INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

NEUSTAR, INC.

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/20/7)

MEMORIAL ON JURISDICTION AND THE MERITS
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1. Neustar, Inc. (**"Neustar"** or **"Claimant"**) submits this Memorial on Jurisdiction and the Merits in this arbitration proceeding against the Republic of Colombia (**"Respondent"** or **"Colombia"**) pursuant to Article 10.16 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (**"the TPA"**), Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the **"ICSID Convention"**), and in accordance with Annex B of Procedural Order No. 1 dated 9 July 2021.

I. INTRODUCTION

2. For more than ten years,[1] Neustar was an investor in and provided support for .CO Internet, a company that had been created to operate the .CO domain under a concession (the "**Concession**") granted by the Ministry of Information and Communications Technology (**"MinTIC"**), a Ministry of Respondent.

3. Starting in 2008 and ending upon the sale of .CO Internet in August 2020, Neustar had invested more than USD 60 million dollars in the development and operation of the .CO domain. These efforts included, among other things, long-term branding programs for the .CO domain (both inside of Colombia and internationally), resulting in the .CO domain becoming one of the most sought-after domains for innovators, entrepreneurs, and start-up businesses worldwide. By way of example, the following major businesses maintain .CO domains: Amazon (a.co), Apple (apple.co), Google (g.co and campus.co), Station F (stationf.co), Volvo Car Mobility (m.co), Mirror (mirror.co), Snapchat (s.co), Twitter (t.co), Taco Bell (ta.co), Brit + co (brit.co), Angel List

[1] Neustar first invested in .CO Internet in 2009 **(C-0016)** and continued such investments until August 2020, when Neustar's sale of its interest in .CO Internet closed, **(C-0110)**.

(angel.co), 500 Startups (500.co), Starbucks (sbux.co). Neustar also provided the oversight and technical know-how required to grow and develop the .CO domain.

4. As a direct result of these efforts and investments, the .CO domain has become one of the fastest growing and most dynamic domains in the world. At the time of the sale of .CO Internet by Neustar, the .CO domain was the 20th largest top-level domain in the world (out of approximately 1,500) and the second largest in Latin America. In less than a decade, the .CO domain grew from just under 28,000 domain names registered primarily inside of Colombia to nearly 2.3 million domain names registered by users in nearly 200 countries and territories worldwide by the end of 2018 (i.e. an increase of a factor of 80).[2] The .CO domain has been described as "easily Colombia's biggest startup success story"[3] and "the most effective branding exercise the internet registry market has ever seen."[4]

5. Security for domain holders is one of the most important and difficult issues for the operator. Through Neustar's expertise, as well as substantial investments of time and money, Neustar helped the .CO domain achieve top level security for its users, which further allowed the .CO domain to grow exponentially.

6. Over these ten plus years, Neustar's Colombian company .CO Internet, which directly operated and managed the domain, also paid tens of millions of dollars to Respondent

[2]MinTIC's most recent performance indicators for the .CO domain report around 2.7 million domain registrations ending in .CO worldwide. *See* MinTIC, Main Figures Associated with the .CO Domain, **C-0024**.

[3] Conrad Egusa, "Colombia is One of Latin America's Most Promising New Tech Hubs" (22 November 2014), **C-0118**.

[4] Kieren McCarthy, "Why Colombia is about to Make a Colossal Mistake with .CO" (27 November 2019) Circle ID, **C-0119**.

(continued)

in the form of Concession payments, taxes, and other payments. Indeed, MinTIC itself reports "generated income" totaling nearly 50 billion Colombian pesos from the Concession.[5]

7. The original Concession between MinTIC and .CO Internet was for an initial ten-year period starting in February 2010.[6] Neustar made substantial investments in the .CO domain—in part—on the basis that its Concession would be extended for an additional ten-year period on generally the same terms[7] because such an extension was contemplated under the legal framework,[8] as described below, as well as the fact that Colombia as a matter of practice extends concessions and contracts with other investors.[9] The ability to operate the Concession for twenty years, rather than just for ten years, allowed for Neustar to make investments of both money and time to develop the .CO domain to its current valuable position in the market.

8. However, when the time came to begin the negotiations with MinTIC for the ten-year extension of the Concession, MinTIC refused to even conduct the most basic negotiations with Neustar and .CO Internet. MinTIC even refused to provide a real rationale for its refusal to simply negotiate with Neustar and .CO Internet, much less an explanation as to whether and when the Concession would be extended.

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[5] *See* MinTIC, Revenue Generated for the Colombian Government by Quarter: Years 2010 to 2020 (Contract 019/2009), **C-0120**.

[6] Concession, Clause 4, **C-0017**.

[7] Law 1150 of 2007, Article 27, **C-0065** (the Spanish version reads as follows: "*prorrogables por lapsos iguales*").

[8] As set out below, the legal framework that provided for the extension encompasses Colombian law and the terms of the Concession itself.

[9] As detailed below, Respondent as a matter of course and state practice extends concessions and contracts for domestic investors, as well as for investors from third countries.

9. As described more fully below, Neustar and .CO Internet made numerous entreaties to MinTIC for meetings or some type of engagement on the extension issue. Even when MinTIC officials would agree to meet with Neustar or .CO Internet representatives, those officials would only *listen* to Neustar's presentation or arguments, and would not otherwise engage. The officials simply kept silent. This was odd behavior as one would have expected MinTIC officials to negotiate or extend the Concession, as Respondent had repeatedly done with other investors.

10. This odd behavior became somewhat explainable when Neustar learned that the direction to not extend the concession apparently came from the office of the President of Colombia. In fact, while MinTIC officials acted as if an extension was still possible, the President of Colombia and others were apparently moving forward with a new tender of the Concession in order to install a new preferred concessionaire. [10]

11. Indeed, the announcement regarding a new tender, which came at a time when Neustar and .CO Internet were still seeking to negotiate for an extension of the concession, came from the President of Colombia.[11] The President's announcement that operation of the .CO domain would be subject to a new tender was further tweeted by a top presidential advisor, an advisor who would later write that the President was right to issue a tender for the operation (rather than negotiate with Neustar and .CO Internet). Thus, the President of Colombia intervened to stop the extension of Neustar's Concession

[10] *See* Letter from MinTIC to .CO Internet, Response to Submission No. 955263 of 27 December 2018 (15 February 2019), MinTIC Reference No. 192011188, **C-0031**.

[11] The President made his announcement at the annual meeting of the Colombian Chamber of IT and Telecommunications, with the announcement subsequently reported by the Colombian press. *See* Ernesto Rodriguez, "Beware of Monopolies" (30 March 2019) EL NUEVO SIGLO, **C-0041**.

(through .CO Internet). This was not an action of a party to the concession, but instead actions taken by others in the Colombian Government.

12. Neustar continued to try to avoid a dispute by seeking to negotiate with MinTIC regarding the extension, but these efforts all failed due to the political decisions that had already been made by others in government to not extend the Concession.

13. Neustar's continued efforts to negotiate an extension of the Concession was not a flight of fancy, but based on expectations articulated in the Concession, Columbian law, and by the actions of the Respondent. The Concession included a provision for its extension for an additional ten-year period. Colombian law likewise provided for an extension of the same period of the original Concession, which would be an additional ten-year period in this case. Most importantly, however, is that Respondent had routinely extended these concessions for other investors.[12] This includes concessions in the telecommunications sector, like that at issue here. Many of these extended concessions were governed by the same legal framework and contained extension language similar to the language in .CO Internet's Concession. In fact, although some of this information is known only to Respondent, all of the examples appear to show that concessionaires that negotiated for an extension obtained them.[13] Thus, Neustar and.CO Internet sought to be treated like other investors.

[12] See e.g. Concession No. 136 between the National Television Commission and CARACOL Televisión S.A. (22 December 1997),**C-0045**, Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., Amendment No. 4 (21 January 2009) **C-0047** to Concession No. 002 to Sociedad Portuaria American Port Company INC., Addendum No. 4 (5 December 2013), **C-0064**.

[13] There may be some examples unknown to Neustar where concessions were not extended despite a request to do so. But given the performance of Neustar and .CO Internet, and the request to negotiate towards an extension, it is unfathomable that Respondent would not even negotiate with Neustar.

14. Despite all of Neustar's efforts, Respondent moved forward with the tender announced by the President. Not surprisingly, the tender was marred by serious irregularities and public allegations of potential corruption. When the initial terms of reference for the tender were issued, it became clear that the tender was designed to exclude Neustar and .CO Internet. The technical requirements had been drafted in such a way that Neustar, one of the largest registry (domain) companies in the world, and the current concessionaire, could not qualify. As one example, the original terms required bidders to demonstrate financial ratios where the level of indebtedness was below (70%), which is unusual given the average of the domain industry is (115%).[14] Respondent was aware that Neustar/.CO Internet had a ratio of (72%),[15] conveniently just outside of the requirement, making Neustar originally ineligible to be awarded the tender.

15. As Neustar further discovered during the tender process, the technical requirements of the initial terms of reference were written so that one company and one company only could satisfy them – a company named AFILIAS.[16] This can be seen by the fact that, for example, another requirement of the tender was that the bidder be required to have more than 1,500 distributors (registrars) accredited by the Internet Corporation for Assigned Names and Numbers (**"ICANN"**). Despite the fact that Neustar successfully

[14] The nature of the domain business is that each domain sale is accounted for as a liability for the term of the domain. For example, a 12-month domain purchase gets recorded as 11/12ths liability and 1/12th revenue. Then every month an additional 1/12th is moved from being a liability to an asset. Consequently, companies in the domain industry have fairly large debt ratios from an accounting standpoint but not necessarily from a cash or operational standpoint.

[15] The tender rules allowed for both Neustar and .CO Internet to be considered with respect to the debt ratio, which nevertheless still resulted in a debt ratio outside of the tender requirement.

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

(continued)

operated the .CO domain for ten years, AFILIAS was the only company in existence with that amount of registrars and thus able to satisfy that requirement.

16. It also began to be reported by Colombian journalists that Respondent's officials were having secret meetings with AFILIAS representatives, to the exclusion of Neustar/.CO. Such secret meetings were of course very improper during a tender process.[17] In addition to these blatant irregularities, it was later discovered that the tender documents included a verbatim section from a tender that AFILIAS had previously won, a tender that had nothing to do with Respondent. The tender was tailormade for AFILIAS and meant to exclude Neustar/.CO Internet (as well as other bidders) from even bidding. .CO Internet repeatedly pointed out these irregularities in the ordinary course of the bidding process. Based presumably on the reporting, the apparent plan to install AFILIAS as the new concessionaire fell apart. AFILIAS never even put in a bid, despite its earlier involvement with Respondent's officials.

17. The damage to Neustar occurred when the President announced the tender of the .CO domain. The tender was conducted in a haphazard and unclear manner. But .CO Internet had no choice but to submit a bid. Respondent's actions by not extending the concession had the potential to create unwarranted reputational damage to .CO Internet and Neustar. The rejection of .CO Internet as a concessionaire could have been seen as a

[17] *See*, *e.g.*, Letter from MinTIC to .CO Internet, Response to Submission No. 191058943 (20 December 2019), Reference No. 192109001, paras. 4-5, **C-0098** (confirming that Minister Constaín attended the meetings in New York); *see* Kieran McCarthy, "One company on the planet, US-based Afilias, meets the criteria to run Colombia's trendy .co registry – and the DNS world fears a stitch-up" (15 January 2020),**C-0096** ("In fact, as those interested in bidding began to realize how restrictive the terms were, one attendee at a meeting in Colombia earlier this month asked the ministry's representatives bluntly why the entire process appeared designed to give the contract to Afilias. Another asked whether technology minister Sylvia Constain had held any bilateral meetings with Afilias executives in recent months . . . . Constain also denied privately meeting Afilias representatives, though at the same time noted she was a member of the internet community and so regularly met people interested in Colombia's progress on the web.").

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rejection of the company itself and its operations. So, .CO Internet submitted a bid in accordance with the tender. Only three companies submitted bids, and .CO Internet was awarded the new services contract.[18]

18. The new services contract did nothing to cure the damage done to Neustar, as will be set out fully in the damages phase of these proceedings. The new concession is only for five years, instead of the ten-year extension. And the economic terms in the new concession differ greatly (in a negative way) from the original concession. Importantly, the new services contract gives Respondent a level of control over the operation that it did not previously hold and that inhibits the full development of the domain.

19. The decision of Respondent to refuse to engage with Neustar left Neustar no choice but to bring this action to remedy Respondent's wrongdoing. In April 2020, Neustar announced that it had reached an agreement with Go Daddy, a U.S. based internet domain registrar and web hosting company, for the sale of Neustar's registry business, which included .CO Internet. The sale closed in August 2020.

II. FACTUAL BACKGROUND

A. The Regulation of Internet Domain Names

20. This dispute primarily concerns the commercial expansion and administration of the country-level top-level domain (**"ccTLD"**) for Colombia, ".CO" (as in the domain name <www.example.co>).

[18] Unlike the earlier Concession, the new contract was substantially different in that it provided for .CO Internet to provide services to MinTIC rather than operate the domain as it had done for more than ten years. It was by all measures a service contract rather than a concession to operate the .CO domain.

21. A ccTLD is a top-level domain name that is used to define the domain for a particular country or a geographical area. Every country has a domain name reserved for it; this is generally denoted by a ccTLD, which is generally two letters long. Some of the most common ccTLDs are: .us for United States; .ca for Canada; .uk for the United Kingdom; .in for India; and .au for Australia.

22. The internet's domain name system, including ccTLD's, is managed by coordination group Internet Assigned Numbers Authority (**"IANA"**) and through not-for-profit organization, The Internet Corporation for Assigned Names and Numbers (**"ICANN**"). ICANN is an international organization comprised of individuals, industry, non-commercial and government representatives, that develops policies about the technical coordination of the internet's domain name system.[19] For its part, IANA is responsible for allocating and maintaining the unique codes and numbering systems used in the protocols that drive the internet.[20] IANA uses the policies developed by ICANN to implement management of domain names, coordination of registries, and assignment of internet protocols' number systems.[21]

[19] ICANN, Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee (23 February 2020), **C-0121**. Long-term stability is part of the principles set by ICANN, as follows:

> *"5.6 In making a designation for a delegee, the government or public authority should take into consideration the importance of **long term stability** in the administration and management of the ccTLD and in the DNS.*

[20] IANA, About Us, **C-0122**.

[21] *Ibid.*

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B. Regulation of the .CO Domain by the Colombian Government

1. Respondent Asserted Control of the .CO Domain in 2002

23. The .CO domain was initially delegated from IANA to the Universidad de los Andes (**"the University"**) on 24 December 1991.[22] Around 2001, the University explored the possibility of exploiting the domain for commercial purposes. The University planned to develop a bidding process to identify an international operator of the domain.[23]

24. In response, the Colombian Government took various actions to prevent the University from proceeding in such manner. Ultimately, on 11 December 2001, at the request of the Minister of Communications, Colombia's apex court, the Council of State, considered the status of the .CO domain and concluded that the domain is of public interest, intrinsically related to communications, and that by virtue of this the Ministry of Communications (**"the Ministry"**) could put into action planning, regulation, and control of the domain.[24]

25. Subsequently, the University terminated the commercialization process with respect to the domain, and advised ICANN that it no longer intended to appoint a new registry operator.[25] As reported by ICANN, the University noted that it:

> "[W]as experiencing 'great difficulty' in operating .CO in light of the December 2001 council decisions, as well as the legal actions concerning the commercialisation. It stated that the University 'believes that it can no longer bear the administrative and operational responsibilities' of operating the

[22] IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS, **C-0123**.

[23] *Ibid.*

[24] Chamber of Consultation and Civil Service, File No. 1.376 (11 December 2001), **C-0124**.

[25] *See* IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS, **C-0123**.

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> domain, and sought to terminate its activities as soon as possible while 'offering its fullest cooperation with ICANN in order to ensure that this process is conducted as smoothly and successfully as possible'".[26]

26. On 10 May 2002, representatives of the University, as well as the Minister and Vice Minister of Communications, met at ICANN's offices in Los Angeles, United States, to discuss the future administration of the .CO domain. However, unbeknownst to the University at that time, just days before – on 7 May 2002 – the Government of Colombia had issued Resolution 600 of 2002, "on partial regulation of administration of the domain name .CO".[27] This Resolution provided regulatory directives for the .CO domain that previously did not exist, *inter alia*, by noting that Law 72 of 1989 "confers on the Ministry of Communications the authority to plan, regulate and control all services in the communications sector, including certain elements and resources necessary for the provision of such services";[28] resolving in part that the "Internet domain name under the country code corresponding to Colombia .CO is an asset of the telecommunications sector, of public interest, which administration, maintenance and development shall be planned, regulated and controlled by the State, through the Ministry of Communications"; and specifying that the Ministry "shall coordinate application of the system laid down in this resolution with the international bodies responsible for managing top-level domain names."[29]

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[26] *Ibid.*

[27] Resolution 600 of 2002, Official Journal No. 44.796, on partial regulation of administration of the domain name .co (7 May 2002), **C-0008**.

[28] *Id*., p. 1.

[29] *Id*., Articles 1 and 7.

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27. Shortly thereafter, on 21 May 2002, the University wrote to ICANN advising that it was "disturbing" that the meeting on 10 May was conducted without the Ministry "faithfully disclosing the resolution that the government had passed three days earlier."[30] On 10 July 2002, the Council of State in Colombia ordered the Minister of Communications to take over administration of the .CO domain from the University.[31]

28. Thus, from the outset of .CO's management by the Colombian Government, the process has been marred by Respondent's strongarm approach and abuse of its sovereign powers.

2. Respondent Introduced Legislation to Administer .CO's Domain Name Registration in 2006

29. On 29 July 2006, some four years after Respondent had taken over the administration of the .CO domain from the University, the Colombian Government issued Law 1065 of 2006 (**"Law 1065"**).[32] During that four-year period, the .CO domain largely languished, and – without proper oversight or investment in its development – was stagnate.

30. Law 1065 was enacted to formalize Respondent's regulation of administrative functions relating to the .CO domain. Article 1(2) of that Law declared:

> "[T]he Internet domain name under the country code corresponding to Colombia -.co-, is a resource of the telecommunications sector, of public interest, whose administration, maintenance and development will be under the planning, regulation and control of the State, through the

[30] *See* IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS , p. 2., **C-0123**.

[31] *See* Chamber of Consultation and Civil Service, File No. 1.376 (11 December 2001), p. 44, **C-0124**.

[32] Law 1065 of 2006, Official Journal No. 46.344, for the administration of domain name registration .co (29 July 2006), **C-0009**.

> Ministry of Communications, for the advancement of global telecommunications and its use by users."

31. Thus, Law 1065 made clear that regulation and control of the .CO domain comes from the state itself, and that the Ministry of Communications was to implement this regulation and control.

32. Article 2 of Law 1065 further provided that:

> "For all purposes, the administration of the registration of .co domain names is an administrative function under the remit of the Ministry of Communications, whose exercise may be conferred on individuals in accordance with the law. In this case, the duration of the agreement may be for up to 10 years, extendable, only once, for a period equal to that of the initial term."

33. The provision of an extension for a term equal to the initial duration of an agreement reflects standard practice in Colombian law.[33]

34. Accordingly, as a matter of Colombian law, the .CO domain is regarded as a public resource and the Ministry exercises a regulatory function (as directed by the state) as regards to its administration, maintenance, and development. In exercise of that regulatory function, the Ministry may appoint a private party as the administrator of the domain. When it does so, the concession period must be set in accordance with Law 1065.

35. The introduction of Law 1065 led to a three-year period of public consultation, focusing on the following topics to improve the strength of .CO domain names:

- What can improve the current process for registering .CO domain names?

[33] *See* Sec. II.E.3, *infra*.

- What mechanisms can be implemented to massively expand the number of .CO domain names?
- How can we control the registration of .CO domain names that are not used by those who register?
- What should be the registry policy for .CO to avoid conflicts and disputes?
- What mechanisms should be used by the Ministry to ensure that the new administrator of .CO provides a continuous and efficient service?
- What mechanisms should the current administrator take to transition to the new administrator in order to protect existing domain registrations?
- What mechanisms should be adopted to attract the interest of the private sector to register .CO domains?[34]

36. In June 2007, representatives of ICANN met with representatives of the Ministry, to encourage them to take an "open and transparent" bottom up consensus driven approach to selecting an appropriate trustee for the .CO domain.[35]

37. As reported by IANA:

> "This was followed by a number of exchanges with ICANN where the Ministry made it clear they were keen to redelegate the .CO domain to the Ministry prior to any decision or process to select a future operator of the .CO domain. The Ministry wanted to take responsibility for the.CO domain, so they could have the ability to in practice delegate the domain to whomever they chose. ICANN representatives met with the Minister and the Rector of the University in Bogotá on 19 September 2007, strongly advising against this course of action. Ultimately, ICANN's CEO wrote to the Minister on 28 May 2008, that

[34] *See* IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS, p.2, **C-0123**.

[35] *Ibid.*

(continued)

> unless there was a proposed operator for .CO the 'due diligence [for redelegation process] could not be made.'"[36]

38. That is, the international body regulating domain names strongly advised against Respondent having full responsibility for the .CO domain, and went so far as to refuse to redelegate the .CO domain from the University to Respondent.

39. Subsequent outreach was coordinated by the government, including a meeting on operational models held in September 2007, and creation of an advisory committee to consider community opinions regarding .CO policy in April 2008.[37] On 30 April 2008, a draft policy regarding the assignment of the .CO domain was published for public comment.[38]

40. During this period, the Ministry also issued additional regulations, in coordination with other parts of the government, to administer the .CO domain. On 21 February 2008, the Ministry issued Resolution 284, which adopted a "totally exclusive outsourcing" model for the administration of the .CO top-level domain.[39] On 30 July 2009, the Ministry issued Resolution 1341, which clarified that the Ministry's role was to define policies and regulations, while a concessionaire would be responsible for the management and promotion of the .CO top-level domain.[40]

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[36] *Ibid.*

[37] *Ibid.*

[38] *See* reference in Resolution 1652 of 2008, No. 47.101 (published 3 September 2008), **C-0010**.

