[CL-072]** ("*In other words, the MFN standard seeks to prevent discrimination against investors from foreign countries on grounds of their nationality*.") (emphasis added); *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt,* ICSID Case No. ARB/02/9, Award, 27 October 2006, para. 126 **[RL-102]** ("*The purposes of (the national treatment clause) is to promote foreign investment and to guarantee the foreign investor that his investment will not because of his foreign nationality be accorded a treatment less favourable than that accorded to others in like situations.* […] [IThe MFN standard] *prevents competition between investors from being distorted by discrimination based on nationality considerations*.") (emphasis added)*; Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 181 **[CL-070]**.

[668] Memorial, para. 202, citing to UNCTAD, 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (2012) **[CL-043]** ("*While the national treatment and MFN standards deal with nationality-based discrimination* […]"; Memorial, para. 252 ("*A State's measures may create nationality-based discrimination de jure or de facto*").

[669] The case is still pending.

[670] *Angel Samuel Seda et al. v. Republic of Colombia,* ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 50 **[RL-078]** (emphasis added). *See also*, *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, para. 210 **[RL-111]**: "*This is*

428. It follows that differences of treatment, even between entities that are "*in like circumstances*", still have to be nationality-driven in order to be actionable under MFN or national treatment clauses.[671] This explains, very logically, why national treatment and MFN clauses target comparators of specific nationalities (either local or different foreign nationalities, respectively), and not just any differential treatment between similarly situated entities.

429. Thus, Claimant cannot merely point to an alleged difference in treatment and claim discrimination; claimant has to prove, and at the very least state a *prima facie* case that the alleged "less favourable treatment" was the result of its nationality.[672] This was made clear by the tribunal in the *Total v. Argentina* case: "*a foreign investor who is challenging measures of general application as de facto discriminatory under Article 4 of the BIT has to show a **prima facie case of nationality-based discrimination**.*"[673]

430. Discrimination can be either *de jure* or *de facto*, and it is well-established in case law that a claimant must prove at least one or the other.[674]

431. As explained by the United States in its submission in *Seda v. Colombia*: "[d]*e jure discrimination occurs when a measure on its face discriminates between investors or investments in like*

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inherent in the very definition of the term "discrimination" under general international law that: '<u>Mere differences of treatment do not necessarily constitute discrimination</u>…discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way." (emphasis added).

[671] *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, para. 211 **[RL-XXX]**: "*Moreover, the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from de iure or de facto discrimination <u>based on nationality (…)</u> different treatment between foreign and national investors who are similarly situated or in like circumstances <u>must be nationality-driven</u>*" (emphasis added).

[672] *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, para. 214 **[RL-111]**: "*the relevant criterion is not just whether a sector has been treated differently, that is worse, than some other (…) A finding of de facto discrimination in such a context would require that the claimant present a <u>prima facie case of nationality-based discrimination</u> without the host State proving that such different and less favourable treatment is not unreasonable*" (emphasis added).

[673] *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, paras. 212 and 213 **[RL-111]**. *See also*, *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 193 **[CL-071]**: "*The national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality, including both de jure and de facto discrimination."*

[674] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para. 138 **[CL-074]**: "*But the Tribunal would add that, even if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that the third requirement of "less favourable treatment" was satisfied*"; *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 209 **[CL-071]**: "*In establishing whether the Tax affords "less favorable treatment" to the Claimants, previous Tribunals have relied on the measure's adverse effects on the relevant investors and their investments rather than on the intent of the Respondent State*"; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 157 **[CL-025]**: "*The question may be raised whether the equality of treatment accorded by the Respondent to the Investor and to U.S. steel manufacturers and steel fabricators was more apparent than real, and whether less favorable treatment was de facto (though not de jure) being meted out to ADF International (…) The Investor did not sustain its burden of proving that the U.S. measures imposed (de jure or de facto) upon ADF International, or the steel to be supplied by it in the U.S., less favorable treatment vis-à-vis similarly situated domestic (U.S.) fabricators or the steel to be supplied by them in the U.S.*"

*circumstances **based on nationality**. De facto discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion **based on nationality**.*"[675]

432. It follows that, in assessing a discrimination claim, a tribunal must consider both: "*whether **the practical effect of the measure** is to create a disproportionate benefit for nationals over non-nationals; whether the measure, **on its face**, appears to favour its nationals over non-nationals who are protected by the relevant treaty.*"[676]

433. Accordingly, the authorities thus show that a link to nationality must always exist for the claim to be viable, with respect to both *de jure* or *de facto* discrimination. Claimant should therefore prove that the alleged discriminatory treatment at least has a nexus to its nationality, whether on the face of the measure or because of its practical effect.[677]

434. Stating, as Neustar does, that "*Respondent has subjected Neustar to wrongful treatment that was not applied to domestic and other foreign investors*"[678] is not sufficient, even *prima facie*, in order to sustain a National Treatment or MFN claim.