[39] Resolution 284 of 2008, Official Journal No. 46.915 (published 27 February 2008), **C-0011**. *See also* 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**.

[40] Resolution 1341 of 2009 (30 July 2009), Article 18.20, **C-0013**. *See also* 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**.

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41. By Resolution 1341, Respondent established MinTIC as the body that was to implement Colombia's public policy of telecommunications, radio, post, and information technologies.[41] Relevantly, Article 18.20 of Resolution 1341 assigned MinTIC the responsibility to "set the administration, maintenance and development policies for the Internet domain name under the country code corresponding to Colombia -.co."[42]

C. Negotiation of the Concession and Neustar's Investment in Colombia

1. Public Consultation and Tender Process (2006 to 2009)

42. On 19 May 2009, MinTIC began the process to select the operator for the .CO domain,[43] officially opening the tender on 24 June 2009. A hearing was held shortly after for potential bidders and other interested parties concerning the Request for Proposal process, allowing for concerns to be raised with the Ministry.[44] Consistent with Article 2 of Law 1065, and Colombian state practice, the tender documents made clear that the operator would be allowed to extend the term of the concession.[45]

43. The tender documents required that the successful bidder have "specific experience, individually or by at least one member of the joint venture . . . of at least 500,000 registrations within a ccTLD."[46] At that time, .CO Internet was a joint venture between Arcelandia SA (a Colombian company) and Neustar., and .CO Internet was able to

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[41] *See* Resolution 1341 of 2009 (30 July 2009), **C-0013**.

[42] *Id*., Article 18.20.

[43] Terms of Reference 2009, **C-0014**.

[44] Resolution No. 002121 of 13 August of 2009, **C-0015**.

[45] *See* Terms of Reference 2009, **C-0014**.

[46] *Id*., p. 44.

(continued)

satisfy this requirement with Neustar's involvement in the joint venture.[47] In addition to its then-1 percent shareholding in .CO Internet, Neustar was to serve as the back-end provider of registry services and infrastructure support for the .CO domain.[48] As IANA noted during its assessment of .CO in 2009:

> "The operator is partly owned by Neustar, an experienced provider of domain registry services for top-level domains such as .US. The registry back-end operation will utilise Neustar's established Registry, DNS and WHOIS implementations, including their Ultra DNS platform that has been in operation since 1999, and their Registry SRS platform that has been in production for eight years."[49]

44. On 15 July 2009, a preliminary evaluation report on two bidders was published and open for seven days for comment from interested parties, followed by a public award hearing on 13 August 2009.[50] The assessment of the two bidders — .CO Internet and VeriSign Switzerland SA — was that only .CO Internet met the requirements of the tender.[51] This, as noted by IANA above, was in no small part due to the involvement of Neustar in the enterprise as it existed at the time.

45. Therefore, on 13 August 2009, MinTIC announced that .CO Internet had been selected as the successful bidder, and would be the new administrator of the .CO top-level domain.[52]

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[47] Neustar's certification for .CO Internet's 2008 offer, p. 918, **C-0016**.

[48] The back-end organization provides for the technical operation of the ccTLD for the administrator.

[49] *See* IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS, p. 4, **C-0123**.

[50] *Ibid.*

[51] *Id*., p. 2.

[52] See 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**.

2. The Concession (3 September 2009)

46. On 3 September 2009, MinTIC and .CO Internet signed Concession State Contract No. 19 of 2009 for the promotion, administration, technical operation and maintenance of the .CO domain and to provide such additional services as required by the Concession.

47. Consistent with Article 2 of Law 1065 (and the tender documentation), Clause 4 of the Concession reflected the extension of the Concession in accordance with that legislative provision. Clause 4 provides as follows:

> "VALIDITY PERIOD AND TERM AGREED. The current concession contract will have a term of ten (10) years that will commence from the date of the authorization given by ICANN to THE CONCESSIONARY to carry out the activities of the domain, provided that by such time, the Universidad de los Andes, in cooperation with the concessionaire, had carried out every single activity required in the transition process, in a timely and adequate manner.
>
> "Paragraph: The term agreed may be extended in the manner and terms established in the legislation in force at the time of its implementation. It may not be less than the term initially established, for which the expansion and extension of the guarantee(s) and the prior subscription of a document that so provides, are required, where the circumstances that motivated it must be indicated."[53]

48. Under the Concession, and in accordance with Article 3 of Law 1065, the Colombian Government received a specified share of the proceeds arising from each .CO domain registration under the Concession.[54] This share of the proceeds had not been previously

[53] Concession, Clause 4, **C-0017**.

[54] *Id*., Clause 5, which in relevant part states "Fifth. Consideration [paid to the] Concessionaire. […] The contribution will be the difference resulting from subtracting from the gross income, the percentage amount agreed in the proposal as [MinTIC]'s participation, as well as the one resulting from applying to such result the equivalent amount of contribution to the Auditor's General Office, which will be calculated by [MinTIC] […]"; *see also* Terms of Reference 2009, **C-0014**, Clause 6.5.1.1.1, which is captioned as "Methodology to Calculate the Amount to Pay to [MinTIC]".

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paid by the University in its administration of the .CO domain, and represented a significant financial benefit to the State. Indeed, MinTIC itself reports "generated income" totaling nearly 50 billion Colombian pesos from the concession.[55] In addition, Respondent also received income tax, VAT, and commerce and industry taxes.[56]

49. The Concession entered into effect on 7 February 2010, after the official transition of the .CO domain from the University to .CO Internet was announced by MinTIC on 20 January 2010.[57] As reported at the time by .CO Internet:

> "The objectives of the transition process have been to continue uninterrupted service for the 27,000 domain-name holders in Colombia; maintain the stability of the .CO domain in Colombia and around the world; and continue the migration of the administration of .CO from the University of the Andes to .CO Internet S.A.S."[58]

50. Following an initial registration period open to eligible trademark holders and those interested in certain high-priority domain names, general availability began on 20 July 2010, opening the .CO domain to registrations on a first-come, first-served basis around the world.

[55] *See* MinTIC, Revenue Generated for the Colombian Government by Quarter: Years 2010 to 2020 (Contract 019/2009), **C-0120**.

[56] *See* **C-0014**, Terms of Reference 2009, Clauses 6.7.1 and 6.7.3.

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

[58] *Ibid.*

(continued)

3. Neustar Expands its Investment in .CO Internet (14 April 2014) Based Upon its Right to Extend the Concession for an Additional 10 Years

51. On 3 February 2014, Respondent and .CO Internet agreed to Amendment No. 3 to the Concession.[59] This Amendment authorized an additional investment from Neustar in .CO Internet in order to change the ownership of .CO Internet, by permitting Neustar to own up to 100 percent of its shares.[60] Further, a new requirement was added to the terms of the Concession such that the Concessionaire had to organize a minimum of two events per year to support MinTIC programs.[61] This amendment paved the way for Neustar to increase its participation in the venture.

52. Prior to agreeing that authorization, MinTIC carried out a technical and legal analysis of the market having regard to the fact that over 1,200 new top-level domains had begun to compete with the .CO domain.[62] The result of this increase was that the continued growth of the .CO domain required technical, economic, and sales leverage. Neustar was well positioned to provide that expertise and investment through its increased participation, which would also come with additional investment into the development and marketing of the .CO domain.

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[59] Amendment No. 3 to the Public Concession Contract No. 00019 of 2009 entered between the Ministry of Information and Communications Technology and .CO Internet S.A.S., dated 3 February 2014 ("Amendment No. 3"), **C-0019**.

[60] *Id.*, First Clause, which in relevant part states: "Eliminate the contractual condition [that set up limitations to foreign investors by not allowing to reduce the percentages of national shareholder interest in the concessionaire]. In that order, the CONCESSIONAIRE will be able [now] to modify its shareholder structure […]"

[61] The Second Clause of Amendment 3 provided that .CO Internet would financially support events or programs for an amount equivalent to 340 legal monthly minimum wages in force for the year in which the programs or events were developed. *See* **C-0019**.

[62] *Id*., Section 1.

(continued)

53. On 14 April 2014, Neustar acquired Arcelandia SA's 99 percent shareholding in .CO Internet, thereby increasing its interest to 100 percent.[63] It also acquired certain associated assets. The total consideration for this purchase included a cash consideration of USD 113.7 million, of which USD 86.7 million was paid at closing and USD 27 million was deposited into escrow for the satisfaction of potential indemnification claims and certain performance obligations.[64] Further, under the terms of the sale, Neustar may have been required to make a contingent payment of up to USD 6 million prior to or during the first quarter of 2020 in the event that the seller satisfied certain post-closing performance obligations. As well as being pre-authorized by MinTIC, Neustar's investment in .CO Internet was registered by the Colombian Central Bank.[65]

D. Neustar Invested Substantial Funds in the .CO Domain and its Performance Exceeded Expectations

54. Both .CO Internet and Neustar wanted to market and promote the domain in order to create substantial growth to achieve the goals imposed by the business plan provided in the Concession.

55. Accordingly, prior to the sale of .CO Internet in 2021, Neustar committed and made significant investments for the administration, promotion and commercialization of the .CO domain.[66] Neustar during the original Concession developed technical capacity,

[63] Nariña & Asociados Auditores Consultores S.A., Share Certification (14 April 2014), **C-0020**.

[64] *See*, *e.g.*, United States Securities and Exchange Commission, Form 10-K, Neustar, Inc. (31 December 2015), **C-0021**.

[65] *See* Banco de la República, Certificate of Registration (16 December 2019), **C-0022**.

[66] Submission from .CO Internet to MinTIC, Submission No. 955263 (27 December 2018), **C-0030**.

considerably increased the number of clients, and progressed the development of a secure, solid, and diversified commercial distribution network through 140 distributors (Registrars) globally and thousands of resellers.

56. This positioning and development of the .CO domain was the direct result of Neustar's relentless marketing and spending upwards of USD 60 million dollars from the beginning of the Concession until Neustar sold its interest in .CO Internet. These efforts and investments included long-term branding programs for the .CO domains (both inside of Colombia and internationally), resulting in the .CO domain becoming one of the most sought after domains for innovators, entrepreneurs, and start-up businesses worldwide.

57. As just some examples of these substantial investments, Neustar caused .CO Internet to run three Super-Bowl Ads, post billboards in Times Square (see Figure 1, below), and make countless other massive branding investments.

Figure 1: .CO Billboard in Times Square[67]

58. As one report noted:

[67] *See*, *e.g.*, Elliot Silver, "First Look: .CO Billboard in Times Square" (23 February 2011), DOMAIN INVESTING, **C-0023**.

> "As you are well aware by now, the .CO Registry has been spending a lot of money to ensure that people know about .CO domain names. The Super Bowl commercial cost about $3,000,000, not including production and endorsement costs.
>
> I was in Times Square in New York City today, and I took some photos of the new .CO billboard, likely seen by tens of thousands of commuters and tourists every day. Anyone traveling up 8th Avenue can see the billboard, which is located on the north side of the street at 42nd and 8th. It's one of the most noticeable billboards to anyone leaving the Port Authority Bus Terminal and several large subway stations.
>
> [. . . .]
>
> Kudos to the marketing team at the .CO Registry and the Pappas Group. I am pretty sure this is the largest marketing effort by a registry, and it's likely the first Times Square billboard campaign by a registry as well."[68]

59. Prior to the sale of .CO Internet, Neustar/.CO Internet sponsored an average of between 800-1,000 start-up business development events on five continents to introduce the .CO domain to the global business population and to grow domain registrations and usage.[69] In addition, Neustar opened marketing offices in India, the EU, Australia, United States and Colombia. Further, .CO Internet also spent substantial efforts to ensure that the TLD would be licensed in China, opening up an additional market that would add substantial registrations for years to come.[70]

60. As a direct result of these efforts and investments, .CO has become one of the fastest growing and most dynamic domains in the world. .CO is currently the 20th largest TLD in the world (out of approximately 1,500) and the second largest in Latin America. In

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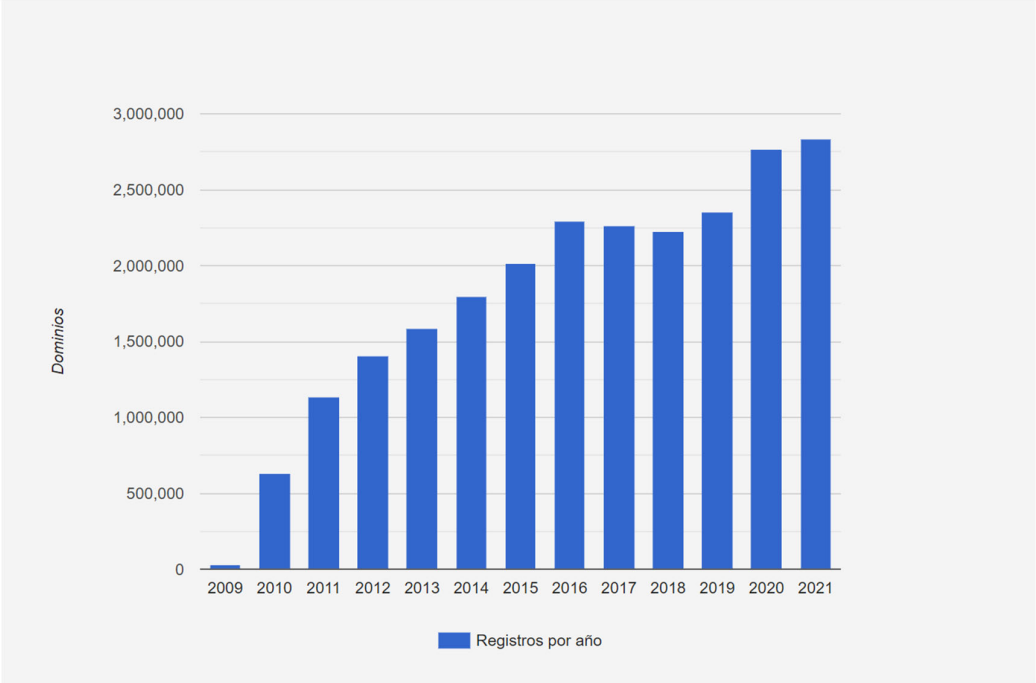
[68] *Ibid.*

[69] Decisión Consejo de Estado de 12 de marzo de 2020 en relación a medidas cautelares de urgencia., **C-0115**.

[70] Konstantinos Zournas, .CO domains get approved in China, (28 June 2018), **C-0116**

less than a decade, the .CO name space has grown from just under 28,000 domain names registered only inside of Colombia to nearly 2.3 million domain names registered by users in nearly 200 countries and territories worldwide by the end of 2018 (i.e. an increase of a factor of 80).[71] Data released by Respondent demonstrates this trend in the following graph:[72]



[71] MinTIC's most recent performance indicators for the .CO domain report around 2.7 million domain registrations ending in .CO worldwide. *See* MinTIC, Main Figures Associated with the .CO Domain, **C-0024**.

[72] *See* MinTIC, Registered .CO Domains (Accumulated by Year), at MinTIC, Revenue Generated for the Colombian Government by Quarter: Years 2010 to 2020 (Contract 019/2009), **C-0120**.

(continued)

61. As a result, it is no wonder .CO has been described as "easily Colombia's biggest startup success story"[73] and "the most effective branding exercise the internet registry market has ever seen".[74]

62. The main feature that demonstrates the value that has been created in the .CO name space is the fact that .CO is utilized daily by world-leading businesses and brands, including Apple, Google, Twitter, among other leading brands, as part of their global branding and marketing efforts.

63. These marketing efforts have positioned Colombia in the spotlight of the global domain industry, and will resonate for years to come as they were long-term investments made by Neustar into the .CO domain. Indeed, the performance by Neustar/.CO Internet significantly exceeded the business plan figures contained in the Concession, by 150 percent, as a result of Neustar's significant investments in .CO Internet and the CO. domain.

64. As a regulator, MinTIC oversaw .CO Internet's performance with the Concession. MinTIC repeatedly expressed, in several ways, its satisfaction with the performance of .CO Internet and the accordant growth of the domain. For example, on 21 November 2017, the ccTLD.CO Domain Policies Advisory Committee (**"Advisory Committee"**) concluded that the .CO Domain is "trustworthy, secure and stable."[75] On 13 June 2018, the same Committee highlighted that the performance of management indicators

[73] *See* Conrad Egusa, "Colombia is One of Latin America's Most Promising New Tech Hubs" (22 November 2014), **C-0118**.

[74] *See* Kieren McCarthy, "Why Colombia is about to Make a Colossal Mistake with .CO" (27 November 2019) Circle ID**, C-0119**.

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

(continued)

continue to demonstrate that the .CO domain was performing well.[76] MinTIC watched as Neustar – via .CO Internet – went far above the tender requirements to grow the domain. MinTIC further watched as Neustar provided the expertise and investments to accomplish top-level security for the .CO domain holders.

E. In an Abrupt Reversal of Position, Colombia Took a Series of Arbitrary, Discriminatory, and Otherwise Wrongful Steps Against Neustar

1. Colombia Ignored Neustar's Attempts to Engage Under the Regulatory Framework

65. In July 2018, the Colombian Government released a report on the .CO domain, recognizing the viability of extending the .CO Concession for a further ten years.[77] The Vice Minister of Digital Economy acknowledged the extension of the Concession, and noted that such an extension should go "hand in hand" with an economic renegotiation of the consideration contemplated.[78] Respondent recognized that while a bidding process may be opened, any such process must be considered only *after* negotiations on the extension of the Concession.[79] Such negotiations for extensions are required, of course, as the parties have to work out the specific terms of the extension.

66. On 20 September 2018, 72 weeks before the Concession was due to expire (on 7 February 2020), .CO Internet wrote to the Minister of Information Technology and Communications (**"the MinTIC Minister"**), providing notice of its intention to

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

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

[78] *Id*., p. 9.

[79] MinTIC indicates that there are technical advantages, but that the financial consideration that it receives is very low in light of the profitability of the business and that any "modification could imply a long and complex negotiation period." *See id*., p. 8.

(continued)

formalize the extension of the Concession as contemplated by the parties, and offering to improve the financial consideration by negotiation.[80] Neustar, through .CO Internet, offered to meet with MinTIC as a priority to discuss these issues.

67. Two months later, on 22 November 2018, MinTIC finally replied to .CO Internet's letter of 20 September 2018.[81] In this reply, MinTIC ignored .CO Internet's offer to meet and discuss the extension of the Concession, and simply stated that Colombian law provided them with the authority to decide whether to extend the Concession.[82] In particular, MinTIC stated that Law 1065: **(i)** required that the administration, maintenance and development of the .CO domain be under the planning, regulation and control of the Ministry; **(ii)** had charged MinTIC with the administration of the register of names in the .CO domain; **(iii)** established the possibility that the exercise of such administrative function be conferred on private entities; and **(iv)** granted the power to, if deemed appropriate, extend such agreement. MinTIC further observed that it was required (by Article 3 of Law 489 of 1998) to act in accordance with principles of good faith, equality, speed and efficiency, impartiality, effectiveness, and transparency (among others).[83]

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

[81] Letter from MinTIC to .CO Internet, Response to Submission No. 935805 of 21 September 2018 (22 November 2018), MinTIC Reference No. 1246985, **C-0029**.

[82] *Ibid.*

[83] *Ibid.*

(continued)

68. On 27 December 2018, Neustar, through .CO Internet, reiterated its desire to extend the Concession and requested to commence discussions to that end with MinTIC.[84] No response was received from Respondent.

69. On 11 February 2019, Neustar met with the Vice Minister of Digital Economy and other MinTIC officials, along with representatives from its subsidiary, .CO Internet. At this meeting, Neustar once again informed Respondent that it intended to extend the Concession as provided for under Colombian law and expressed a desire to establish a negotiation framework for this purpose. The Vice Minister and his officials indicated that MinTIC would be putting in place a simultaneous process of negotiating an extension to the Concession with .CO Internet and preparing for a potential tendering process in case those negotiations were unsuccessful.[85] There was, however, no suggestion whatsoever that MinTIC might ignore the Concession extension process entirely and instead proceed directly to a new tendering process. Rather, the Vice Minister and his officials represented to Neustar that negotiations with them would commence shortly, and that MinTIC would soon share with them its offer to extend the Concession. This offer from Respondent never came.

70. Several days later, however, MinTIC wrote to .CO Internet and reneged on its statement made in the meeting with Neustar and .CO Internet advising that it in fact had not decided on whether to establish a framework for the negotiations.[86] Respondent

[84] Submission from .CO Internet to MinTIC, Submission No. 955263 (27 December 2018), **C-0030**.

[85] In a letter dated 6 March 2019 (received on March 8), MinTIC asserts that "it is in the process of evaluating the current concession" but that the other possible scenario was a new tender. **C-0033**. In addition, in Minutes No 2 of 18 March 2019, the Committee asserts that "it is necessary to give adequate consideration to all the options indicated" – i.e., an extension or a tender. **C-0039.**

[86] Letter from MinTIC to .CO Internet, Response to Submission No. 955263 of 27 December 2018 (15 February 2019), MinTIC Reference No. 192011188, **C-0031**.

continued to ignore Neustar's request to commence negotiations on the extension of the Concession and Neustar's proposal that it could present an offer for Respondent's consideration.

71. On 5 March 2019, .CO Internet wrote to MinTIC once more, insisting on discussing the terms to take forward "the negotiation process . . . [and] the new conditions that the extension would contain", in conformity with the Concession, Colombian Law, and Colombian state practice.[87] .CO Internet reiterated that it was essential to begin and move forward the negotiation process of the extension, emphasizing that such an extension required Respondent to speak with .CO Internet regarding the specifics of an extension, which to date had not occurred.

72. In its response, on 6 March 2019, MinTIC wrote to .CO Internet requesting that .CO Internet produce by 15 March 2019 a plan for the transition of the .CO domain in light of a possible new concessionaire being appointed to commence on 2 February 2020.[88] This was the first formal indication from Respondent that it was contemplating wholly avoiding its obligations to negotiate to extend the Concession.

73. On 15 March 2019, .CO Internet highlighted that MinTIC was required to first engage in negotiations for the terms of an extension to the existing Concession before taking steps to make way for a new concessionaire.[89] In any event, .CO Internet noted, it had not been supplied with sufficient details in order to provide the requested transition plan

[87] Again, Neustar wrote through its subsidiary, .CO Internet. *See* Letter from .CO Internet to MinTIC, Response to Letter No. 192011188 of 15 February 2019 and Specific Petition (5 March 2019), MinTIC Reference No. 191010681, **C-0032**.

[88] Letter from MinTIC to .CO Internet, Request for a Transition Schedule (6 March 2019), MinTIC Reference No. 192016874, **C-0033**.

[89] Letter from .CO Internet to MinTIC (15 March 2019), MinTIC Reference No. 191012761, **C-0034**.

– in particular, it was essential that it be appraised of the technical capabilities of the new concessionaire. Under any metric or rationale, .CO Internet needed additional information before it could come up with a transition plan. Again, Respondent did not respond to this correspondence.

2. Colombia Abruptly Announced a Public Tendering Process

74. Although unknown to Neustar at the time, Respondent had no intention of engaging on the extension of the Concession. Instead, Respondent had been secretly putting into motion a process to open a tender process for the .CO domain as early as December 2018. On 3 December 2018 – that is, just eleven days after Respondent sent the letter ignoring .CO Internet's original notice of intent to formalize the extension of the Concession – MinTIC modified the composition of the Advisory Committee on the .CO domain.[90] The consequence of this change was the deliberate exclusion of .CO Internet from Advisory Committee meetings which, up until that date, .CO Internet had attended on a regular basis. In fact, the attendance at those meetings by .CO Internet was prescribed in the Concession itself and was mandatory as long as the Concession was in force.[91] Now, .CO Internet could only attend those Committee meeting sessions to

[90] Resolution 3278 of 2018, by which the Advisory Committee on ccTLD.co is Regulated (3 December 2018), **C-0035** (according to MinTIC, this resolution "responds to the current needs in which the entity must face the challenge of decision making with regard to the administration of the ccTLD.CO"). *See also* Letter from MinTIC to .CO Internet, Response to Submission No. 955263 of 27 December 2018 (15 February 2019), MinTIC Reference No. 192011188, **C-0031**. Prior to Resolution 3278 of 2018, .CO Internet, as the administrator of the ccTLD.co, could attend the sessions of the Committee as a permanent guest. *See* Resolution 1250 of 2008, Article 2, **C-0036**; MinTIC, Minutes of Advisory Committee Meeting (10 December 2018), p. 5, **C-0037**.

[91] The Preliminary Studies of the 2009 Public Bidding and the 2009 Terms of Reference established that "the administrator will be part of the Advisory Committee as a permanent guest," p. 10, **C-0014**. These documents, in turn, integrate and regulate the Concession according to Clause 34.

(continued)

which it was specifically invited.[92] This meant that .CO Internet could not attend meetings which would have been necessary for it to attend with respect to the original Concession, as .CO Internet continued to operate the .CO domain.

75. The following week, after .CO Internet had been excluded from the Advisory Committee, MinTIC arranged a meeting for 10 December 2018.[93] The Advisory Committee met to consider the report of the Vice Ministry of Digital Economy which, as stated above, had recommended engaging in negotiations for the extension of the Concession. However, the Committee members ignored this recommendation from the previous government,[94] and decided not to extend the Concession.[95] The Committee members gave no reason for this refusal to negotiate, and likewise did not explain why it did not have to negotiate with respect to the extension of the Concession. To the contrary, as stated in that Committee meeting, Minister Constaín and her team had been holding a series of meetings with the President of Colombia to discuss the new tender and the fact that the .CO Internet Concession would not be extended.[96] It was later learned that Minister Constaín was also holding meetings with AFILIAS, which was a competitor of Neustar.[97]

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[92] *See* Resolution 3278 of 2018, by which the Advisory Committee on ccTLD.co is Regulated (3 December 2018), **C-0035**.

[93] *See* **C-0037,** MinTIC, Minutes of Advisory Committee Meeting (10 December 2018) (to which .CO Internet was not invited, as usual).

[94] President Ivan Duque, representing the right-wing Democratic Center Party, was elected on 18 June 2018, immediately before the release of the former government's analysis of the .CO domain in July 2018. *See* MinTIC, Minutes of Advisory Committee Meeting (13 June 2018), p. 70, **C-0026**.

[95] *See* **C-0037**, MinTIC, Minutes of Advisory Committee Meeting (10 December 2018), p. 5.

[96] *See* **C-0037**, MinTIC, Minutes of Advisory Committee Meeting (10 December 2018).

[97] *See* Section II.A.3, *supra*.

(continued)

76. In addition, in that same meeting, the Advisory Committee recommended that MinTIC contract a third party to move ahead with the general tender process.[98] Respondent engaged the services of a contract lawyer, Ms. Dominique Behar Piquero, to support the tender process on 18 February 2019.[99]

77. Meanwhile, just three days earlier, on 15 February 2019, MinTIC asserted (falsely) to .CO Internet that "as soon as it has taken the decision to extend" the Concession, it would communicate this decision to the company.[100]

78. Respondent continued to engage in *sub rosa* actions with respect to the bidding process within government over the next three months, without any engagement with .CO Internet and without regard to the legal framework regulating Neustar's investment. For example, a meeting of the Advisory Committee was held on 18 and 19 March 2019, to which .CO Internet was not invited.[101] At that meeting, the Advisory Committee was – according to its agenda – supposed to analyze the performance of .CO Internet as well as the technical, commercial and financial conditions of the market.

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[98] *Id*., p. 5.

[98] *Id*., p. 10. *See* Professional Service State Contract 465 of 2019 between the Information, Communications and Technologies Fund and Dominique Behar Piquero (18 February 2019), p. 4, **C-0038** (to "offer legal support for the development and planning of the .CO Domain concession process, which must be implemented at the end of State Concession No. 019 of 2009." The contracted lawyer was formerly working in the firm that was representing Afilias during the tender process. She "manifested that undertaking the extension and modifacion would result in an unnecessary risk in light of the fulfillment of norms that apply to the administrative function and the contractual activity of the State*"* and recommended taking forward the tender process at a later date.

[99] *See* **C-0038**, Professional Service State Contract 465 of 2019 between the Information, Communications and Technologies Fund and Dominique Behar Piquero (18 February 2019), p. 4.

[100] *See* **C-0031**, Letter from MinTIC to .CO Internet, Response to Submission No. 955263 of 27 December 2018 (15 February 2019), MinTIC Reference No. 192011188.

[101] MinTIC, Minutes No. 2 of Advisory Committee Meeting (18 March 2019), **C-0039**.

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79. The meeting minutes (made available only after .CO Internet requested them) clearly demonstrate, however, that no such analysis was conducted, and that the technical, legal and economic reasons on which its decision was based are wholly untenable, and inconsistent with both the market circumstances and the legal framework applicable to the Concession. The discussion was conclusory and did not engage on any relevant issue.[102] Moreover, the fact that Respondent had made the decision to not extend the Concession since at least 10 December 2018 was made clear by the emphasis placed on proceeding with the tender plans by the Vice Minister of MinTIC and the IT Development Director.[103]

80. While Neustar's correspondence with Respondent had been with MinTIC, and MinTIC – according to Colombia's own laws – is the department in charge of the administration of the .CO domain, the President of Colombia and related advisors were the ones directing the matter and making decisions with respect to Neustar's investment.

81. On 17 March 2019 (*i.e.* before the Advisory Committee Meeting on 18 March 2019 wherein the Committee decided not to extend the Concession), the Presidential Advisor for Innovation and Digital Transformation tweeted that the President would announce that the public tender for the .CO domain would take place during the second half of 2019.[104] Then, on 30 March 2019, President Iván Duque Márquez announced that ***he had decided*** to launch a public tendering process for the administration of the .CO

[102] *Id.*

[103] *Id.*

[104] *See* Victor Munoz (@Vicmunro), Tweet on the President's Announcement (17 March 2019), **C-0040**.

(continued)

domain.[105] This announcement was without any prior notice to Neustar, and ignored the fact that MinTIC was required to negotiate with .CO Internet on the terms of the extension to the Concession.[106]

82. The fact that both of these announcements came from the office of the President is telling. The President had not previously been involved in any aspect of the .CO domain Concession or with Neustar. The President's announcement, and direction to proceed directly to a tender, was made without proper consultations with stakeholders and, of course, without discussions with .CO Internet or Neustar. That is particularly notable given that neither the President, nor his Office, was a party to the Concession – rather, the Concession was between MinTIC and .CO Internet.

83. As was reported at the time, the President of Colombia had intervened in the process of the extension of the Concession and ordered that the operation of the .CO domain be given to another entity.[107]

84. The Presidential Advisor for Economic Affairs and Digital Transformation noted that Colombian President Ivan Duque announced that a tender would be held for the

[105] The President made his announcement at the annual meeting of the Colombian Chamber of IT and Telecommunications, with the announcement subsequently reported by the Colombian press. *See* Ernesto Rodriguez, "Beware of Monopolies" (30 March 2019) EL NEUVO SIGLO, **C-0041**.

[106] In fact, President Iván Duque Márquez has continued to dictate the use of the .CO domain, with the Minister of MinTIC stating on 28 June 2021 that "The .CO or .COM.CO domain is the nation's most important digital asset and from the government of President Iván Duque, we have decided to make it available to businessmen and entrepreneurs in our regions to innovate in e-commerce and digitally transform their business ideas at no cost for one year." *See* MinTIC Press Release, "5,996 free .CO Domain kits were delivered to companies and enterprises in the country" (28 July 2021), **C-0042**.

[107] *See* **C-0041**, Ernesto Rodriguez, "Beware of Monopolies" (30 March 2019) EL NUEVO SIGLO.

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operation of the .CO domain.[108] President Duque made this announcement at the same time that MinTIC stated that it was considering whether to extend the Concession. In other words, the evidence demonstrates that MinTIC (the counterparty to the Concession) knew that an extension was the best way to proceed when the President of Colombia decided to conduct a new tender instead.[109] Following President Duque's announcement, MinTIC changed course and stated that it would not consider .CO Internet's offer or an extension of the Concession. President Duque's direction had been conveyed to the MinTIC officials who would have otherwise been responsible for negotiating an extension to the Concession.

85. As demonstrated above, it was understood that the decision to conduct the tender rather than extend the Concession came from the President. As explained in Part III.E.5 below, the tender was created so that only one company could meet the qualifications, calling further into question the President's actions in deciding to hold a tender and taking that decision away from the Concession counter party, MinTIC.

86. Concerns existed with respect to the tender and the lack of negotiations. As reported by the Colombian press, "Minister Silvia Constaín had [] asked for [Vice Minister] Castro's head due to strong differences in the management of the bidding process for Colombia's Internet domain."[110]

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[108] *See* **C-0040**, Victor Munoz (@Vicmunro), Tweet on the President's Announcement (17 March 2019).

[109] *See* **C-0041**, Ernesto Rodriguez, "Beware of Monopolies" (30 March 2019) EL NUEVO SIGLO.

[110] *See* Valora Analitik, Jehudi Castro, Vice Minister of Digital Economy, Resigns (9 October 2019), **C-0043**. The report also notes that three other senior officials from the same agency left their positions in the course of 2019.

(continued)

87. On 10 April 2019, MinTIC finally formally informed .CO Internet that a decision had been taken not to extend the Concession, some two weeks *after* the President had made his abrupt announcement.[111] In its letter, Respondent asserted that it had the "sole and exclusive power" according to Article 2 of Law 1065 of 2006 to evaluate and decide as to whether to extend the Concession or to instead commence a new tendering process. In other words, Respondent was making clear that it was acting in exercise of its sovereign powers with respect to the refusal to negotiate and extend the Concession. And such direction to do so came not from MinTIC, but was directed by officials not within MinTIC.

3. Respondent Regularly Negotiates and Extends Concessions as Required by Law and Obligation

88. The Respondent did not work towards an extension of the Concession itself despite having an obligation to do so. The Respondent would not even *agree to negotiate* regarding the proper extension of the Concession with Neustar despite having an obligation to do so.

89. Yet, the Respondent has repeatedly negotiated and extended concessions for domestic investors and investors of other nationalities without question as a matter of routine course.

90. This is evidenced by Respondent's approach to various other concessions in the telecommunications sector. Based on a review of publicly available information, it appears that *every* request for an extension by a concessionaire, other than the request by .CO Internet, has been negotiated and agreed. Further, it is striking that, unlike with

[111] Letter from MinTIC to .CO Internet, Response to Submission No. 191010681 of 5 March 2019 (10 April 2019), MinTIC Reference No. 192027599, **C-0044**.

the current Concession, several of the concessions which were extended did not have an extension clause in the concession and were instead extended in accordance with the relevant Colombian law.

91. To wit, in the telecommunications sector, the Respondent has negotiated and agreed to extensions with respect to the following concessions:

- Concession No. 136 of December 22, 1997, between the National Television Commission,[112] as grantor, and CARACOL Televisión S.A., "*CLAUSE FIVE. (...) PARAGRAPH - EXTENSION. Pursuant to paragraph e) of Article 48 of Law 182 of 1995, the concession may be extended. The extension will be for one time only and for the same term of the original contract without being subject to a new bidding or selection process.*"[113] Based on this provision, by means of Amendment No. 4 of January 21, 2009, the concession was extended for an additional 10 years.[114]

- Concession No. 140 of December 26, 1997, between the National Television Commission, as grantor, and RCN Televisión S.A., "*CLAUSE FIVE. (...) PARAGRAPH - EXTENSION. Pursuant to Article 48(e) of Law 182 of 1995, the concession may be extended. The extension shall be for one time only and for the same term of the original contract without being subject to a new bidding or prior selective process.*"[115] By means of Amendment No. 8 of October 29,

[112] Concession No. 136 between the National Television Commission and CARACOL Televisión S.A. (22 December 1997), **C-0045**. Note that – like the .CO domain – Law 1978 of 2019 applied to this concession. *See* Law 1978 of 2019, Article 2, **C-0046** ("*...For all purposes of this Law, the provision of telecommunications networks and services includes the provision of television networks and services. The broadcast open television service shall continue to be governed by the relevant special rules, in particular Law 182 of 1995, Law 335 of 1996, Law 680 of 2001 and other rules that modify, add or replace them.*").

[113] The Spanish version reads as follows: *"CLÁUSULA QUINTA. (...) PARÁGRAFO-PRÓRROGA. De acuerdo con el literal e) del Artículo 48 de la Ley 182 de 1995, la concesión es prorrogable. La prórroga será por una sola vez y por el mismo término del contrato original sin que sea objeto de un nuevo proceso licitatorio o selectivo previo."*

[114] Concession No. 136 between the National Television Commission and CARACOL Televisión S.A., Amendment No. 4 (21 January 2009), **C-0047** ("*CLAUSE SIX.- EXTENSION OF THE CONTRACT. The term of duration of the extension of Contract No. 136 of 1997 shall be ten (10) years, counted as of January 11, 2009*").

[115] Concession No. 140 between the National Television Commission and RCN Televisión S.A. (26 December 1997), **C-0048**. The Spanish version reads as follows: "*De acuerdo con el literal e) del Artículo 48 de la Ley 182 de 1995, la concesión es prorrogable. La prórroga será por una sola vez y*

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2009, the concession was extended for an additional term of 10 years.[116]

- Concession No. 49 of 2011 signed between the Ministry of Information Technology and Communications and Sociedad Comercial Cadena Melodía de Colombia S.A., "*CLAUSE THIRD TERM AND EXTENSION OF THE CONCESSION. The term of duration of the concession is ten (10) years from the date of commencement of execution of this contract, extendable for equal periods, in accordance with the provisions of Article 27 of Law 1150 of 2007 and Article 10 of Resolution No. 0415 of 2010. In no case shall there be automatic or free extensions.*"[117] Under Amendment No. 2 of July 21, 2021, the concession was extended for an additional term of 10 years. [118]

- Concession No. 44 of 2010 signed between the Ministry of Information Technology and Communications and Erica Alejandra Londoño Restrepo, "*CLAUSE THIRD TERM AND EXTENSION OF THE CONCESSION. The term of duration of the concession is ten (10) years from the date of commencement of execution of this contract, extendable for equal periods, in accordance with the provisions of Article 27 of Law 1150 of 2007 and Article 10 of Resolution No. 0415 of 2010. In no case shall there be automatic or*

por el mismo término del contrato original sin que sea objeto de un nuevo proceso licitatorio o selectivo previo."

[116] Concession No. 140 between the National Television Commission and RCN Televisión S.A., Amendment No. 8 (29 October 2009), **C-0049** ("CLAUSE SIX.- EXTENSION OF THE CONTRACT. The term of duration of the extension of Contract No. 136 of 1997 shall be ten (10) years, counted as of January 11, 2009").

[117] Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., **C-0050**. The Spanish version reads as follows: *"CLAUSULA TERCERA PLAZO Y PRÓRROGA DE LA CONCESIÓN. El término de duración de la concesión es de diez (10) años contados a partir de la fecha de inicio de ejecución del presente contrato, prorrogables por lapsos iguales, de conformidad con lo establecido en el artículo 27 de la Ley 1150 de 2007 y el artículo 10 de la Resolución No 0415 del 2010. En ningún caso habrá prórrogas automáticas ni gratuitas"*

[118] Concession No. 49 between MinTIC and Sociedad Comercial Cadena Melodía de Colombia S.A., Amendment No. 2 (21 July 2021), **C-0051** ("FIRST- EXTENSION of the term of performance contained in the third clause of the Concession Contract No. 049 of 2011, for a term of ten (10) more years, that is, until July 12, 2031").

(continued)

free extensions."[119] By Amendment No. 1 of May 4, 2021, the concession was extended for an additional term of 10 years. [120]

- Concession No. 618 of 2019 signed between MinTIC's Information Technology Fund and Red de Ingenierías S.A.S.[121] Despite not containing a clause that expressly provided for the extension, it was extended for two years under the second clause of Amendment No. 2 of February 6, 2020.[122]

- Concession No. 372 of 2019 signed between MinTIC's Information Technology Fund and Computadores para Educar.[123] Extended for a term of 91 additional days and did not have a contractual clause that contemplated this possibility.[124]

92. Neustar knows of no situation in which a domestic investor or a non-U.S. investor requested an extension of a telecommunications sector concession and such extension

[119] Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, **C-0052**. The Spanish version reads as follows: "*CLAUSULA TERCERA PLAZO Y PRÓRROGA DE LA CONCESIÓN. El término de duración de la concesión es de diez (10) años contados a partir de la fecha de inicio de ejecución del presente contrato, prorrogables por lapsos iguales, de conformidad con lo establecido en el artículo 27 de la Ley 1150 de 2007 y el artículo 10 de la Resolución No 0415 del 2010. En ningún caso habrá prórrogas automáticas ni gratuitas.*"

[120] Concession No. 44 between MinTIC and Erica Alejandra Londoño Restrepo, Amendment No. 1 (4 May 2021), **C-0053** ("FIRST- EXTEND the term of performance contained in the third clause of the Concession Contract No. 049 of 2011, for a term of ten (10) more years, that is, until May 3, 2031").

[121] Concession No. 618 between MinTIC's Information Technology Fund and Comunicaciones and Red de Ingenierías S.A.S ("INRED") (18 June 2019), **C-0054**.

[122] Concession No. 618 between MinTIC's Information Technology Fund and INRED, Amendment No. 2 (6 February 2020), **C-0055** ("[*G*]*iven the need raised by the Director of Infrastructure, where 300 new populated centers that meet the technical conditions established for the project and that are duly supported in the application and planning document are integrated to the list of eligible for the project, by virtue of the concept of feasibility of the Office of Fund Revenue and taking into account that the addition does not exceed 50% of the value initially agreed in accordance with the provisions of paragraph of Article 40 of Law 80 of 1993 will proceed to amend the contract 618 of 2019 in the sense of extending, adding and making other determinations.*").

[123] Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar (23 January 2019), **C-0056**.

[124] Concession No. 372 between MinTIC's Information Technology Fund and Computadores para Educar, Amendment No. 2 and Extension No. 1 (20 December 2019), **C-0057**.

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was denied, much less that the Respondent refused to even negotiate with them regarding such an extension.[125]

93. In the mining sector (by way of further example), there exists the same pattern of Respondent negotiating and entering extensions of concessions. In fact, all of the concessions identified in the mining sector were extended, including the following:

- Concession No. 078-88 of August 23, 1988 between CARBOCOL and Drummond extended by Addendum No. 15 of January 22, 2019 for an additional 20 years.[126]
- Concession No. 109-90 of June 7, 1993 between CARBOCOL and Consorcio Minero Unido S.A. extended by Addendum No. 9. Of July 11, 2016 for 17 additional years.[127]
- Concession No. 051-96M of November 13, 1996 between the National Mining Agency and Cerro Matoso S.A. extended by Amendment No. 4 of December 27, 2012 for 15 additional years.[128]
- Concession No. 070-89 of October 10, 1989 between the National Mining Agency and Minas Paz del Río extended by Otherí No. 3 of December 27, 2012 for 20 additional years.[129]

94. At least some of these mining concessions included express language (as in the current Concession) that the concession may be extended. For example, Contract No. 109-90 of June 7, 1993, between CARBOCOL and Consorcio Minero Unido S.A., provides as

[125] This does mean, of course, that this never happened. The Respondent is the only entity with the information regarding whether it has refused to negotiate with a concessionaire that sought an extension. There do exist a few concessions that had or have not yet been extended, but only Respondent knows whether or not such an extension was requested and whether Respondent refused to negotiate for such an extension.