435. This one sentence assertion does not make any nexus whatsoever to Claimant's nationality.[679] It does not allege that the "*treatment*" received would have been different had it been Colombian, Swiss or any other nationality.

436. In the absence of a prima facie case showing discriminatory treatment, Neustar's claim is untenable.

(ii) ***There is no detrimental difference in treatment between Neustar and its alleged comparators***

437. Assuming, *arguendo*, that Neustar's nationality was irrelevant for purposes of MFN and national treatment protection, Neustar evidently would still need to prove that it was afforded less favourable treatment than the relevant comparators. Indeed, it follows logically from the authorities cited above that if the treatment complained of by a claimant is also afforded to national investors or foreign investors of different nationalities, the national treatment and MFN claims, respectively, must fail.[680]

438. Here, Neustar fails to prove that its alleged comparators in the telecommunications sector were afforded more favourable treatment.

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675 *Angel Samuel Seda et al. v. Republic of Colombia,* ICSID Case No. ARB/19/6, Submission of the United States of America as Non-Disputing Party, 26 February 2021, para. 50 **[RL-078]**.

676 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 252 **[CL-032]**.

677 *See for instance*, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 252 **[CL-032]** (where the tribunal made clear that the focus of national treatment analysis should be on the practical effect of the measure, including whether the measure disproportionately benefits nationals over non-nationals).

678 Memorial, para. 238.

679 Memorial, para. 253.

680 *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 November 2010, para. 215 **[RL-111]**.

439. *First*, a detailed examination of the concessions cited by Neustar reveals that these included different contractual terms regarding the possibility of renewal. Further, the renewal of these concessions did not entail significant changes to their main terms:

- The old generation television broadcasting concessions concluded with Caracol and RCN both explicitly provided that that the renewal would be done without having recourse to a new tender process, and conditioned it on the respect by the concessionaire of its contractual obligations.[681] While the financial terms were slightly modified, most provisions of the original concessions remained in force and the structure and rationale of the concessions were left untouched.[682]

- The radio broadcasting concessions concluded with Cadena Melodía and Erica Alejandra Restrepo both provided for a specific procedure for the concessionaire to request an extension of the concession, and conditioned such a renewal on the respect of a number of requisites.[683] Further, the renewal of these concessions did not lead to any modification of their financial terms.[684]

440. *Second*, it bears reminding that *in lieu* of a renewal, Neustar was nevertheless granted the operation of the .co domain under a new contract.

441. As seen above, in its very first request of renewal of the 2009 Contract, .CO Internet and Neustar had already acknowledged that, in case of a renewal of the 2009 Contract, it would be necessary to adapt its financial terms due to the dynamism of the industry.[685] In its Memorial, Neustar in fact admits that "*negotiations for extensions are required, of course, as the parties have to work out the specific terms of the extension*."[686] Once acknowledged the necessity to renegotiate the terms of a concession prior to being granted an extension thereof, one can hardly fathom how concluding a new contract that effectively has this effect, means being subject to a less favourable treatment. The distinction made by Neustar is simply illusory.

442. Thus, regardless of any nexus to Neustar's nationality, Neustar fails at proving that it was treated less favourably than the relevant comparators.

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681 Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 22 December 1997, Art. 5 **[C-0045]**.

682 Amendment No. 4 to Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., 21 January 2009, Consideration 12.1 **[C-0047]**; Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021, Art. 1 **[C-0052]**.

683 Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A. **[C-0050]**; Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021 **[C-0052]**.

684 Amendment No. 2 to Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., 21 July 2021, Art. 2 **[C-0051]**; Amendment No. 1 to Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, 4 May 2021, Art. 2 **[C-0053]**.