[126] Concession No. 78-88 between CARBOCOL and Drummond, Addendum No. 15 (22 January 2019), **C-0058**.

[127] Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A., Addendum No. 9 (11 July 2016), **C-0059**.

[128] Concession No. 051-96M between the National Mining Agency and Cerro Matoso S.A., Amendment No. 4 (27 December 2012), **C-0060**.

[129] Concession No. 070-89 between the National Mining Agency and Minas Paz del Río, Amendment No. 3 (27 December 2012), **C-0061**.

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follows: "*6.4. The exploitation term may be extended upon written request of the contractor submitted to CARBOCOL no less than six (6) months prior to its expiration. It is understood that the aforementioned extension shall be subject to the charges, terms and conditions established by law or provisions of CARBOCOL's Board of Directors for that time*".[130] As noted above, this contract was indeed extended.

95. The same pattern can be further seen in Respondent's port concessions (by way of yet a further example). Two of those concessions would have expired but both have been extended. Those two concessions were extended for an average of 15 additional years.[131] The only other port concessions remain within their original terms, so the question of extension has not yet arisen.

96. Regarding the legal framework in respect of the current Concession, Law 1150 of 2007, which updates Law 80 of 1993, includes a provision regarding the extension of such contracts, providing that their term would be 10 years "*extendable for equal periods*."[132] This language demonstrates that the Concession here was in fact extendable for an additional ten-year term. This is further confirmed by the language of the Concession itself, as discussed above and in the next section below.

[130] Concession No. 109-90 between CARBOCOL and Consorcio Minero Unido S.A. (7 June 1993), Article 6.4, **C-0062**. The Spanish version reads as follows: "*6.4. El término de explotación podrá ser prorrogado previa solicitud escrita del contratista presentada a CARBOCOL con antelación no menos de seis (6) meses de su vencimiento. Queda entendido que la prórroga mencionada, se someterá a las cargas, términos y condiciones que para esa época tenga previsto la ley o disposiciones de la Junta Directiva de CARBOCOL.*"

[131] Concession No. 009 to Sociedad Portuaria Puerto Brisa S.A, Addendum No. 1 (7 May 2014), **C-0063** (extended the Concession an additional ten years); Concession No. 002 to Sociedad Portuaria American Port Company INC., Addendum No. 4 (5 December 2013), **C-0064** (extended the Concession an additional twenty years).

[132] Law 1150 of 2007, Article 27, **C-0065** (the Spanish version reads as follows: "*prorrogables por lapsos iguales*").

97. More fundamentally, however, the extendibility of the Concession is demonstrated by the fact that Respondent has apparently negotiated and extended every concession in the sectors studied for which a request has been made, meaning extensions for domestic investors and other investors from third countries. Yet, here, Respondent would not even negotiate with Neustar and .CO Internet regarding an extension.

4. Respondent is Aware that Extensions are Required and Provides for the Right to Negotiations to Conclude Them

98. Putting aside the consistent practice whereby Respondent has negotiated with domestic and non-US investors[133] in extending concessions, Respondent is otherwise aware of its obligation to negotiate and extend concessions with investors when the legal conditions are met. For example, Article 2.2. of MinTIC's terms of reference for the Concession provided that

> "Pursuant to the provisions of Article 2 of Law 1065 of 2006, the concession contract resulting from this bidding will have a term of ten (10) years. (...)The agreed term may be extended in the manner and terms established in the legislation in force at the time of its execution, which may not be less than the initially established term".[134]

Article 6.6.1 of the terms of reference for the Concession, titled "Extension," repeats this provision.[135]

[133] Neustar is aware that one concession was extended for a U.S. company in the port sector: Concession Contract No. 002 of December 21, 1992 - Sociedad Portuaria American Port Company INC. extended by Addendum No. 4 of December 5, 2013 for an additional 20 years. See Concession No. 002 to Sociedad Portuaria American Port Company INC., Addendum No. 4 (5 December 2013), **C-0064**.

[134] *See* **C-0014**, Terms of Reference 2009, Article 2.2.

[135] *See id.*, Article 6.6.1.

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99. Subsequently, the fourth clause of the Concession itself provided in relevant part as follows:

> "Paragraph: The term agreed may be extended in the manner and terms established in the legislation in force at the time of its implementation. It may not be less than the term initially established, for which the expansion and extension of the guarantee(s) and the prior subscription of a document that so provides, are required, where the circumstances that motivated it must be indicated."[136]

These clauses, in addition to the legal framework, are the same or similar to the provisions in other concessions in which Respondent negotiated and extended concessions, as described above.

100. Respondent on more than one occasion acknowledged the desirability of extending the Concession. For example, in an analysis of whether Respondent could extend the Concession, the Vice Ministry of Digital Economy Report noted as follows:

> "The following are some considerations regarding the legal feasibility of both an extension of the current contract and the subscription of a new concession contract:. . . ."

> "In this sense, in relation to the possibility of extending the current contract, several advantages are recognized, which have already been analyzed by the Ministry's teams, such as the guarantee of uninterrupted continuity of the service because it is the same concessionaire, the avoidance of a transition period that may generate some inconvenience or technical, logistical, administrative or operational risk, not assuming the transactional costs of a new structuring and selection process, nor the procedures for the redelegation of the domain before ICANN. . . ."

> "[I]f the extension does not imply an upward renegotiation of the consideration, it is deemed necessary to structure a new

[136] *See* **C-0017**, Concession.

> concession contract to guarantee greater resources to the State. . . ."
>
> "It is therefore essential to emphasize the need that an extension of the current concession contract would be advisable and reasonable if it goes hand in hand with an economic renegotiation that leads to a significant modification of the consideration paid by the Concessionaire to MINTIC/FONTIC. It is important to take into consideration that this modification scenario could imply a long and complex negotiation period, since the consideration offered was one of the determining factors at the time of choosing the proposals, so the Concessionaire would undoubtedly request a series of additional modifications to the contract that could eventually be subject to questioning against the principle of transparency in the current concession."[137]

Although Respondent notes that the terms of the extended concession have to be agreed, which is of course true, Respondent's report implicitly agrees that a negotiation would be important and should have been done. In fact, the Report admits that the Ministry has studied the extension and recognized several advantages of the extension.

101. Even persons from the Presidential office who were seeking to have AFILIAS operate the new concession (as explained below) acknowledged the extension of the Concession. For example, the President's Advisor for Digital Transformation Victor Muñoz acknowledged that the concession contains a clause that allowed the contract to be extended by mutual agreement for another 10 years:

> "The Ministry of ICT carried out a bidding process awarding the promotion, administration and technical operation of the domain to the company .CO Internet SAS in a concession for 10 years, which contains a clause that allowed by mutual

[137] *See* **C-0027**, Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia (July 2018), p. 8.

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> agreement between the parties to opt for its renewal (sic) [extension] for another 10 years".[138]

102. Respondent's own view, expressed multiple times, is that an extension of such a concession is allowed and recognized under the law and, with respect to this particular Concession, is also provided for in the language of the Concession itself. This had also been the consistent state practice of Colombia with respect to concessions held by other investors. Respondent has also recognized that an extension of this Concession would have certain advantages, such as continuity and experienced performance by the current operator. Nevertheless, Respondent never undertook to negotiate or engage seriously with Neustar's offer through .CO Internet.

5. Respondent's Tender Process Was Conducted in an Arbitrary and Discriminatory Manner

(a) Respondent's Support for Commencing a Public Tender Process was Manufactured and Unreasoned

103. Just weeks after informing .CO Internet that it had no intention of adhering to its commitments, and after the President had intervened to stop negotiations over an extension of the Concession, Respondent received a study it had commissioned on the .CO Domain from a group of consultants led by a Mr. Jim Prendergast (the "**.CO Domain Study**").[139] Despite having been commissioned months before, and in advance of the formal notification that it would not extend .CO's Concession, the .CO Domain Study was exclusively focused on recommendations for a future tender process. It did not address Neustar's or .CO Internet's performance or ability to continue to provide

[138] *See* Victor Muñoz, Advancing the Process for .CO (17 December 2019), EL ESPECTADOR, **C-0066**.

[139] Jim Prendergast et al., Consultancy Services Related to the .CO Domain (May 2019), **C-0067**.

the service, let alone the offers made by .CO Internet to engage with Respondent to extend the Concession. Instead, it simply concluded that something "technically different" was required, and that MinTIC should assume part of the administrative function of .CO Internet's activities.

104. Shortly thereafter, on 21 May 2019, MinTIC announced its action plan to commence the public tendering process to select a new concessionaire by publishing the ".CO Domain Selection Process Action Plan" (the **"Plan"**).[140] In that Plan, MinTIC echoed the cursory findings of the .CO Domain Study, and stated that the current model of operation was "different" from existing market practices.

105. In any event, the changes envisaged by Respondent could have easily been addressed by Neustar and .CO Internet if Respondent had been transparent about their requirements. Nothing in the new tender requirements, except the wrongful elements explained below, were outside of what could have been discussed and negotiated with .CO Internet.

(b) Colombia Continued to Ignore .CO Internet's Attempts to Engage on the Concession

106. Having already been harmed by not being allowed to formalize the extension or even to discuss an extension of the Concession on terms generally consistent with the current terms, Neustar sought to mitigate its damages.

107. Respondent's mistreatment of Neustar and its stated intention to immediately proceed with the tender left Neustar no choice but to proceed (through .CO Internet) with a

[140] MinTIC, MinTIC Launches Roadmap for the.CO Domain Selection Process (21 May 2019), **C-0068**.

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unilateral offer of its own in the hope that this offer would serve to formalize the extension and as a basis to negotiate the extension of the Concession (**"the 22 May 2019 Offer"** or the **"Offer"**).[141] Neustar and .CO Internet reiterated that – despite having attempted on multiple occasions to engage in negotiations with Respondent – it had not yet received a clear proposal from Respondent on a framework for the negotiation of the extension to the Concession, as required under the legal framework – i.e., under the terms of the Concession and Colombian law. Neustar and .CO Internet once again offered to meet to discuss this issue, and highlighted that the 22 May 2019 Offer was a good faith attempt to negotiate with Respondent.

108. In fact, the Offer provided far more benefits to Respondent than the then-existing Concession, which was supposed to be the basis of the negotiation. Under the 22 May 2019 Offer, .CO Internet would have assumed the risks of the operation, of the technological trends in the use of domains, and of the competition in the market by paying almost five times the existing royalties to Respondent (approximately USD 110 million over ten years). The Offer would also pay USD 50 million to Respondent in advance, thereby completely removing any commercial risk to Respondent during the next ten years – including the risks that the domain becomes less relevant, an abuse of the domain, and any technical and cyber-security risks. In addition, Neustar and .CO Internet offered to sponsor IT programs for a sum of up to USD 10 million over the ten years, offering local scholarships and to support certain other MinTIC programs. Furthermore, Neustar offered to provide a free online presence to all the Small Businesses in the country ("Pymes") for an estimated value of USD 90 million. The

[141] Letter from .CO Internet to MinTIC, Concession No. 19 of 2009 (21 May 2019), MinTIC Reference No. 191025099, **C-0069** (note that the letter is dated 21 May 2019, but was received by MinTIC on 22 May 2019, and will thus be referred to as "22 May Offer" for ease of reference).

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total monetary value of the 22 May 2019 Offer over the life of the ten-year extension period was approximately USD 200 million and provided significant support for the Government towards its digital economy development agenda.[142]

109. Neustar and .CO Internet, through their subsequent request for information from Respondent,[143] discovered that the .CO Advisory Committee met to discuss the 22 May 2019 Offer on 30 May 2019. According to the agenda of that meeting, the Advisory Committee was supposed to analyze and make recommendations with respect to engaging in negotiations with .CO Internet and to assess the 22 May 2019 Offer.[144] However, there was no such discussion at the meeting. Instead, the Advisory Committee recommended contracting an expert firm that develops projects, which would accompany the MinTIC throughout all the stages of the tender process until the signing of a new contract that would replace the Concession.[145] The process of contracting the firm – Durán y Osorio Abogados – took place the following week.

110. On 13 June 2019, MinTIC informed .CO Internet that it had three months to consider and respond to the 22 May 2019 Offer.[146] Despite this representation, Respondent never responded substantively or in a manner that was clear, accurate, or congruent with what

[142] *Ibid*.

[143] MinTIC, Minutes No. 3 of Advisory Committee Meeting (30 May 2019), **C-0070**.

[144] *Id.*, Section 2.2 (Agenda: "2.2. Analysis and Recommendations regarding the petition right filed by the concessionaire .CO Internet S.A.S through Submission No. 191025099 of 22 May 2019").

[145] *Id.*, Section 2.2 (Development of the Meeting: 2.2. Analysis and Recommendations regarding the petition right filed by the concessionaire .CO Internet S.A.S through Submission No. 191025099 of 22 May 2019 … The Advisory Committee recommends to advance the process to hire an expert firm".).

[146] Letter from MinTIC to .CO Internet, Response to Submission No. 191025099 of 22 May 2019 (13 June 2019), MinTIC Reference No. 192047252, **C-0071**.

(continued)

was raised in the 22 May 2019 Offer. Rather, Respondent kept it open past the three-month period it itself claimed to be relevant.

111. On 21 June 2019, just a week later, MinTIC wrote and reiterated that it had decided unilaterally to not extend the Concession.[147] MinTIC asserted that an extension was not viable, but failed to explain its justification for that assertion and failed to address the economic offer that Neustar had made. MinTIC provided no reasoning to support its decision, and provided no means of review for Neustar. Respondent further incorrectly asserted that it had previously stated (on 15 February 2019) that it would move forward with the tender and not consider the extension of the Concession. On 25 June 2019, .CO Internet replied to this letter, clarifying that MinTIC had not made such statements in its 15 February 2019 letter, but had instead stated that it would study the matter.[148]

112. On 26 June 2019, after Neustar provided notification of an investment dispute under the TPA on 7 June 2019, Neustar's representatives flew to Bogotá to meet with Respondent. Respondent's representatives included government officials from the Ministry of Industry, Commerce and Tourism (**"Ministry of Commerce"**), including the then-Director for Foreign Investment, Services and Intellectual Property, as well as others. Neustar was led to believe that this was to be an opportunity for the parties to discuss a resolution of the dispute and, at a minimum, an exchange of views or proposals. Instead, Respondent's officials said nothing of substance, just listening (ostensibly) to Neustar's presentation and offering nothing in response.

[147] Letter from MinTIC to .CO Internet (21 June 2019), MinTIC Reference No. 192050579, **C-0072**.

[148] Letter from .CO Internet to MinTIC, Response to Submission No. 192050579 of 21 June 2019, (25 June 2019), MinTIC Reference No. 1-2019-019013, **C-0073**.

113. The very next day, on 27 June 2019, MinTIC signed a service contract with Durán y Osorio to help justify the termination of Concession. The legal services contract also instructed the law firm to assist with the legal aspects of the tender process, including the preparation of the terms of reference for the tender process and providing advice on legal mechanisms to appoint a new .CO domain administrator.[149]

114. Thus, at the same time Neustar and .CO Internet were seeking to engage in good faith with Respondent, Respondent was continuing to ignore .CO Internet's rights under the Concession and Law 1065, and Neustar's rights under the TPA. In fact, from 27 June 2019, MinTIC started taking various actions against Neustar and .CO Internet, including threatening to terminate the Concession before its term expired for no just reason.[150] This would have excluded .CO Internet from participating in the tender process, as Respondent was no doubt highly aware.

115. Simultaneously, MinTIC constantly demanded that .CO Internet provide it with information and a plan for the transition of the .CO domain to a new concessionaire, which .CO Internet did when requested. Despite Neustar's position with respect to the extension and Respondent's failure to even negotiate with respect to an extension, Neustar sought to continue to engage in good faith with Respondent on the transition.

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[149] Contract No. 644 of 2019 between MinTIC's Information Technology Fund and Durán y Osorio Abogados Asociados (27 June 2019), Clause B.7, **C-0074** (note that the Contract was subsequently amended in September 2019). *See* Durán y Osorio Abogados Asociados, Service Proposal (30 August 2019), p. 9, **C-0075** (recognizing that the initial contract term was for a period of 10 years).

[150] Letter from MinTIC to .CO Internet, Supervision of the .CO Concession (29 August 2019), MinTIC Reference No. 192068729, **C-0076** (in this correspondence, MinTIC also requests a transition plan for the third time, despite the fact that .CO Internet had previously provided this material each time it was requested); Letter from MinTIC to .CO Internet, Requirement for Information Relating to the .CO Domain (16 July 2019), MinTIC Reference No. 192055572, **C-0077** (in this correspondence MinTIC requests information about Go Daddy promotions).

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As one example, on 4 July 2019, .CO Internet provided a draft transitional plan for the .CO domain to Respondent, following Respondent's request of 5 June 2019.[151]

116. On 23 July 2019, Neustar met with MinTIC and other government officials at the offices of the Ministry of Commerce.[152] The purpose of the meeting was ostensibly to try and reach an amicable settlement regarding the dispute. At the meeting, Neustar sought clarification about next steps and the negotiation of the Concession and the 22 May Offer. MinTIC's then-Vice Minister, Jehudi Castro, stated that he would consult within government and that Respondent would communicate the date of the next meeting to continue discussions with Neustar and .CO Internet.[153]

117. On 26 July 2019, Neustar and .CO Internet met again with Respondent's representatives.[154] Again, Respondent's officials did nothing to resolve the differences regarding the extension of the Concession or even provide a constructive framework for discussions of these differences.

118. On 29 July 2019, and notwithstanding the representations made to Neustar and .CO Internet during the meetings held on 23 and 26 July, Respondent requested that they provide a "final transition" plan and stated that the Concession would expire on 7

[151] Letter from .CO Internet to MinTIC, Presentation of Integration and Management Report (4 July 2019), **C-0078**.

[152] Letter from .CO Internet to MinTIC, Response to Submission No. 192076098 of 17 September 2019 (25 September 2019), MinTIC Reference No. 191047611, p. 14, **C-0079**. ("meetings held on 11 February 2019 and 23 July 2019."); Letter from.CO Internet to MinTIC, Response to Submission No. 192059553 of 26 July 2019 (6 August 2019), **C-0081**. ("meetings held on 23 and 26 July 2019.")

[153] Letter from .CO Internet to MinTIC, Response to Submission No. 192076098 of 17 September 2019 (25 September 2019), MinTIC Reference No. 191047611, p. 15, **C-0079**.

[154] Letter from.CO Internet to MinTIC, Response to Submission No. 192059553 of 26 July 2019 (6 August 2019), **C-0081**. ("meetings held on 23 and 26 July 2019.")

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February 2020.[155] In good faith, Neustar and .CO Internet recalled that they had already provided a transition plan on 4 July 2019.[156] The companies also presented additional information on the proposed extension of the Concession and offered once again to continue negotiations.[157]

119. Nevertheless, on 26 August 2019, MinTIC once again demanded that a final transition plan be provided. On this occasion, it threatened to sanction noncompliance by "use of all the tools that the law grants it."[158]

120. On 17 September 2019, MinTIC wrote to .CO Internet and stated that Respondent would not extend the Concession.[159] In that letter, and contrary to the earlier representations made to Neustar and .CO Internet, MinTIC stated that the aim of the meetings held on 11 February and 23 July 2019 was to allow .CO Internet an opportunity to submit a proposal, and could not be interpreted as Respondent commencing negotiations.[160] The Respondent went out of its way to make it clear that it was not and would not negotiate with .CO Internet and Neustar regarding an

[155] Letter from MinTIC to .CO Internet, Final Transition Report (29 July 2019), Reference No. 192059553, **C-0080**.

[156] Letter from.CO Internet to MinTIC, Response to Submission No. 192059553 of 26 July 2019 (6 August 2019), **C-0081**.

[157] Letter from .CO Internet to MinTIC, Additional Information Requested (2 August 2019), Reference No. 191037064, **C-0082** (including an extensive explanation of the legal doctrine regarding the enforceability and legality of the extension, as well as the duties to act in good faith, to cooperate and not to abuse its governmental powers).

[158] Letter from MinTIC to .CO Internet, Exercise of Supervision of the Concession (26 August 2019), MinTIC Reference No. 192068729, **C-0083**.

[159] Letter from MinTIC to .CO Internet, Response to Communications (17 September 2019), MinTIC Reference No. 192076098, **C-0084**.

[160] *Id*. In a later correspondence, MinTIC highlighted that they understood .CO and Neustar to have made proposals to agree on the extension, but that the Ministry had advised it was not interested. *See* Letter from MinTIC to .CO Internet, Response to Submission No. 191062320 (24 January 2020), MinTIC Reference No. 202005284, **C-0085**.

(continued)

extension. The Respondent's letter also contained a number of additional inaccuracies with respect to substantive points discussed between the parties.

121. On 25 September 2019, .CO Internet wrote to MinTIC and responded on each of the points and inaccuracies raised by Respondent's communication of 17 September 2019. .CO Internet further requested that Respondent discontinue the tender process, and negotiate to formalize the extension to the Concession, as provided for by law.[161]

122. On 2 October 2019, MinTIC wrote to .CO Internet and rather than address the issues in dispute, wanted to discuss the transition terms of the .CO domain.[162] Again, in a show of good faith, .CO Internet responded that even though it had the right to an extension of the Concession, it would agree to meet, and requested the agreement of a protocol to define the scope and content of the matters for discussion.[163]

123. MinTIC did not reply or provide such protocol. Then, on 23 October 2019, Respondent summoned .CO Internet to a meeting scheduled for the following day.[164] Given the short notice, no Neustar or .CO Internet representative was available to attend the meeting. Respondent then stated that the companies had failed to attend the meeting and accused .CO Internet of violating its duty to cooperate and act in good faith.[165]

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[161] *See* **C-0079**, Letter from .CO Internet to MinTIC, Response to Submission No. 192076098 of 17 September 2019 (25 September 2019), MinTIC Reference No. 191047611.

[162] Letter from MinTIC to .CO Internet, Transition of the .CO Domain (2 October 2019), MinTIC Reference No. 192080371, **C-0086**.

[163] Letter from .CO Internet to MinTIC (16 October 2019), MinTIC Reference No. 191051496, **C-0087**.

[164] Letter from MinTIC to .CO Internet, Transition of the .CO Domain (9 December 2019), MinTIC Reference No. 192101964, **C-0088** (making reference to invitation dated on 22 October 2019 (MinTIC Reference No. 192087132). Note that .CO Internet did not receive the invitation sent on 22 October 2019 until the following day, on 23 October 2019).

[165] *Id.*

(continued)

124. Despite these accusations, it was clear that Respondent had no intention of fulfilling its commitments under the legal framework regulating the investment. For example, Minister of Information and Communication Technologies, Sylvia Constaín, announced on 9 October 2019 that "Colombia had decided not to extend" and that while the Concession "could be extended by mutual agreement, [] it was clear that there was a party that did not wish to do so."[166] News reports of the same day noted, however, that Minister Constain requested the resignation of Vice Minister Castro, based on "strong differences in relation to the management of the Colombian Internet domain."[167]

125. On 29 October 2019, Neustar and .CO Internet met with Respondent to discuss an extension of the transition period requested by MinTIC.[168] Although Minister Constaín was supposed to attend, she left the meeting to be chaired by outside counsel and lower government officials. Respondent's representative announced that the minutes of the meeting could not be recorded and that the content of the discussions could not be used as evidence going forward.[169] .CO Internet objected to this stipulation,[170] and noted that

[166] La República Newspaper (@larepublica_co), Tweet (9 October 2019), **C-0089** (citing Sylvia Constaín as follows: "El proceso del dominio .co tiene un valor a nivel internacional y Colombia tiene una concesión a 10 años que se acaba el año entrante y no hay obligación de extenderla. Colomo tomó la decsión de no prorrogarla", Sylvia Constaín, ministra de las TIC."). *See also* La República Newspaper, Interview with Sylvia Constaín (9 October 2019), **C-0090**.

[167] *See* Valora Analitik, Jehudi Castro, Vice Minister of Digital Economy, Resigns (9 October 2019), **C-0043**. The report also notes that three other senior officials from the same agency left their positions in the course of 2019.

[168] *See* Letter from MinTIC to .CO Internet, Transition of the .CO Domain (9 December 2019), MinTIC Reference No. 192101964, **C-0088**.

[169] *See* Letter from MinTIC to .CO Internet, Transition of the .CO Domain (9 December 2019), MinTIC Reference No. 192101964, **C-0088** (MinTIC confirmed that what was said there could not be used as evidence later and that .CO Internet was preventing "good faith progress" in the transition negotiation).

[170] Letter from .CO Internet to MinTIC (18 November 2019), MinTIC Reference No. 191057262, **C-0091**.

(continued)

it was particularly egregious in light of the systemic failure of Respondent to discuss the extension, and Respondent's ambiguous and delaying behavior.[171] Neustar and .CO Internet repeated these concerns in a letter to Respondent on 25 November 2019,[172] and again on 27 November 2019.[173]

(c) The New Tender Process Arbitrarily Discriminated Against Neustar and .CO Internet

126. At the same time Respondent was stringing along Neustar and .CO Internet, and delaying negotiations of the extension of the Concession and 22 May Offer, Respondent was progressing a new tender process that arbitrarily discriminated against Neustar and .CO Internet.

127. On 13 December 2019, Respondent issued the final Request for Proposals (**"RFP"**).[174] The RFP contained a terms of reference that laid out the requirements and conditions with respect to the tender process (**the "TORs"**).

128. The RFP process was designed to exclude Neustar and .CO Internet and to allow Respondent to choose another concessionaire. In fact, the way in which the preliminary

[171] Letter from .CO Internet to MinTIC (25 November 2019), MinTIC Reference No. 191058943, para. 1, **C-0092**

[172] Letter from .CO Internet to MinTIC (25 November 2019), MinTIC Reference No. 191058943, **C-0092**.

[173] Letter from .CO Internet to MinTIC, Draft Exclusionary Provisions for .CO's Participation (27 November 2019), Reference No. 191059214, **C-0093**.

[174] MinTIC, Selection Process, Public Tender No. MTIC-LP-01-2019 (November 2019), **C-0094**.

(continued)

TORs were drafted demonstrated that they had been prepared to exclude Neustar and to benefit only one competitor – AFILIAS.[175]

129. For example, some of the arbitrary and discriminatory provisions of the TORs included:

- Section 5.2 of the preliminary TORs requested proponents to demonstrate financial ratios including the level of indebtedness to be (70%), which is unusual given the average of the domain industry is (115%).[176] What is yet more remarkable is that that threshold was set a mere 2% below Neustar/.CO Internet's ratio of (72%), a fact known to MinTIC when it issued the preliminary TORs. Further, it is of note that only one company – AFILIAS – was able to meet this requirement.

- Section 5.4(c) of the preliminary TORs required proponents to demonstrate, as an experience qualification, to having more than 1,500 distributors (registrars) accredited by the ICANN. The company AFILIAS had 1,600 registrars at that time. In fact, AFILIAS at that time was the only company in the world with more than 1,500 registrars. MinTIC knew that Neustar/.CO Internet has 141 accredited distributors (registrars), and that this has been more than enough to do a very efficient global distribution of the .CO domain in more than 200 countries and territories, representing an exponential growth of the volumes and targets that were

[175] AFILIAS is a U.S. company the provides TLD registry services in the same way as Neustar and .CO Internet (for such TLDs as, for example, .org, .ngo, .info etc.). *See* Afilias, "About Us", **C-0095**.

[176] As stated previously, the nature of the domain business is that each domain sale is accounted for as a liability for the term of the domain. For example, a 12-month domain purchase gets recorded as 11/12ths liability and 1/12th revenue. Then every month an additional 1/12th is moved from being a liability to an asset. Consequently, companies in the Domain industry have fairly large debt ratios from an accounting standpoint but not necessarily from a cash or operational standpoint.

projected at the beginning of the Concession. There was no good reason to demand an arbitrary number such as 1,500 registrars.

- Section 6(9) of Technical Appendix 2 (Service Levels) is an **exact** transcript of a provision contained in the terms of reference published on 25 July 2016, within a selection process that culminated with the award of the contract to the company AFILIAS. This selection process was not a selection process of Respondent but of another entity. This is particularly concerning since those terms of reference from the earlier selection process were not public, so Respondent must have obtained the information from AFILIAS or persons connected with AFILIAS when drafting the TORs.

- Section 5.4(b) of the final TORs requested proponents to demonstrate, as an experience qualification to participate in the final offer, that they have proven experience as an TLD operator in the operation of Domain Name System ("**DNS**") databases in which an average of at least 25 million transactions per day during one month were verified. MinTIC knew that .CO Internet had a maximum record of an average 6.2 million of EPP billable and searching transactions per day in a month, and that this has been more than enough to do a very efficient global distribution of the .CO domain as indicated above. There is no technical reason to demand an arbitrary number such as 25 million transactions, which represents more than four times the number of transactions that .CO domain has achieved. This again demonstrates that the requirement was tied to AFILIAS, which was arguably the only entity which could satisfy this arbitrary requirement.

- In addition, some of the provisions in the terms of reference are internally inconsistent in an apparent attempt to assist AFILIAS. Section 7.1 of the TORs

allows the bidder to contract with third parties with regard to the DNS and network despite the fact that other sections and the overall framework require that the bidder have the technical abilities itself. This specific carveout is in the area where AFILIAS does not have the technical expertise and contracts such expertise from third parties. This is yet another demonstration that the TORs were drafted to have AFILIAS be the concessionaire.

130. These terms were widely recognized to apply to AFILIAS.[177] In an article entitled "Colombia accused of rigging .CO contract for dot-org provider Afilias", UK publication "The Register" stated:

> "Suspicions have grown deeper that a lucrative contract to run Colombia's .co registry was rigged to favor US-based operator Afilias, thanks to unusual references in one of the South American government's official documents.
>
> The contract for trendy dot-co – beloved by startups and the like worldwide – is out for tender, and Colombia's IT ministry, MinTIC, has published the minimum technical requirements bidders must meet to be considered. However, as we reported last month, those requirements were so strict they excluded every registry operator in the world save one: Afilias."[178]

131. However, despite these highly detailed requirements, Respondent failed to include in the RFP the basic requirements needed for the ongoing development of the domain and to ensure the marketing and security needed for its continued success. Without marketing requirements, AFILIAS would have been able to avoid spending the time

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

[178] Letter from .CO Internet to MinTIC (25 November 2019), MinTIC Reference No. 191058943, **C-0092**; see also Kieran McCarthy, "Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?" (4 February 2020) THE REGISTER, **C-0097**.

and money necessary to keep the .CO domain at its level of prominence, much less to grow the brand. The lack of security requirements is more problematic, as security failures and issues would cause many users to stop using the .CO domain. The Respondent inexplicably ensured that marketing and security would not be required priorities for the .CO domain.

132. In addition to these blatantly preferential terms for AFILIAS, and the exclusion of all other bidders, including the current concessionaire, Respondent also conducted the tender process with a fundamental lack of transparency. In particular, MinTIC held meetings with AFILIAS without inviting Neustar/.CO Internet, and in which proprietary issues related to the .CO domain selection process were discussed.[179] For example, on 23 September 2019, MinTIC attended a meeting in New York with at least two officers from AFILIAS.[180] On 6 November 2019, MinTIC convened a special meeting in Montreal on the premises of the annual session of ICANN to discuss the terms of the .CO domain selection process where AFILIAS was invited, but Neustar/.CO Internet were not, despite their having interacted with MinTIC officials during the ICANN event.[181]

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[179] Kieran McCarthy, "Afilias vanishes from battle to run Colombia's trendy .co after El Reg probes technical docs, allegations of a stitch-up", (25 February 2020) THE REGISTER, **C-0117**.

[180] *See*, *e.g.*, Letter from MinTIC to .CO Internet, Response to Submission No. 191058943 (20 December 2019), Reference No. 192109001, paras. 4-5, **C-0098** (confirming that Minister Constaín attended the meetings in New York); *see* **C-0096** ("In fact, as those interested in bidding began to realize how restrictive the terms were, one attendee at a meeting in Colombia earlier this month asked the ministry's representatives bluntly why the entire process appeared designed to give the contract to Afilias. Another asked whether technology minister Sylvia Constain had held any bilateral meetings with Afilias executives in recent months… Constain also denied privately meeting Afilias representatives, though at the same time noted she was a member of the internet community and so regularly met people interested in Colombia's progress on the web.").

[181] Kieran McCarthy, "Afilias Vanishes from Battle to Run Colombia's Trendy .CO after El Reg Probes Technical Docs, Allegations of a Stitch-Up" (25 February 2020), The Register, **C-0102**.

(continued)

133. After these meetings, and after Neustar and .CO Internet raised concerns with respect to Respondent's transparency and candor during the tender process, Respondent introduced Addendum 16 to the RFP.[182] That Addendum set out a new "Protocol" for MinTIC's interaction with the market players, and retrospectively allowed MinTIC to undertake private, closed-door meetings during the selection process. The terms of the Addendum, and MinTIC's use of the new Protocol departed from that legally prescribed for public government contracting in Colombia.[183]

134. Despite this amendment, and despite the reports of Minister Constaín and others meeting with AFILIAS representatives, Minister Constaín denied meeting with AFILIAS. This denial is false, as one article notes:

> "[T]here is no doubt that Constaín has personally met Afilias CTO Ram Mohan – the man who would be in the best position to discuss registry technical requirements – because the Ministy's own Twitter feed shows Constaín sat next to him at a roundtable meeting in May last year. Why did a senior executive from a US-based internet infrastructure outfit with no obvious business in Colombia attend a roundtable in Bogota, and how did he come to be seated next to the minister?"[184]

135. In addition, an article in the Colombian press, published more than a month before the tender process was announced, shows AFILIAS' Chief Business Officer Keith Lubsen talking at length about Colombia's alleged frustrations with the Concession –

[182] MinTIC, Addendum 16 to the RFP, **C-0099**.

[183] See Law 80 of 1993, **C-0112**; Article 24 of Law 1437 of 2011, **C-0113**; Trade Promotion Agreement between the Republic of Colombia and the United States of America, Article 9.11, **C-0114**.

[184] *See* **C-0097**, Kieran McCarthy, "Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?" (4 February 2020) THE REGISTER.

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something that presumably he would only know about through direct communication with Respondent.[185]

136. Finally, and as described in more detail above, Respondent constantly applied coercive and unfair conditions to the transition period. Respondent summoned .CO Internet representatives to meetings with MinTIC's advisors for the sole purpose of demanding modification of the terms for the "Transition Period" – i.e., the period of time after Respondent has terminated the existing Concession and before a new concessionaire begins operating the domain. Respondent sought to upend the current provisions of the Concession during the transition period to Neustar/.CO Internet's substantial detriment. Respondent further told Neustar/.CO Internet that it would change the terms unilaterally if .CO Internet did not agree.

137. .CO Internet registered complaints with Respondent about the treatment afforded by MinTIC, to no avail. For example, on 27 November 2019, .CO Internet submitted another complaint to Minister Constaín for the *de facto* exclusion from participating in the tendering process for a new concession period. Many of the tender terms could not be fulfilled by the company.[186] .CO Internet received no response to this communication.

[185] Dominio.co: hay que seguir la tendencia global (4 October 2019), **C-0100**.

[186] *See* **C-0093**, Letter from .CO Internet to MinTIC, Draft Exclusionary Provisions for .CO Internet's Participation (27 November 2019), Reference No. 191059214.

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6. Respondent Awarded a Services Contract to .CO Internet on Less Favorable Terms, After AFILIAS Curiously Withdrew from the Tender Process

138. The allegations of wrongdoing and corruption with respect to AFILIAS reached a fevered pitch during the tender process.[187] The original TORs had been written to exclude all other bidders, including especially .CO Internet, which had successfully been operating the domain for the past 10 years and had grown the domain exponentially during that time.[188] In addition, a portion of the TORs were exactly copied from a previous and unrelated tender that AFILIAS had won.[189]

139. With the rising pressure, either AFILIAS decided not to submit a bid or Respondent's officials forced AFILIAS to withdraw.[190] Had AFILIAS actually bid and won the tender, especially as the TORs were originally drafted, the pressure regarding the rigged bid would have continued. Eventually, the pressure from the press reporting and the

[187] *See*, e.g., **C-0097,** Kieran McCarthy, "Colombia accused of rigging .co contract for dot-org provider Afilias – is this document a smoking gun?" (4 February 2020) THE REGISTER; **C-0096,** Kieran McCarthy, "One company on the planet, US-based Afilias, meets the criteria to run Colombia's trendy .co registry – and the DNS world fears a stitch-up" (15 January 2020) THE REGISTER.

[188] W Radio, "The Dispute for the .CO Domain" (14 January 2020), **C-0101** ("W Radio has received several complaints of national and international experts who affirm that without a doubt the [TOR] for the tender process are tainted so the company Afilias [can win] the millionaire contract.").

[189] Kieran McCarthy, "Afilias Vanishes from Battle to Run Colombia's Trendy .CO after El Reg Probes Technical Docs, Allegations of a Stitch-Up" (25 February 2020), The Register, **C-0102** ("Then, it was discovered the technical requirements, for those bidding to run.co domains, included references to the Public Interest Registry, the operator of .org whose back-end has been run by... Afilias since 2003. There was no legitimate reason for .org's PIR to appear in the Colombian government's tender documents for .co, further raising suspicions Afilias had supplied MinTIC with technical requirements from one of its other contracts to cut'n'paste in. Thus, Afilias could show it fits the requirements exactly, having provided those requirements itself, or so it appeared.").

[190] *See*, *e.g.*, Kieran McCarthy, "Afilias Vanishes from Battle to Run Colombia's Trendy .CO after El Reg Probes Technical Docs, Allegations of a Stitch-Up" (25 February 2020), The Register, **C-0102**.

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public outcry regarding the AFILIAS issue led to AFILIAS dropping out of the tender process.

140. The Respondent subsequently amended the TORs several times as there would be no qualified bidders even possible after the withdrawal of AFILIAS.[191] These modifications allowed .CO Internet and some other companies to actually qualify to submit a bid, now that AFILIAS was no longer in the picture.

141. At this same time, Respondent was forcing .CO Internet to agree to a short extension of the current Concession with very unfavorable terms so that an operator (.CO Internet) would be in place until a new operator could be selected in the tender. Respondent's failure to negotiate with Neustar/.CO Internet on a 10-year renewal of the Concession, coupled with Respondent's malfeasance with respect to the tender, meant that the Concession would expire before a new operator was selected. Respondent attempted to include abusive modifications to the contract (such as an external audit for contract liquidation,[192] payments by .CO Internet to Respondent for services not provided,[193] and redelegation and transition[194]) to which it stated that .CO Internet would have to agree. These provisions which Respondent was threatening to introduce unilaterally would have altered the terms of the original Concession. Respondent was clear that it

[191] *See*, *e.g.*, MinTIC, Licitación Publica No. MTIC-LP-01-2019, Addenda No. 1 (24 January 2020), **C-0103**; MinTIC, Licitación Publica No. MTIC-LP-01-2019, Addenda No.2 (7 February 2020), **C-0104**.

[192] This provision would have required additional and abusive steps in order to allow .CO Internet to be paid for the services it performed both under the original Concession and the short-term extension.

[193] This provision would have required .CO Internet to pay for services that were not actually being performed.

[194] This provision would have added additional and significant burdens to .CO Internet regarding the transition that were not provided for in the original Concession.

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would include the new obligations unilaterally if the deadline provided by the Respondent was not met. In the end, .CO Internet was forced to agree with Respondent to a short extension of the Concession in order to allow Respondent to select a new operator for the .CO domain and to prevent any disruptions to its many users. This extension is set forth in Amendment 4, which was executed 10 January 2020, just before the Concession would have expired.[195]

142. Eventually, Respondent finalized the new TORs and companies could bid to be the new concessionaire.[196] The terms of the new tender were drastically different than the Concession.[197] Respondent also could intervene more with respect to the domain, as it inserted itself into the technical aspects of the domain. Rather than being a Concession, the terms of the tender were that of a service contract.[198]

143. In addition to the economics, which will be the subject of a damages phase, and which Respondent essentially admits, the term of the new concession is five years, versus the ten-year extension envisaged under the Concession.

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[195] Amendment No. 4 to Concession, **C-0125**.

[196] For instance, on 24 February 2020, MinTIC published a list of the companies that submitted bids (Consorcio Dot CO, CO Internet S.A.S., Nominet UK). *See* MinTIC, MinTIC Publishes List of Bidders for the Tender of the .CO Domain (24 February 2020), **C-0105**. On 26 March 2020, MinTIC issued Addendum No. 4 to the TOR, through which it extended the term to select the winner of the tender process; and, finally, on 3 April 2020, MinTIC issued Resolution No. 649 of 2020, through which it awarded the concession to .CO. *See* MinTIC, Licitación Publica No. MTIC-LP-01-2019, Addenda No. 4 (26 March 2020), **C-0106**; MinTIC, Resolution No. 649 of 2020 Awarding the Public Bid Process (3 April 2020), **C-0107**.

[197] *See*, *e.g.*, Andrew Allemann, "Breaking: Neustar retains .co registry, at a cost" (3 April 2020), **C-0108**; Loren Moss, "Neustar Subsidiary Wins Renewal of .CO Domain Registrar Contract with Colombian Government" (3 April 2020) Finance Colombia, **C-0109**.

[198] *See*, *e.g.*, Andrew Allemann, "Breaking: Neustar retains .co registry, at a cost" (3 April 2020), **C-0108**; Loren Moss, "Neustar Subsidiary Wins Renewal of .CO Domain Registrar Contract with Colombian Government" (3 April 2020) Finance Colombia, **C-0109**.

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144. Despite the Draconian nature of the new tender, and the heavy-handed manner in which Respondent handled the various issues, Neustar was left with no choice but to submit a tender in accordance with the revised TORs. The registry business, and the technology business in general, is heavily driven by reputation. Respondent had refused to extend the Concession, despite the practice to do so in Colombia. Should .CO Internet not have been awarded the new concession, the reputational damage done to .CO Internet would have been significant. Neustar therefore submitted a bid in order to mitigate any such damage.[199]

III. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

145. The Tribunal has jurisdiction over this dispute, by virtue of the TPA and Article 25 of the ICSID Convention. Article 25(1) of the ICSID Convention states:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

146. The requirements of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione persone*, and *ratione materiae* set out in Article 25(1) of the ICSID Convention have all been fulfilled, as demonstrated in the following sections.