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

686 Memorial, para. 65.

443. Neustar's claims under articles 10.3 or 10.4 of the TPA must therefore fail for failure to state, and for failure to prove, that Colombia has treated Neustar differently than comparators, and even less so because of, or as a result of, Neustar's nationality.

(d) In any event, Colombia's decision not to renew the 2009 Contract is amply justified by a public policy rationale

444. Even if there had been a discriminatory treatment as alleged by Claimant, its claim would still fail as in any event Colombia's decision not to renew the 2009 Contract was justified by a public policy rationale.

445. Indeed, discriminatory less favourable treatment, even when it exists, cannot give rise to a claims under a national treatment or MFN clause if it bears "*a **reasonable relationship to rational policies** not motivated by preference of domestic over foreign owned investments*".[687]

446. Here, Colombia's decision not to renew the 2009 Contract was based on a public welfare objective (**i**) and it was appropriate to address said objective (**ii**).

(i) *Colombia's decision was aimed at addressing a public policy objective*

447. Here, Neustar alleges, in utmost bad faith, that there is *"no rational policy for Respondent's conduct"*.[688]

448. This allegation is plainly inaccurate. As explained in detail at paragraph [xx] *supra* regarding Neustar's claim under the TPA's fair and equitable treatment provisions, Colombia's decision not to renew the 2009 Contract and launch the 2020 Tender Process was amply justified by at least two public policy objectives:

- *First*, Colombia sought to obtain an increase in MinTIC's share of proceeds resulting from the administration and operation of the .co domain. As a reminder, these proceeds are used to foster Colombia's digital transformation policies and increase connectivity in remote areas. While Neustar alleges that this could have been achieved through a renegotiation of the financial conditions of the 2009 Contract with .CO Internet, as seen above this would have entailed a significant legal risk and potentially violate fundamental Colombian law principles of transparency and equal opportunity.[689] To the contrary, an open selection process such as the one put in place by MinTIC was fully compliant with Colombian law and carried out in a transparent manner.

- *Second*, Colombia sought to adapt the conditions of administration and operation of the .co domain to the evolving realities of the domain name industry, in order to align with best

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[687] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 78 **[RL-113]**.

[688] Memorial, para. 258.

[689] *See* para. 106 *supra.*

practices, and notably obtain an increase in MinTIC's share of proceeds. Further, Colombia also sought to develop its internal knowledge of domain names in order to foster its participation in global domain name policy-making, by increasing its participation in international internet bodies (and chiefly ICANN).

449. More generally, Neustar's allegation is further disproved by the actual results of the 2020 Tender Process, which saw an increase of MinTIC's share of proceeds from maximum 7% under the 2009 Contract to 81% under the 2020 Contract. Colombia's decision to carry out an open selection process is further validated by the fact that .CO Internet's performance under the 2020 Contract and the new ownership of GoDaddy appears to have increased. As set out at paragraph [xx] *supra*, .co domain names have resumed growing, and the revenues stemming from the operation of the domain have generally increased.

(ii) ***Colombia's decision bears an appropriate correlation to the targeted objective***

450. In its Memorial, Neustar states that "*a State does not meet this burden where it could have achieved its policy objective through non-discriminatory means*".[690]

451. Here, even if Colombia's refusal to renew the concession was, *par extraordinaire*, and in disregard of all the above-cited tests and requirements , considered to be discriminatory, it is very difficult to fathom how exactly Respondent could have otherwise addressed the issue. In fact, concluding a new contract, albeit on its own terms, is the closest alternative to renewing the concession on modified terms – which, as a reminder, was Neustar's proposal [691].

452. However, as seen above, the renewal of the 2009 Contract together with a revision of the main contractual terms could have created serious legal issues under Colombian law.[692]

453. Accordingly, MinTIC's decision not to renew the 2009 Contract and proceed with a new tender was clearly connected to the targeted objective, while taking into account applicable limitations under Colombian law.

454. For all of the above reasons, Neustar's claim that Colombia breached Article 10.3 and 10.4 of the TPA are untenable and must be rejected.[693]

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690 Memorial, para. 255.

691 Memorial, paras. 65 and 66.

692 *See* para. 106 *supra.*

693 Neustar also claims that even if Respondent has not violated this Articles, Respondent would still be in in breach of its obligation to protect confidential business information under Article 10.14 and 10.14(2) of the TPA. However, Claimant has not even attempted to demonstrate this allegation nor provided any explanation. Therefore, this is also bound to fail.