[199] *See*, *e.g.*, Andrew Allemann, "Breaking: Neustar retains .co registry, at a cost" (3 April 2020), **C-0108**; Loren Moss, "Neustar Subsidiary Wins Renewal of .CO Domain Registrar Contract with Colombian Government" (3 April 2020) Finance Colombia, **C-0109**.

A. The Parties have Consented to Arbitration (Jurisdiction *Ratione Voluntatis*)

147. Chapter 10 of the TPA establishes a framework to promote and protect investment in Colombia and the United States, including consent to claims of arbitration with respect to substantive obligations afforded to investors.

148. First, Article 10.17(1) of the TPA provides Colombia's written consent as a Party to the TPA to "the submission of a claim to arbitration under this Section in accordance with this Agreement."[200] Under Article 10.16.1, Colombia's consent to arbitration extends to investment disputes in connection with violations of the substantive obligations owed under Section A of Chapter Ten, as well as violations of an investment authorization or investment agreement, insofar as the claimant has incurred loss or damage by reason of, or arising out of, such violations. Neustar likewise consented when it submitted its Request for Arbitration. The dispute between Neustar and Respondent satisfies those requirements.

149. Second, Article 10.17(2) refers to the requirements of Article 25 of the ICSID Convention, and notes that "[t]he consent under [Article 10.17(1)] and the submission of a claim to arbitration under this section shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre). . . ."[201] As noted above, Article 25 of the ICSID Convention requires, *inter alia*, that a dispute exist between a

[200] TPA, Article 10.17, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**

[201] TPA, Article 10.17, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**

(continued)

"Contracting State" and "a national of another Contracting State", which "the parties to the dispute consent in writing to submit to the Centre."

150. Colombia is a "Contracting State" for these purposes. Colombia signed the ICSID Convention on 18 May 1993, deposited its instrument of ratification on 15 July 1997, and the Convention entered into force for Colombia on 14 August 1997.[202] Colombia has therefore provided its written consent by virtue of Article 10.17(1) of the TPA and its ratification of the ICSID Convention.

151. Likewise, Neustar is a "national of another Contracting State". As detailed below, Neustar is a company incorporated in the United States. The United States is a Contracting State to the ICSID Convention, and has been since 14 October 1996.[203] Neustar has consented in writing to arbitration through the Request for Arbitration, in accordance with the procedures set out in Article 10.18 of the TPA.

152. Therefore, both Parties have provided written consent to ICSID arbitration with respect to the substantive protections provided for investors under Section A of Chapter 10 of the TPA.

B. Neustar Falls Under the Application of the TPA (Jurisdiction *Ratione Temporis*)

153. The TPA entered into force on 15 May 2012, when Neustar's investment in Colombia was already established, and remains in force. The TPA sets out a number of temporal requirements, all of which are satisfied in this dispute.

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[202] List of Contracting States and Other Signatories of the Convention (as of 12 April 2019), ICSID, **C-0001**.

[203] *Ibid*.

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154. First, Article 10.1(3) provides that the TPA does not bind any Party "in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."[204] Colombia's failure to comply with its obligations under international law with respect to Neustar's investment occurred after the TPA entered into force (notably, from 2018). Therefore, Article 10.1(3) does not apply.

155. Second, Article 10.16(2) requires a claimant to deliver "written notice of its intention to submit the claim to arbitration" at least 90 days before submitting any claim to arbitration. Neustar delivered a written notice of intent on 13 September 2019, 101 days before filing its Request for Arbitration on 23 December 2019.[205] Respondent sent a letter acknowledging receipt of the Notice of Intent on 19 September 2019.[206] Thus, Neustar has fulfilled the requirements of Article 10.16(2).[207]

156. Third, Article 10.16(3) requires that "six months have elapsed since the events giving rise to the claim" and the submission of a claim to arbitration. The events giving rise to this claim stem from at least September 2018, culminating in an announcement by the President of Colombia on 30 March 2019 that he had decided to launch a public

[204] TPA, Article 10.1(3), Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**

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

[206] Letter from Ministry of Commerce to .CO Internet (19 September 2019), Reference No. 2-2019-027462, **C-0005**.

[207] Neustar also notes that the requirements stipulated in Article 10.16(2)(a)-(d) were fulfilled in the Notice of Intent, which included: (a) the name, address, and place of incorporation of Claimant; (b) identification of the provision of the TPA alleged to have been violated; (c) the legal and factual basis for each claim; and (d) the relief sought and approximate damages claimed.

(continued)

tendering process for the administration of the .CO domain,[208] and, separately, a letter from MinTIC on 10 April 2019, making clear that it was not going to honor the process in place for managing the investment.[209] These events giving rise to the claim occurred more than eight months before Neustar submitted its claim to arbitration. Thus, the requirements of Article 10.16(3) have been met.

157. Fourth, and related, Article 10.18 of the TPA provides that "[n]o claim may be submitted to arbitration … if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged." Here, the actions of Colombia giving rise to a violation of the TPA started in September 2018, less than 18 months before Neustar submitted this claim to arbitration. Accordingly, Article 10.18 is not applicable to this dispute.

158. As a result, the requirements of jurisdiction *ratione temporis* have been met in these proceedings.

C. Neustar is a Protected Investor Under the TPA and the ICSID Convention (Jurisdiction *Rationae Personae*)

159. Neustar also satisfies the requirements of jurisdiction *ratione personae* under both the TPA and Article 25 of the ICSID Convention.

[208] The President made his announcement at the annual meeting of the Colombian Chamber of IT and Telecommunications, with the announcement subsequently reported by the Colombian press. *See* **C-0041**.

[209] *See*, Letter from MinTIC to .CO Internet, Response to Submission No. 191010681 of 5 March 2019 (10 April 2019), MinTIC Reference No. 192027599, **C-0044**

160. Article 10.28 of the TPA defines an "investor of a Party" as, in relevant part, "an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party."

161. Likewise, Article 25(1) of the ICSID Convention requires that the non-State party to the dispute be "a national of another Contracting State" to the Convention. Article 25(2)(b) defines a "national of another Contracting State" to include "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to … arbitration". Pursuant to ICSID Institution Rule 2(3), the date on which the parties consented to submit their dispute to arbitration is the date of the Request for Arbitration.

162. Neustar fulfils all of these requirements: Neustar is, and has been at all material times, an "enterprise of a Party".[210] Neustar is a company established under the laws of the State of Delaware, United States of America.[211] As noted above, the United States is a Contracting State to the ICSID Convention, and has been since 14 October 1996.[212] Neustar has also made an investment in Colombia, as discussed below.

[210] "Enterprise of a Party" means "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there." *See* TPA, Article 10.28, definition of "enterprise of a party", **C-0002**. Under Chapter 10 of the TPA, "enterprise" also "means an enterprise as defined in Article 1.3 (Definitions of General Application), and a branch of an enterprise." Article 1.3 of the TPA defines an enterprise as "any entity constituted or organized under applicable law [of a Party], whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association".

[211] Certificate of Incorporation of Neustar, Inc. issued by the Secretary of State of the State of Delaware, **C-0006**.

[212] List of Contracting States and Other Signatories of the Convention (as of 12 April 2019), ICSID, **C-0001**.

163. Accordingly, Neustar is a protected investor under the TPA and the ICSID Convention and the requirements of jurisdiction *ratione personae* have been met.

D. Neustar has Qualifying Investments Under the TPA and the ICSID Convention (Jurisdiction *Ratione Materiae*)

164. Finally, Neustar satisfies the requirements for jurisdiction *ratione materiae* under the TPA, in addition to the terms of Article 25(1) of the ICSID Convention.

1. Neustar has Made Qualifying Investments Under the TPA

165. As noted above, the definition of "investor of a Party" under the TPA includes a requirement that the investor "attempts through concrete action to make, is making, or has made an investment in the territory of another Party".[213]

166. Article 10.28 of the TPA further defines "investment" as:

> [E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;

[213] TPA, Article 10.28, Chapter Ten of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, **C-0002**

> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

167. Neustar satisfies this definition. At all relevant times,[214] Neustar held the following investments in Colombia:

a. its 100 percent shareholding in .CO Internet;[215]

b. the Concession and the subcontracts stemming therefrom;[216]

c. monetary claims and activities resulting from the Concession;[217]

d. the tangible and intangible assets constructed and developed during the performance of the Concession;[218] and

e. its expectations concerning earnings and profits resulting from its activities resulting from the Concession.[219]

168. All of Neustar's investments fall within the TPA's definition of "investment", and are thus protected by its terms.

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[214] Neustar sold its interest in .CO Internet to Go Daddy in a transaction that closed in August 2020. **C-0110**.

[215] *See id*., definition of "investment", items (a) and (b).

[216] *See id*., definition of "investment", item (e).

[217] *See id*., definition of "investment" ("every asset … that has the characteristics of an investment").

[218] *See id*., definition of "investment", item (h).

[219] *See id*., definition of "investment" ("every asset … that has the characteristics of an investment").

2. Neustar has Made Qualifying Investments Under the ICSID Convention

169. In addition, Neustar also fulfills the requirement of an "investment" under Article 25(1) of the ICSID Convention, which states:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. . . ." (emphasis added)

170. While the term "investment" is not defined in the Convention,[220] it is widely accepted that jurisdiction will be presumed to exist if a claimant has an "investment" within the meaning of that term under the applicable investment treaty or other legal instrument under which a claim is brought.[221] As outlined above, the requirements of the TPA have been fulfilled.

171. Furthermore, Neustar's economic activity and contributions in Colombia through its enterprise equally fulfil commonly-accepted requirements for an "investment" under the ICSID Convention, notably: (1) contribution of money or assets; (2) a certain

[220] Report of the Executive Directors on The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 27, **CL-001** ("No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).").

[221] *See*, *e.g.*, *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award (3 November 2008), para. 83, **CL-002**; *Patrick H. Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Excerpts of Award (9 February 2004), paras. 43-44, **CL-003**.

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duration; (3) an element of risk; and (4) a contribution to the economic development of the host State.[222]

172. First, ICSID tribunals have interpreted the criterion of contribution broadly, to encompass not only payments of money, but also other kinds of non-pecuniary contributions of value, such as "materials, works, or services".[223] Neustar has committed resources of substantial economic value, amounting to upwards of USD 60 million through long-term branding programs for the .CO domains (both inside of Colombia and internationally), resulting in .CO becoming the domain of choice for innovators, entrepreneurs, and start-up businesses worldwide.

173. Second, ICSID tribunals have recognized that "[duration] is a very flexible term … [and] could be anything from a couple of months to many years."[224] Neustar falls into the latter category, having spent a decade investing in .CO Internet for the benefit of

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[222] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 52, **CL-004**. *See also Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), paras. 90-106, **CL-005**; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), para. 53, **CL-006**; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 95-114, **CL-007**.

[223] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006), para. 73(i), **CL-008** (original in French: "S'agissant de l'apport: II ne peut y avoir d' «investissement» que si une partie fait dans Ie pays conceme des apports ayant une valeur economique. Sans doute peut-il s'agir au premier chef d'engagements financiers, mais ce serait privilegier une interpretation par trop restrictive que de ne pas admettre d'autres types d'engagements. Ces apports peuvent donc consister en prets, en materiaux, en travaux, en services, pour autant qu'ils aient une valeur economique. En d'autres termes, il faut que Ie contractant ait engage des depenses, sous quelque forme que ce soit, afin de poursuivre un objectif economique." Translated: "[T]here can be no investment unless a portion of the contribution is made in the country concerned and brings with it economic value. This would presumably involve financial commitments, in the first place, but it would be too restrictive an interpretation not to admit other sacrifices. These contributions could, then, consist of loans, materials, works, or services, provided they have an economic value.")

[224] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para. 303, **CL-009**.

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Colombia,[225] since the Concession came into effect on 7 February 2010. The "duration" criterion is thus clearly satisfied in this case.

174. Third, ICSID tribunals have stated that an element of risk is inherent in any long-term investment.[226] Neustar exposed itself to financial risk in order to make .CO Internet a profitable enterprise. Neustar made countless branding and sponsorship investments, taking on risk to further its investment for the benefit of Colombia. As a direct result of these investments, and attendant risks, .CO became one of the fastest growing and most dynamic domains in the world.

175. Fourth, and finally, while the contribution to the host State's economic development is arguably implicit in the criteria of contribution, duration and risk, and therefore need not be established separately,[227] Neustar has nonetheless contributed substantially to

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[225] Under the Concession, **C-0017**, and in accordance with Article 3 of Law 1065, **C-0009**, the Colombian Government receives a specified share of the proceeds arising from each .CO domain registration under the Concession, which was not paid by Andes University before. In addition, Respondent receives income tax, VAT, and commerce and industry taxes.

[226] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 56, **CL-004** ("A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 136, **CL-010** ("Besides the inherent risk in long-term contracts, the Tribunal considers that the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for Bayindir."); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 109, **CL-011** ("In the present case, the undisputed stopping of the works which took place… and the necessity to renegotiate the completion date constitute examples of inherent risks in long-term contracts").

[227] *See*, *e.g.*, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 85, **CL-012** ("[T]he contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development." A less ambitious approach should therefore be adopted, centred on the contribution of an international investment to the *economy* of the host State, which is indeed *normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed." (emphasis in original)); *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 111, **CL-007** ("[W]hile the preamble refers to the "*need for international cooperation for economic*

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Colombia's economic development through developing an internationally-recognized business in Colombia, and promoting .CO as a leading TLD in the world (and the second-largest in Latin America). Indeed, Respondent must think so itself, given its efforts to abuse its sovereign powers to seize greater control and value from this asset. Neustar has further trained and employed many citizens of Colombia to operate the .CO domain.

E. This is not a Contract Dispute

176. Respondent indicated at the First Procedural Conference that it viewed this dispute as a contract dispute. It is wrong to do so. Neustar does not seek a remedy for a breach of the Concession by MinTIC, the counter party to the Concession. Rather, Neustar complains of specific governmental actions, measures, and wrongdoing that are specific to the government and are not contractual in nature. For example, it was the President of Colombia and his office that made the decision to ignore Colombian law and the terms of the Concession. The President of Colombia and his advisors announced, demanded, and pushed through the tender, notwithstanding the purported independent authority of MinTIC, the party to the Concession. More importantly, the actions of the government violate the discrimination prong of the minimum standard of

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development," it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording… [The] objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects". (emphasis in original)); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), para. 220, **CL-013** ("[S]uch contribution may well be the consequence of a successful investment, it does not appear as a requirement."); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013), para. 171, **CL-014** ("[S]uch contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment.").

(continued)

treatment, as well as national treatment and the most-favored-nation ("**MFN**") protections. Respondent's actions also violated the duty to protect and not impair Neustar's investment through unreasonable measures pursuant to Article 4.1 of the Swiss-Colombia BIT.[228] Respondent has negotiated with domestic investors and non-US investors and extending contracts, but has not treated Neustar's investment in the like manner. These wrongful actions were not accidental but instead were designed to direct the tender to AFILIAS, rather than provide for a transparent process for the benefit of the Colombian people. It is these actions, among other detailed above, that give rise to this claim, not a breach of the Concession.[229]

F. Conclusion with Respect to the Tribunal's Jurisdiction in this Dispute

177. Therefore, the conditions of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae* have all been met: Colombia has consented to jurisdiction through the TPA, which applies to the violation by Respondent of the investment protections in the TPA; Neustar qualifies as a foreign investor; and there exists an investment under both the TPA and the ICSID Convention. The Tribunal thus has jurisdiction to hear this dispute.

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

178. Respondent has violated the provisions of the TPA, including the fair and equitable treatment (**"FET"**) standard and non-discrimination obligations, as well as the national treatment and MFN protections, among others. In addition, the Respondent violated its

[228] As discussed below, Neustar incorporates the substantive protections offered by Colombia to other investors, such as this protection provided for in the Swiss-Colombia BIT.

[229] These issues are not meant to be exhaustive as to the governmental measures that make up this dispute.

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duty to protect Neustar's investment against unreasonable measures, as provided for in Article 4(1) the Colombia-Swiss Agreement on the Promotion and Reciprocal Protection of Investments (the "**Swiss-Colombia BIT**").[230] As a result of Respondent's failure to comply with its obligations under the TPA, customary international law, and general principles of international law, Respondent is liable for its actions and conduct with respect to Neustar.

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

179. Article 10.5 of the TPA sets out the "minimum standard of treatment" that the State Parties must accord to covered investments, such as Neustar's investment. Article 10.5 provides:

> "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

[230] In accordance with the MFN clause provided in Article 10.4 of the Treaty, Neustar invokes the Agreement between the Republic of Colombia and the Swiss Confederation about the Reciprocal Promotion and Protection of Investments (BIT) agreed on 17 May 2006, **CL-083**, approved by Law 1198 of 2008, declared constitutional via ruling C-150/09 and incorporated by means of Decree No 4309/09 of the Ministry of Foreign Affairs of Colombia, 5 November 2009.

> 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."

180. Annex 10-A then confirms that the customary international law minimum standard of treatment of aliens, as that phrase is used in Article 10.5, refers to "all customary international law principles that protect the economic rights and interests of aliens."[231]

1. The Requirement to Grant Fair and Equitable Treatment Under the Customary International Law Minimum Standard of Treatment

181. The customary international law minimum standard of treatment has been the subject of significant examination. Some tribunals have relied upon the standard evoked in the U.S.-Mexico Claims Commission's decision in *Neer*, that:[232]

> "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that

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[231] TPA, Article 10.5, n. 3, **C-0002** ("Article 10.5 shall be interpreted in accordance with Annex 10-A."). *See also* North American Free Trade Agreement ("NAFTA"), Article 1105, **CL-015**; NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001) ("Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."); Dominican Republic – Central America – United States Free Trade Agreement ("DR–CAFTA"), Article 10.5, **CL-016**.

[232] *See*, *e.g.*, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 616, **CL-017**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 286, **CL-018**; *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. 152-153, **CL-019**. However, even strictly applying the standard articulated in *Neer*, NAFTA tribunals have considered that the principles of customary international law are not understood to be "frozen in amber at the time of the *Neer* decision". *See Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 499, **CL-020** (citing *Pope Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002), para. 57, **CL-021**).

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> every reasonable and impartial man would readily recognize its insufficiency."[233]

182. However, this standard is broadly recognized to be a developing body of law. Most recently, the tribunal in *Eco Oro v. Colombia* noted that Colombia accepts that the *Neer* standard need not be rigidly applied, stating:

> "[T]he Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves; it should be understood today to include today's notions of what comprises minimum standards of treatment under customary international law. Colombia correctly accepts that the Tribunal is not rigidly bound by the standard set out in *Neer* and it is the Tribunal's view that the standard today is broader than that defined in the *Neer* case."[234]

183. This approach is echoed by numerous tribunals, recognising that *Neer* did not deal with investment protection, and therefore the standard to be applied in investment arbitration is not limited to that articulated in *Neer*.[235] For example, in *Mondev International v. United States*, the tribunal interpreted Article 1105(1) of the North American Free

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[233] *L.F.H. Neer and Pauline E. Neer (United States) v. Mexico*, UNRIAA Award (15 October 1926), Vol. 4, pp. 61-62, para. 4, **CL-022**.

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

[235] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 115, **CL-024** (due to this dissimilarity in circumstances, "there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA […] are confined to the Neer standard of outrageous treatment…"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 181, **CL-025** ("There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of foreign investors and their investments by a host or recipient State."); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), para. 433, **CL-026** ("NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.").

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Trade Agreement ("NAFTA") to protect investments against treatment that is unfair or inequitable:

> "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith ... the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s."[236]

184. Likewise, in *ADF v. United States*, the NAFTA tribunal agreed with the findings of the *Mondev* tribunal, observing – as the NAFTA parties had in that dispute – that "the customary international law … is not 'frozen in time' and that the minimum standard of treatment does evolve," so that the NAFTA incorporates "customary international law 'as it exists today.'"[237] The tribunal further observed that a State would be deemed to have violated the minimum standard of treatment if its measures were "idiosyncratic or aberrant and arbitrary."[238]

185. The modern content of fair and equitable treatment under the customary international law minimum standard has been explained by the *Waste Management* tribunal, and endorsed by many others, in the following terms:

> "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack

[236] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 119, **CL-024**.

[237] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 179, **CL-025** ("it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not "frozen in time" and that the minimum standard of treatment does evolve…. It is equally important to note that Canada and Mexico accept the view of the United States on this point…").

[238] *Id.*, para. 188.

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> of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[239]

186. The tribunal in *Biwater* extensively cited *Waste Management* in explaining that the general standard of fair and equitable treatment includes a number of components, including "[t]ransparency, consistency, nondiscrimination: the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary."[240] Likewise, the tribunal in *Mobil Investments Canada Inc. v. Canada* articulated:

> "(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;
>
> (2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.

[239] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**. *See also William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), paras. 442-444, **CL-026**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 501, **CL-028** ("Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.")

[240] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award with Dissent (24 July 2008), para. 602, **CL-029**.

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> (3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of
>
> > (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
> >
> > (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
> >
> > (iii) were subsequently repudiated by the NAFTA host State."[241]

187. In sum, a State thus will be deemed to have violated its obligation to accord the minimum standard of treatment, including fair and equitable treatment, if it imposes arbitrary measures, targets or discriminates a foreign investor, or repudiates representations on which a claimant reasonably relied when it made its investment. As described in the following section, Colombia's actions are arbitrary and discriminatory, and violate Neustar's legitimate expectations.

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

188. In determining whether the fair and equitable treatment standard has been violated in this case, the Tribunal must consider the specific circumstances in issue,[242] and how the

[241] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-019**. *See also TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**.

[242] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 118, **CL-024**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), paras. 98-99, **CL-027**.

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standard applies to these facts.[243] As the tribunal in *Windstream v. Canada* most recently stated, "just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts."[244]

189. Further, and as highlighted by the tribunal in *Eco Oro v. Colombia*, quoting *Gold Reserve v. Venezuela*, "even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures."[245] Thus, the Tribunal should examine the cumulative effect of Respondent's actions when determining whether Respondent violated Article 10.5 of the TPA.[246]

190. Here, the facts undeniably point to a violation of the fair and equitable treatment standard. Colombia failed to accord Neustar fair and equitable treatment in violation of

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[243] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 362, **CL-031**.

[244] *Ibid.*

[245] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 761, **CL-023** (citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), para. 566, making reference to the fact that cumulative effects of State's measures or conduct as integrating a violation of the FET had been considered in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 459). On point is also the dictum in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), para. 593, **CL-026** ("Canada is one entity for the purposes of NAFTA responsibility. There is a saying that sometimes 'the left hand does not know what the right hand is doing'. For the purposes of state responsibility the combined impact of its left hand and right hand can be determinative even if the actions of either in isolation do not rise to the level of a breach."). *See also Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 181, **CL-010** ("a breach need not necessarily arise out of individual isolated acts but can result from a series of circumstances, and that it does not presuppose bad faith on the part of the State").

[246] Any of these acts would be sufficient by itself to constitute a violation of Article 10.5, **C-0002**. Nevertheless, when you examine the acts together, the unfair and inequitable treatment becomes all the more apparent.

Article 10.5 of the TPA. The Respondent violated Article 10.5 of the TPA by failing to even negotiate with Neustar regarding an extension of the Concession and failing to provide Neustar any reasonable information as to the extension process, which was both shrouded in secrecy and showed concerted actions with another company, AFILIAS. As described below, the Respondent also violated Article 10.5 of the TPA by discriminating against Neustar with respect to the extension and negotiation for an extension. The Respondent further violated Article 10.5 of the TPA for frustrating Neustar's legitimate investment backed expectations, as set out below. The result of these actions, among others, was a violation of the fair and equitable treatment standard to the detriment of Neustar, as discussed in the remainder of this Part.

(a) Colombia's Measures were Arbitrary

191. First, Respondent's actions were arbitrary, and thus violated Article 10.5 of the TPA.[247] In *Eco Oro v. Colombia*, the tribunal noted it was "satisfied that FET encompassing

[247] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-019**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 263, **CL-032**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 187, **CL-033**; *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 94, **CL-034**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-030**. *See also* Christophe Schreuer, THE FUTURE OF INVESTMENT ARBITRATION (C.A. Rogers, R.P. Alford eds, 2009), p. 190, **CL-035** ("In a number of cases, Tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with Tribunals applying the NAFTA. It may be explained, at least in part, by the fact that the NAFTA does not contain a separate provision on arbitrary or discriminatory treatment.").

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concepts of non-arbitrariness, transparency and fairness are recognised elements of customary international law."[248] This standard, found the tribunal:

> "[E]ncapsulates the *bona fide* obligation upon a State and, as such, constitutes a guarantee to investors that whilst regulatory changes may be made, any such changes will be consistent with the requirements of FET under customary international law and not made in an arbitrary or otherwise egregious fashion. The regulatory changes effected by Colombia will therefore amount to a breach [] if Colombia has acted in a way which is "arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard"."[249]

192. As noted by the tribunal in *Lemire v. Ukraine*, "the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law."[250]

193. In determining the meaning of arbitrariness, the *Eco Oro* tribunal referred to indicia of arbitrary measures formulated by Professor Schreuer in *EDF (Services) Limited v. Romania*,[251] which it noted had been cited with approval recently by the tribunals in *Teinver v. Argentina*,[252] *Glencore v. Colombia*,[253] and *Global Telecom v. Canada*.[254] As explained by the tribunal in *Eco Oro v. Colombia*:

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[248] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 752, **CL-023**.

[249] *Ibid.*

[250] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 263, **CL-036**.

[251] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), para. 303, **CL-037**.

[252] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017), para. 923, fn. 1116, **CL-038**.

[253] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para. 1449, **CL-039**.

[254] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020) [Redacted], para. 561, **CL-040**.

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"These indicia are:

> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice, or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision-maker; and
>
> d. a measure taken in wilful disregard of due process and proper procedure."[255]

194. Respondent's conduct satisfies these indicia, and: (1) was not rationally connected to any legitimate policy objective; (2) was not based on legal standards, but rather was based on prejudice and was discriminatory in nature; and (3) arose out of a failure of Respondent to act in good faith. For example, Respondent's own Report discusses the benefits of extending the Concession and discusses ways in which such an extension can be accomplished as a benefit to Colombia.[256] Yet the President's decision to begin a tender did not appear to consider any of those benefits. The decision to refuse to negotiate an extension was likewise based on prejudice and discriminatory. Putting aside the dubious reasons for the President and others to propose a tender, and the nature of the tender in its initial *de facto* exclusion of the current operator .CO Internet, the fact that extensions are negotiated and given to others in the telecommunication sectors

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

[256] *See* **C-0027**, Vice Minister of Digital Economy, Analysis with Respect to the Administration, Promotion, Operation and Maintenance of the .CO Domain in Colombia (July 2018), p. 8.

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and in other sectors demonstrates that the decision was not based on legal standards but was based out of prejudice and discrimination.[257]

195. Furthermore, in line with the Tribunal's finding in *Lemire v. Ukraine,* the impossibility of verifying the reasons for the rejection of the extension, despite the multiple requests submitted by Neustar/.CO Internet, demonstrates that the decision was arbitrary.[258] and that the Respondent's refusal to negotiate with Neustar was due to its ulterior motive to award the concession to AFILIAS.

196. Respondent's actions also violated Neustar's right to fair and equitable treatment by violating its right to due process and proper procedure.

(1) Colombia's Conduct was not Rationally Connected to Any Legitimate Policy Objective

197. Colombia's conduct was arbitrary because it was not rationally connected to any legitimate policy objective, and caused detriment to Neustar. Neustar does not deny Respondent's right to regulate as a sovereign state, but notes that such right is not unlimited. In particular, deference to a State's powers cannot require a tribunal to condone actions that would otherwise be a treaty violation.[259]

198. A comprehensive and sophisticated test to ascertain arbitrary treatment has been highlighted by Dr. Heiskanen as follows:

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[257] See Sec. II.E.3, *supra*.

[258] *Joseph Charles Lemire v. Ukraine*. ICSID Case No. ARB/06/18. Decision on Jurisdiction and Liability, para. 420, CL-036 *("In six years Gala Radio, although it tried insistently, and presented more than 200 applications for all types of frequencies, was only able to secure a single licence. (...) ((...) the impossibility of verifying the reasons why Gala was rejected) which can be construed as indications that at least some of the decisions of the National Council when it awarded frequencies were arbitrary and/or discriminatory.")*

[259] *Id.*, para. 751.

> "The decision-maker assesses the international legality of the governmental measure in question by focusing on the relationship between the measure and its underlying policy justification. Has any rationale or justification been put forward in support of the measure in the first place? In the affirmative, is such a rationale or justification related to a legitimate governmental policy? If the answer to the first question is in the negative, and if there is no conceivable rationale that could justify it, the measure can be classified as 'arbitrary'. This 'definition' of arbitrary is also largely in line with the standard definition of arbitrary in legal dictionaries - an arbitrary measure can indeed be defined as a measure taken without any justification, actual or conceivable. If the answer to the first question is yes - if a rationale or justification has in fact been put forward for the measure - then the relevant question is whether there is a reasonable relationship between such a purported justification and a legitimate governmental policy. If there is no such relationship (e.g. if the measure discriminates between investors based on their eye colour), then the measure in question can be considered 'unreasonable'."[260]

199. Thus, the Tribunal must, in effect, consider a two-prong test: (1) whether there is any rationale or justification put forward in support of the measure; and (2) if so, whether the rationale or justification is related to a legitimate governmental policy. As the 2012 UNCTAD Report explains with respect to the second part of the test:

> "Arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned. A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary."[261]

[260] V. Heiskanen, "Arbitrary and Unreasonable Measures, in Standards of Investment Protection", in: A. Reinisch (ed.), *Standard of Investment Protection*, Oxford U. Press 2008, 111, 104, **CL-041**. The same test is put forward by Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Wolters Kluwer 2012) 453, **CL-042**.

[261] UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012), p. 78, **CL-043**.

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200. Here, there is no rational reason for Respondent's conduct, nor were these actions in furtherance of any legitimate policy objective. Instead, Respondent acted in an arbitrary or otherwise egregious fashion for no apparent legitimate purpose,[262] to the detriment of Neustar, and in violation of Article 10.5 of the TPA. The evidence shows that Respondent knew that benefits existed to an extension of the Concession. And Respondent has repeatedly extended concessions for domestic investors and other foreign investors. But Respondent refused to even negotiate with Neustar regarding the extension and provided no good faith basis for refusing to negotiate.

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

201. Colombia's conduct was not based on legal standards, but on discretion and prejudice. In particular, tribunals have consistently found the failure to grant regulatory approvals for an ulterior, political motive to be arbitrary, and thus a violation of the fair and equitable treatment standard.[263] Here, the failure to negotiate or engage with Neustar regarding the extension was apparently done for the most pernicious of ulterior motives – to install a favored operator for reasons not related to that company's performances or some other rationale measure. Not only was the motive an ulterior one, this potential corrupt act was only stopped because of the journalistic and public pressure.

[262] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 752, **CL-023**.

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

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202. Thus, Colombia's conduct was motivated by discriminatory preference for other investments over Neustar's,[264] rather than being justified by any rational policy.[265] There is a wide consensus amongst scholars that the minimum standard of treatment covers specific types of 'discrimination' (*other* than nationality-based).[266] An authoritative UNCTAD report of 2012 also came to the same conclusion:

> "Tribunals have held that the FET standard prohibits discriminatory treatment of foreign investors and their investments. The non-discrimination standard that forms part of the FET standard should not be confused with the treaty obligation to grant the most favourable treatment to the investor and its investment (UNCTAD, 2010a, pp.15–16). While the national treatment and MFN standards deal with nationality-based discrimination, the non-discrimination requirement as part of the FET standard appears to prohibit discrimination in the sense of specific targeting of a foreign investor on other

[264] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-019**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 94, **CL-034**; *Merrill & Ring Forestry L.P. v. The 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**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 263, **CL-032**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 156, **CL-024**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 135, **CL-047**; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 215 *et seq*, **CL048**.

[265] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 307, **CL-049** ("[A]ny differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.").

[266] *See*, *e.g.*, Andrew Newcombe & Luis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer 2009), pp. 289-291, **CL-053**; Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice* (1999) 70 BRITISH YIL 137, p. 133, **CL-054** ("if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated"); Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law* (2005) 6(2) J. WORLD INVEST. & TRADE 297, pp. 311-314, **CL-055**; Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Second Edition, Oxford University Press 2017), § 7.221, **CL-56**.

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> manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a "deliberate conspiracy […] to destroy or frustrate the investment". A measure is likely to be found to violate the FET standard if it evidently singles out (de jure or de facto) the claimant and there is no legitimate justification for the measure."[267]

203. Thus, the 2012 UNCTAD report expressly refers to the "prohibition of targeted discrimination" as one of the five existing elements of the FET standard.[268] This finding has been echoed by a number of NAFTA tribunals, which have concluded that the fair and equitable treatment provision covers certain forms of 'discrimination' (*other* than nationality-based), including targeted discrimination.[269] In fact, the *Glamis* tribunal made the following distinction between different types of discrimination: "The Tribunal notes that, as exhibited under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment".[270] While the *Glamis* tribunal mentioned that nationality-based discrimination "falls under the purview" of the national treatment provision (NAFTA Article 1102),[271] its reasoning suggests that targeted discrimination is covered by Article 1105. Thus, the Tribunal referred 11 times

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[267] UNCTAD, *Fair and Equitable Treatment* 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), p. 82, **CL-043**.

[268] *Id.*, pp. xv-xvi.

[269] Andrew Newcombe & Luis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer 2009), pp. 289-291, **CL-053**. See also *Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, (18 September 2009), paras. 2. 300, 303, 387, 550, **CL-018** ("With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS, all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment"); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 681, 789, 791, **CL-017**.

[270] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), n. 1087, **CL-017**.

[271] *Ibid.*

(continued)

to the terms 'evident discrimination' in its award alongside other elements of the FET standard such as denial of justice, arbitrariness and due process.[272]

204. In this case, in addition to the targeted discrimination, Neustar was discriminated against as compared with domestic investors and investors from third countries. As the tribunal in *Lemire v. Ukraine* noted:

> "Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be "discriminatory and expose[s] the claimant to sectional or racial prejudice;" or a measure must "target[ed] Claimant's investments specifically as foreign investments."[273]

205. Likewise, in *Saluka v. Czech Republic*, the tribunal noted:

> "A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a

[272] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 22, 24, 616, 627, 762, 765, 776, 779, 788, 824, 828 616., **CL-017**. The Tribunal also explained the reasons why it examined this discrimination-related allegation in the context of arbitrariness. *See id*., para. 559 and nn. 1087 and 1128.

[273] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 261, **CL-036** (citing *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 313, **CL-049**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**; *Methanex Corporation v. United States of America*, UNCITRAL, Award (3 August 2005), para. 274, **CL-050**; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 147, **CL-051**.

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preference for other investments over the foreign-owned investment."[274]

206. Respondent engaged in blatant discrimination with respect to Neustar, without any justification. Neustar knows of no case in the telecommunications sector where a concessionaire sought an extension and the government refused, much less a situation where the Respondent refused to even negotiate. In fact, concessionaires in the telecommunications sector have had their concessions extended, including:

- Concession by the National Television Commission[275] was extended for an additional 10 years.[276]
- Concession between the National Television Commission and RCN Televisión S.A. was extended for an additional term of 10 years.[277]
- Concession between the Ministry of Information Technology and Communications and Sociedad Comercial Cadena Melodía de Colombia S.A. was extended for an additional term of 10 years. [278]
- Concession between the Ministry of Information Technology and Communications and Erica Alejandra Londoño Restrepo was extended for an additional term of 10 years.[279]

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[274] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 307, **CL-049** (emphasis added). *See also Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), para. 438, **CL-052**.

[275] *See* **C-0045**. Note that – like the .CO domain – Law 1978 of 2019 applied to this concession. *See* **C-0046**, Article 2 ("*...For all purposes of this Law, the provision of telecommunications networks and services includes the provision of television networks and services. The broadcast open television service shall continue to be governed by the relevant special rules, in particular Law 182 of 1995, Law 335 of 1996, Law 680 of 2001 and other rules that modify, add or replace them.*").

[276] *See* **C-0047** ("*CLAUSE SIX.- EXTENSION OF THE CONTRACT. The term of duration of the extension of Contract No. 136 of 1997 shall be ten (10) years, counted as of January 11, 2009*").

[277] *See* **C-0049** ("CLAUSE SIX.- EXTENSION OF THE CONTRACT. The term of duration of the extension of Contract No. 136 of 1997 shall be ten (10) years, counted as of January 11, 2009").

[278] *See* **C-0051** ("FIRST- EXTENSION of the term of performance contained in the third clause of the Concession Contract No. 049 of 2011, for a term of ten (10) more years, that is, until July 12, 2031").

[279] *See* **C-0053** ("FIRST- EXTEND the term of performance contained in the third clause of the Concession Contract No. 049 of 2011, for a term of ten (10) more years, that is, until May 3, 2031").

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- Contract between the MinTIC's Information Technology Fund and Red de Ingenierías S.A.S. was extended for two years. [280]

- Interadministrative Agreement between MinTIC's Information Technology Fund and Computadores para Educar was extended for a term of 91 additional days.

207. In addition, as described above, all of the concessions in the mining sector were extended.[281] And all of the concessions in the port sector were likewise extended.[282]

208. Many of these extensions included language similar to the language in Neustar's investment Concession, as well as operating under the same or similar Colombian law that provides for extensions of these concessions without regard to the language of the concessions. Yet the Respondent in those cases extended the concessions and negotiated with the concessionaires. Respondent's actions towards Neustar and its investment were discriminatory in several ways, but most fundamentally in that other companies (e.g., those facing the expiration of concessions with the opportunity for extensions) were treated better without any justification or rationale to do so.

209. Neustar notes that Respondent cannot assert that it refused to negotiate an extension because of any defect in .CO Internet's performance. As described in Sections II.C and II.D above, .CO Internet was lauded for its work in growing and operating the domain.

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[280] *See* **C-0055** ("[*G*]*iven the need raised by the Director of Infrastructure, where 300 new populated centers that meet the technical conditions established for the project and that are duly supported in the application and planning document are integrated to the list of eligible for the project, by virtue of the concept of feasibility of the Office of Fund Revenue and taking into account that the addition does not exceed 50% of the value initially agreed in accordance with the provisions of paragraph of Article 40 of Law 80 of 1993 will proceed to amend the contract 618 of 2019 in the sense of extending, adding and making other determinations.*").

[281] Again, this does not mean that every mining concession was extended. But our review turned up these examples, all of which were extended. *See*, *e.g.*, **C-0058**; **C-0059**; **C-0060**; **C-0061**; **C-0062**, Article 6.4.

[282] *See*, *e.g.*, **C-0063** (extended the Concession an additional ten years); **C-0064** (extended the Concession an additional twenty years).

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As definitive proof that .CO Internet operated the Concession well, it continues to operate the Concession (albeit under a services contract and not a concession as before) and was chosen by Respondent following the new tender.

(3) Colombia Failed to Act in Good Faith

210. Although a claimant does not need to demonstrate bad faith or intent to injure by a State, its existence is persuasive in establishing a violation of the minimum standard of treatment.[283] This was recognized in *Cargill* when the tribunal stated that the standard was "not so strict as to require 'bad faith' or 'willful neglect of duty'," though the presence of these factors will suffice to establish a violation of the standard.[284] The tribunal in *TECO Guatemala* confirmed this by stating "the minimum standard is part and parcel of the international principle of good faith . . . a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached."[285] Similarly, the tribunal in *Tecmed v. Mexico* stated that "the commitment of fair and equitable treatment […] is an

[283] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 754, **CL-023**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 296, **CL-018**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 560, **CL-017**; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 280, **CL-057**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 93, **CL-027**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 153, **CL-058**; Andrew Newcombe & Luis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer 2009), p. 277, **CL-053**.

[284] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 296, **CL-018**; Andrew Newcombe & Luis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer 2009), p. 277, **CL-053**.

[285] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 456, **CL-030**. *See also Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para. 754, **CL-023**.

(continued)

expression and part of the *bona fide* principle recognized in international law although bad faith from the State is not required for its violation."[286]

211. Here, Respondent acted in bad faith. It is true that Respondent's improper intent ultimately failed in part, but that is only because the wrongdoing came to light. Nevertheless, the fact remains that Respondent's refusal to negotiate was due to its intention to install AFILIAS as the concessionaire. Respondent had purportedly met AFILIAS representatives in secret, despite having no good reason to do so. The original TORs were designed to literally exclude every company except for AFILIAS. Moreover, the TORs lifted verbatim a requirement that was used in a non-public tender AFILIAS had won and in which Respondent was not even involved.

212. In any event, bad faith is shown by the fact that other concessionaires received extensions whereas it was refused for Neustar. Such bad faith can be inferred where there is no rationale reason for such a distinction.

(b) Colombia Failed to Afford Due Process to Neustar

213. Under the minimum standard of treatment set out under Article 10.5 of the TPA, Colombia has an obligation to afford due process of law.[287] It is well-established that the FET standard contains an obligation for host States to provide foreign investors with due process.[288] Furthermore, in applying the minimum standard of treatment,

[286] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 153, **CL-058**.

[287] *See*, *e.g.*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**.

[288] For example, the 2012 UNCTAD report on the fair and equitable treatment standard expressly includes "flagrant violations of due process" as one of the five elements of the standard. *See* UNCTAD, *Fair and Equitable Treatment* 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), pp. xv-xvi, **CL-043**.

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NAFTA tribunals have consistently recognized the existence of a due process obligation under Article 1105 as part of the FET standard. The tribunal in *Thunderbird v. Mexico* highlighted that administrative proceedings "should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process."[289] Likewise, the Tribunals in *Murphy Exploration & Production Company International v. Republic of Ecuador*,[290] and *Deutsche Telekom v. India*,[291] held that a violation of the FET standard does not depend on whether the respondent has proceeded in a "grossly unfair" manner or with a "complete lack of" transparency or generated an "outcome which offends judicial propriety," but instead acknowledged that the treaty standard is now accepted as reflecting recognizable components, such as: "transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations.(…)."[292]

214. The same conclusion has also been reached by CAFTA-DR tribunals, in application of the minimum standard of treatment. The *TECO* tribunal mentioned that it "considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct … involves a lack of due process leading to an outcome which offends judicial propriety."[293] The

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[289] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 200, **CL-059**.

[290] *Murphy Exploration & Production Company International v. Republic of Ecuador*, (PCA Case No. 2012-16), Partial Final Award (6 May 2016), para. 206, **CL-028**

[291] *Deutsche Telekom v. India,* (PCA Case No. 2014-10), Interim Award (13 December 2017), para. 336, **CL-068**

[292] *Murphy Exploration & Production Company International v. Republic of Ecuador*, (PCA Case No. 2012-16), Partial Final Award (6 May 2016), para. 206, **CL-028**.

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

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TECO ad hoc annulment committee agreed with this finding and stated that "the Tribunal correctly identified the applicable law".[294] Similarly, the *Railroad* tribunal endorsed the definition of the minimum standard of treatment adopted by the NAFTA *Waste Management* case, which refers explicitly to the obligation of due process as being part of the minimum standard of treatment.[295]

215. In assessing whether a failure to provide due process has violated the minimum standard of treatment, tribunals have focused on a number of key factors, all of which are met in this instance.