4.3 Claimant fails to state a claim that Colombia failed to protect its investment against unreasonable measures in violation of Article 4(1) of the Swiss-Colombia BIT

455. Being well aware that its allegations are meritless under the TPA, in a last attempt to fabricate an international claim, Neustar contends that, by refusing to renew the 2009 Contract, Colombia's conduct was "*unreasonable*".[694] On this basis, and "*in relation to the standards of **fair and equitable treatment**, arbitrariness, transparency, due process, and discrimination"*,[695] it alleges that Respondent violated Article 4(1) of the Swiss-Colombia BIT's prohibition of interfering with qualified investments through "unreasonable measures", which would be applicable by operation of the MFN clause of the TPA.[696]

456. This argument must plainly fail.

457. *First*, according to Article 31.1 of the VCLT, treaties must be interpreted in good faith and in accordance with their ordinary meaning in context. As noted by Prof. Douglas in his authoritative treatise,[697] the tribunal in *Telenor Mobile v. Hungary* found that, in order to interpret the scope of an MFN clause, "*what has to be applied **is not some abstract principle of investment protection in favour of a putative investor** who is not a party to the BIT and who at the time of its conclusion is not even known, **but the intention of the States who are the contracting parties**.*"[698] In fact, it is well-established that a successful invocation of MFN clauses to bypass more restrictive substantive provisions is a rarity. As already explained,[699] the TPA was drafted to expressly limit the scope of the FET standard to the minimum standard of protection, i.e. to protect the foreign investor against "*manifest*" arbitrary measures, not "*unreasonable*" ones. In fact, the Parties to the TPA emphasized the importance of this limitation in Article 10.5 of the TPA by specifying that this article "[does] *not require treatment in addition to or beyond*" the customary international law minimum standard of treatment. Therefore, the MFN clause in Article 10.4 of the TPA cannot be interpreted in the sense that Claimant alleges: Colombia and the United States could not have intended to bypass and override their express intention to limit the scope of the FET. Claimant's attempt to expand the FET minimum standard to "unreasonable" measures through the MFN clause must therefore fail.

458. *Second*, even assuming that the parties' intention in entering into the TPA could be bypassed in such a way as to apply Article 4(1) of the Swiss-Colombia BIT (*quod non*), Neustar fails to show any violation thereof. The article prohibits "*unreasonable measures or discriminatory measures*"

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[694] Memorial, para. 178.
[695] Memorial, para. 270.
[696] Memorial, paras. 266 and 270.
[697] Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 359 **[RL-114]**.
[698] *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 95 **[RL-115]**.
[699] *See* para. 355 *supra*.

impairing the "*management, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments*":[700]

- As already discussed, Neustar has failed to prove any discriminatory measures by Colombia.[701]

- Regarding unreasonable measures, Neustar itself recognises that unreasonableness requires showing measures which "*are irrational in themselves or result from an irrational decision-making process*".[702] Again, it has already been proven that Colombia acted entirely rationally when deciding to launch a new tender process.[703] This was Colombia's perfectly valid contractual prerogative, which actually resulted in the conclusion of a new contract for the operation of the .co domain more adjusted to the necessities of MinTIC and Colombia's public interest.

459. Neustar's attempt to invoke the MFN clause in Article 10.4 of the TPA in order to avail itself of having to meet the agreed standards under the TPA must therefore fail.

5. RELIEF REQUESTED

460. For the reasons set out above, Respondent hereby respectfully requests that the Tribunal:

- Decline jurisdiction in the present proceedings;

- In the alternative, dismiss all Claimant's claims in finding that Respondent has not breached its obligations under the TPA or under international law;

- Order Claimant to pay all costs incurred in connection with these arbitration proceedings, including Respondent's legal fees, expert fees, administrative fees and the fees and expenses of the Tribunal, together with pre-award and post-award interest on the amount so ordered;

- Such other and further relief as the Tribunal, in its discretion, considers appropriate.

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[700] Swiss-Colombia BIT, Article 4(1) **[CL-082]** ("*Each Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.*").

[701] *See* para. 333 *supra*.

[702] *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1. Decision on Liability, 3 October 2006, para. 158 **[RL-80]**.

[703] *See* para. 129 *supra*.

Respectfully submitted,

25 February 2022

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