216. First, tribunals have considered whether the powers exercised by a host State administrative body have been misused for improper purposes.[296] Again, if it could be said that the refusal to negotiate and extend the Concession was an administrative action, such an action was used for improper purposes. In addition, as the direction to refuse to extend and move ahead with the tender came from the President's office, rather than through administrative functions, such actions are likewise improper.

217. Second, tribunals have considered that a failure on the part of the administrative agencies to act in a transparent and candid manner could amount to a violation of the

[294] *Id.*, para. 231.

[295] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), para. 219, **CL-060**.

[296] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 87, **CL-044**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 174, **CL-058** (where the tribunal held that the investor had a fair expectation that the powers of the agency would be used for the proper purposes of the laws. Instead, the agency had used its powers in order to deal with political problems arising from public opposition to the landfill).

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fair and equitable treatment standard.[297] A lack of transparency and candor in an administrative process will violate the minimum standard of treatment.[298]

218. As noted by the tribunal in *Metalclad v. Mexico*, the concept of transparency should "include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party."[299] Recently, the NAFTA *Windstream* tribunal criticized the conduct of the Government of Ontario leading to its decision to impose a moratorium on the development of offshore wind for being not "transparent" precisely because the investor "was kept in the dark as to the evolving policy position of the Government while [it] continued to invest in the Project".[300] Here, among other things, Neustar continued to make substantial investments of time and money into the .CO domain only to have the President of Colombia and other officials decide to conduct a new tender of the now valuable .CO domain.

219. Colombia's actions were taken in willful disregard of due process and proper procedure, in a manner shrouded in secrecy. As stated, Respondent never provided a good faith rationale for refusing to even negotiate with Neustar. In addition, the tender process was shrouded in secrecy and lacked transparency. Respondent was meeting

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[297] *See*, *e.g.*, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 154, **CL-058**; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 76, **CL-044**;

[298] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**.

[299] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 76, **CL-044** .

[300] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 376, **CL-031**.

secretly with representatives from AFILIAS regarding the tender and apparently even obtained information from AFILIAS to use in the tender. Further, Respondent failed to provide a transparent and effective mechanism for these wrongful actions to be challenged.

220. Equally, when a State takes a decision that affects an investor in the exercise of its public administration, it must act in good faith and provide clear, consistent, and truthful reasoning.[301] Respondent has the obligation to explain to an investor the reasons why specific measures affecting its interests were adopted. This is part of the broad obligation of "transparency", which the NAFTA *Metalclad* tribunal defined as follows:

> "The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."[302]

221. The reasoning for the failure to negotiate was not truthful and lacked basic transparency. The Colombian President had already decided to direct that a new tender be conducted, while Colombian officials were reportedly having secret meetings and

[301] Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Second Edition, Oxford University Press 2017), § 7.205(b), **CL-056**.

[302] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 76, **CL-044**.

discussions with AFILIAS regarding a new concession. Neustar had no transparency with respect to this. Neustar thus had no ability to challenge the real reasons for the failure to negotiate and extend the Concession. Respondent did not provide clear, consistent, and truthful reasoning.

222. Finally, due process for claimants requires a mechanism to raise claims against actions taken or about to be taken by a host State. As the tribunal in *ADC v. Hungary* noted:

> "Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "*the actions are taken under due process of law*" rings hollow."[303]

223. Under the principle of due process, Respondent had the obligation to consult with Neustar and .CO Internet and to give them the opportunity to address any issues of concern. As explained by the NAFTA *Thunderbird* tribunal, the host state must give to an investor the "full opportunity to be heard and to present evidence" at the administrative hearing whenever its rights are directly affected by a measure.[304] This requirement includes the obligation for the host State not only to conduct such a public hearing, but also to timely inform an investor that it is taking place and to

[303] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 435, **CL-061**. While the tribunal made these comments with respect to a discussion on expropriation, these principles of due process are universally applicable to the conduct of States.

[304] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 198, **CL-059**.

invite it to appear and present evidence at that hearing. Respondent took none of those essential steps required under the due process obligation.

224. The issue here is that Respondent lacked candor and truthfulness with respect to the refusal to negotiate and the tender, making it impossible to challenge such reasoning.

(c) Colombia Violated Neustar's Legitimate Expectations

225. In addition to the arbitrary nature of Colombia's conduct, and the complete lack of due process afforded to Neustar, Colombia's actions also violated its legitimate expectations regarding (1) extension of the Concession; and (2) negotiating the extension of the Concession in good faith.

226. Tribunals applying the minimum standard of treatment have consistently recognized that it protects investors against unfair treatment arising from a state's repudiation of commitments made to encourage the investor to invest, and of the investor's legitimate expectations. As set out above, the tribunal in *Mobil* noted that a state's repudiation of representations made to an investor that were reasonably relied on by the investor could amount to a violation of the minimum standard of treatment.[305] Similarly, the tribunal in *Waste Management* noted that "[i]n applying [the fair and equitable treatment standard] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[306] In *BG Group v. Argentina*, the tribunal adopted the reasoning of the *Waste Management* tribunal in

[305] *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, 154, **CL-019**.

[306] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-027**.

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concluding that "commitments to the investor are relevant to the application of the minimum standard of protection under international law."[307] Similarly, the tribunal in *Glamis Gold* held that a repudiation of an investor's legitimate expectations could constitute a violation of fair and equitable treatment "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. In this way, a State may be tied to the objective expectations that it creates in order to induce investment."[308]

227. The tribunal in *Merrill & Ring* likewise accepted that the minimum standard of treatment protects investors' legitimate expectation that their business may be conducted in a normal framework free of government interference, even in the absence of specific representations made to induce the investment.[309] Similarly, the tribunal in *Thunderbird* considered that:

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[307] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), para. 294, **CL-062**. While the claimant in this dispute argued that the treaty in question provided a "more generous independent standard of protection", the *BG Group* tribunal did not consider it necessary to address in light of the facts in issue, and therefore was focusing its remarks specifically on the international minimum standard. *See id*., para. 291.

[308] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 621, **CL-017** (citing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, **CL-059**).

[309] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 233, **CL-033**. In addition, there is a rich body of investment arbitration decisions applying the fair and equitable treatment standard in which tribunals have held that the "dominant element" of the fair and equitable treatment standard is the protection of an investor's legitimate expectations: *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), paras. 339-340, **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. 7.78, **CL-064**; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 302, **CL-049**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 175, **CL-051**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 173, **CL-058**; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 611, **CL-065**.

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> "Having considered recent investment case law and the good faith principle of international customary law, the concept of "legitimate expectations" relates … to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[310]

228. In addition, and related, tribunals have also recognized that the minimum standard of treatment encompasses a State's obligation to ensure regulatory fairness and predictability to investors. As the *CMS* tribunal explained:

> "[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."[311]

229. In *Chemtura v. Canada*, the tribunal found that "[the minimum standard of treatment] seeks to ensure that investors from NAFTA member states benefit from regulatory fairness."[312] Similarly, the tribunal in *Merrill & Ring v. Canada* confirmed that "[t]he stability of the legal environment is also an issue to be considered in respect of fair and equitable treatment."[313] Specifically, the tribunal found that "state practice and jurisprudence have consistently supported such a requirement in order to avoid sudden

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[310] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, **CL-059**.

[311] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2004), para. 284, **CL-065**. *See also Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), paras. 609-611, **CL-066**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004), para. 190, **CL-067**.

[312] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 179, **CL-048**.

[313] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 232, **CL-033**.

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and arbitrary alterations of the legal framework governing the investment."[314] The tribunal adopted a contextual analysis and held that what matters is the abruptness of the change in the legal environment.[315] The *Metalclad v. Mexico* tribunal found that failure to ensure a transparent and predictable framework for business planning and investment points toward violation of the fair and equitable treatment standard.[316] In *Mobil Investments v. Canada*, the tribunal accepted that the minimum standard may protect investors from regulatory changes if those changes are arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard.[317]

230. In accordance with these legal standards, numerous tribunals have held the host State liable for a violation of its obligation to provide fair and equitable treatment where, as here, the State violated the investor's legitimate expectations or took arbitrary measures against the investment that were inconsistent with principles of regulatory fairness. Colombia's conduct undoubtedly created reasonable and justifiable expectations on the part of Neustar, who acted in reliance of this conduct and suffered loss as a result.

231. Neustar had legitimate expectations based on the fact that Respondent negotiates and extends concessions, as described above. These expectations exist separate and apart

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[314] *Ibid.*

[315] *Ibid*; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 99, **CL-044**.

[316] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), paras. 99-100, **CL-044**.

[317] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 153, **CL-019**. *See also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 290, **CL-018** (where the tribunal recognized that an obligation to provide a stable business framework could be protected under Article 1105 where such expectations "arise from a contract or quasi-contractual basis.").

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from whether the Respondent in the instant case applied the law and the terms of the Concession correctly or not. The basis for the legitimate expectations arises, among other ways, in the fact that Respondent extended the other concessions and negotiated with those concessionaires regarding these extensions.

232. Neustar's legitimate expectations likewise, and separately, derive from the law and the terms of the Concession itself,[318] as these fulfill the requirements of being "legitimate and reasonable."[319]

233. Article 2 of Law 1065 authorizes the extension of the Concession, subject only to compliance with the requirements set forth in the law, and not to the Respondent's sole discretion.

234. As to the expectation regarding the negotiation of the terms of the extension of the Concession, Neustar had an expectation that Respondent would negotiate in good faith, which in any event is mandated by Colombian law.[320]

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[318] Murphy Exploration & Production Company v. Ecuador. UNCITRAL/ Partial Final Award (6 May 2016) para. 248, **CL-028**, ("*An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State"*).

[319] Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (8 April 2013) para. 532, **CL-081** ("*Where these expectations have an objective basis, and are not fanciful or the result of misplaced optimism, then they are described as 'legitimate expectations'. "Their expectations, in order to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances"*).

[320] Political Constitution of the Republic of Colombia of 1991, Article 83, C-0111. ("*The actions of individuals and public authorities must adhere to the postulates of good faith, which shall be presumed in all the actions they take before them*." The spanish versión reads as follows: "*Las actuaciones de los particulares y de las autoridades públicas deberán ceñirse a los postulados de la buena fe, la cual se presumirá en todas las gestiones que aquellos adelanten ante éstas."*).

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235. In a number of privatization cases, tribunals have emphasized the importance of the bidding rules issued on behalf of the State on the basis of which the investors were induced to invest as establishing a legitimate expectation. In *Gold Reserve v. Venezuela*, for example, the tribunal found that the investor's expectation that it would obtain the required authorization to exploit its concessions was legitimate, in the light of a consistent course of conduct by the State over a twenty-year period in issuing licenses, permits and certificates of compliance.[321] Here, as explained in Section II.E.3 above, Respondent negotiated and extended concessions with other investors. Consequently, Neustar had a reasonable expectation that Respondent would engage in good faith to ensure a transparent and predictable framework for business planning and investment.

236. As demonstrated in the preceding section, Colombia has violated its international obligation to accord Neustar's investment fair and equitable treatment by engaging in arbitrary regulatory conduct and disregarding the legal and regulatory framework which it adopted to induce Neustar's investment. These violations give rise to compensation obligations, which will be addressed as part of the damages phase of these proceedings.[322]

237. Neustar notes here, however, 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. The actual damages from these wrongful acts will be determined at a later stage in the proceeding.

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[321] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), paras. 578-582, **CL-069**.

[322] Procedural Order No. 1 (9 July 2021), Article 14.2.

B. Colombia has Acted in a Discriminatory Manner in Violation of Articles 10.3 and 10.4 of the TPA

238. Respondent has violated its national treatment and most-favored-nation obligations under the TPA. Respondent has subjected Neustar to wrongful treatment that was not applied to domestic and other foreign investors.[323]

239. Article 10.3 of the TPA protects against national treatment, and provides:

> "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 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."

240. Similarly, Article 10.4 of the TPA, entitled "Most-Favored-Nation Treatment," provides that:

> "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion,

[323] Respondent's wrongful treatment of Claimant violates several of its obligations under the TPA. Even were, however, this treatment not a fair and equitable treatment violation, the fact that the Respondent has treated its domestic investors and other foreign investors more favorably than Claimant is sufficient to find a violation here. *See*, *e.g.*, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 137, **CL-070**.

> 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."

241. These broad provisions expressly apply to both "investors" and "investments", meaning that Respondent has an obligation to investors to treat them as favorably as it does its nationals and all foreigners. Separately, and in addition to the obligation to investors, Respondent has an obligation to treat the investments in the same no less favorable manner.

242. The purpose of national treatment is "to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors."[324] In a similar fashion, the MFN provision obligates the Respondent to treat U.S. investors and investments no less favorably than investors and investments from other foreign countries. The fundamental purpose of the MFN protection is "to guarantee equality of competitive opportunities for foreign investors in a foreign state."[325]

243. The Tribunal in *Cargill v. Mexico* laid out the basic requirements of these obligations:

> "[I]t must be demonstrated first that the Claimant, as an investor, is in "like circumstances" with the investor of another Party or of a non-Party, or that the Claimant's investment is in "like circumstances" with the investment of an investor of another Party or of a non-Party. And second, it must be shown

[324] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 199, **CL-071**.

[325] *See, e.g.*, UNCTAD, Most Favored Nation Treatment, UNCTAD/ITE/IIT/10 (vol. III) (December 1998), p. 7, **CL-72**.

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> that the treatment received by Claimant was less favourable than the treatment received by the comparable investor or investment."[326]

1. Neustar and its Investment are in "Like Circumstances" with Domestic and Foreign Investors and Investments

244. The first step in the analysis is to identify comparators in "like circumstances." The concept of "like circumstances" is not rigid, but instead should be tailored by the tribunal to the context of each case. As the tribunal in *Pope & Talbot* explained, by "their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[327]

245. To determine the "like" examples, the Tribunal should find the most apt comparators where possible. As the *Methanex* tribunal explained, "it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[328]

246. Tribunals engaged in a "like circumstances" inquiry have considered three principal factors in identifying comparators in like circumstances. Tribunals have considered whether the comparators (1) operate in the same business or economic sector, (2) produce competing goods or services, and (3) are subject to a comparable legal regime

[326] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 228, **CL-018**.

[327] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), para. 75, **CL-021**.

[328] *Methanex Corp. v. United States of America*, UNCITRAL, Final Award (3August 2005), Part IV, Ch. B, para. 17, **CL-050**.

(continued)

or requirements.[329] Tribunals assess these factors in the context of the claim, focusing on analysis of the circumstances relevant to the measure taken.[330]

247. As noted, one factor considered in establishing appropriate comparators is whether the investor's enterprise operates and competes in the same business sector as the proposed comparators.[331] The analysis focuses on the commercial operations of the investor, rather than the scale of those operations.[332] Tribunals examine the business's various activities, including the economics of the services offered, the logistics and internal controls on those operations, and the customer base.[333]

248. A second factor tribunals have examined when considering like circumstances is whether the investor provides the same or competing goods or services as its proposed comparators. Tribunals have found producers of both identical goods as well as directly competing goods to be in like circumstances. For example, in *Corn Products International v. Mexico*, a NAFTA tribunal considered a single comparator and found

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[329] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), para. 78, **CL-021** ("the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector"); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 199, **CL-071** (In analyzing like circumstances "tribunals convened under Chapter Eleven have focused mainly on the competitive relationship between investors in the marketplace."); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), para. 167, **CL-073** ("the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like….").

[330] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 207, **CL-018**.

[331] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), paras. 120, 130, **CL-074**.

[332] *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 391, **CL-075**.

[333] *United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007), paras. 101–104, **CL-076**.

(continued)

like circumstances where the claimant's sweetener (high fructose corn syrup) was in direct competition with a different sweetener produced by national companies (cane sugar).[334] Accordingly, where an investor's product is in direct competition with that of a comparator, this factor supports a conclusion that the two entities are in "like circumstances."[335]

249. The third factor tribunals have considered in determining comparators in like circumstances is whether the claimant and the comparator are subject to the same legal regime with regard to the subject matter of the claim. "NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances'. . . ."[336] The tribunal in *Grand River*, conducting its own comparison *sua sponte*, determined that the appropriate comparators for the claimant were those "potentially subject to [the same legal penalties]."[337] Likewise, in *Merrill & Ring v. Canada*, the NAFTA tribunal found that the "proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority."[338]

250. Here, Neustar's comparators fall into all three categories. Neustar operates with other businesses in the telecommunications sector. Neustar provides a service similar to other

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[334] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), paras. 120, 130, **CL-074**. *See also S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 251, **CL-032** (holding that where the claimant was in a position to take business away from national firms, the companies were in like circumstances).

[335] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), para. 130, **CL-074**.

[336] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), para. 166, **CL-073**.

[337] *Id.*, para. 165.

[338] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 89, **CL-033**.

services in Colombia. And Neustar's investment operates under the same legal regime as other investors. In fact, with respect to the last category, many of the concessions that were negotiated and extended include the same or similar language regarding extensions.

2. Neustar has Been Treated Less Favorably than Comparable Investors and Investments, Violating National Treatment and MFN

251. Having established the mode of deciding comparators, the Tribunal has to determine whether Neustar has been treated less favorably than these or other comparators.

252. Tribunals have held that the term "'no less favorable' means equivalent to, not better or worse than, the best treatment accorded to the comparator."[339] A State's measures may create nationality-based discrimination *de jure* or *de facto*.[340] A *de jure* discriminatory measure is one that "on [its] face treat[s] certain entities differently,"[341] A *de facto* discriminatory measure "includes measures which are neutral on their face but which result in differential treatment" or which are applied differently to other investors.[342]

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[339] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), para. 42, **CL-021**; *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. 205, **CL-071** ("Accordingly, Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances…").

[340] *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**; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), para. 115, **CL-074** (explaining "that Article 1102 embraces de facto as well as de jure discrimination.").

[341] *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**.

[342] *Ibid.*

(continued)

253. Here, as set out above, Neustar was treated differently in that it was not even allowed to negotiate, much less extend the Concession.

254. Once the claimant has established that it is treated less favorably than comparators in like circumstances, as Neustar has done, the burden shifts to Respondent to demonstrate that the less favorable treatment describe above and elsewhere was justified.[343]

255. In doing so, the Respondent must show that its differential treatment of Neustar "bears a reasonable relationship to rational policies not motivated by [nationality-based preferences]."[344] Moreover, a State does not meet this burden where it could have achieved its policy objective through non-discriminatory means. For example, in *S.D. Myers*, Canada attempted to justify its restrictions on the exportation of certain hazardous chemical waste products (**"PCBs"**) to the United States by claiming the ban was necessary "to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future."[345] The tribunal considered this indirect objective "understandable" but held that the means Canada used to achieve it "contravened CANADA's international commitments under the NAFTA . . . ."[346] In other words, no matter how laudable the goal (even though here the goal was to discriminate against Neustar), the means the State uses to achieve that goal has to be non-discriminatory in its application.

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[343] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 176, **CL-070**.

[344] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), paras. 79, 88, **CL-021**.

[345] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 255, **CL-032**.

[346] *Id.*, paras. 195, 263.

256. When tribunals are called upon to assess whether a State's treatment of an investor bears a "reasonable relationship to a rational policy" tribunals have identified two elements necessary to justify such measures. For a state's conduct to be reasonable, "it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors."[347] Thus, a justification defense demands that the State prove (1) "the existence of a rational policy", and (2) an "appropriate correlation between the state's public policy objective and the measure adopted to achieve it."[348]

(a) No Rational Policy Exists for Respondent's Conduct

257. To satisfy the existence of a rational policy element, Respondent must show that implementation of the policy occurred "following a logical (good sense) explanation and with the aim of addressing a public interest matter."[349] Under the second prong, the tribunal must assess the "reasonableness" of the measure by examining "the nature of the measure and the way it is implemented."[350] This requires the tribunal to assess the "correlation between the state's policy objective and the measures adopted to achieve it."[351] Where the correlation is "reasonable, proportionate, and consistent" a tribunal will find the measure to be reasonably related to a rational policy.[352]

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[347] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013), para. 525, **CL-077**.

[348] *AES Summit Generation Ltd. and AES-Tisza Erömü KRT v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010), paras. 10.3.7, 10.3.9, **CL-078**.

[349] *Id.*, para. 10.3.8.

[350] *Id.*, paras. 10.3.7, 10.3.9.

[351] *Id.*, para. 10.3.35.

[352] *Id.*, para. 10.3.36.

258. Here, there is no rational policy for Respondent's conduct. Based on the concessions we have reviewed, there is no apparent justification for not extending the Concession for .CO Internet. In addition, and as a separate matter, there is no apparent justification for refusing to even negotiate with Neustar. Respondent has not asserted that .CO Internet did not operate the .CO domain appropriately, nor could it: .CO Internet grew the domain from practical obscurity to prominence. And, most fundamentally, Respondent chose .CO Internet as the new concessionaire, meaning that the issue was self-evidently *not* that .CO Internet could not operate the domain.

(b) There is No Correlation Between Respondent's Policy Objective and its Conduct

259. Even if a rational policy did exist for Respondent's actions (*quod non*), this alone is not sufficient. Instead, a State must be able to show that there is an "appropriate correlation" between their public policy objective and the measure achieved to adopt it. Here, there is no correlation between any alleged public policy rationale and Respondent's conduct. This is especially true here where Respondent offered no rationale other than its (incorrect) assertion that it does not have to. No rationale has been offered as to the failure to negotiate.

260. Even if the measures were reasonable and correlated to Respondent's policy objective, Respondent still has the obligation to apply the measure consistently and fairly. Here, the circumstances show that Respondent's intent was to discriminate against Neustar. Even if were not Respondent's intent, and the disparate treatment was purely accidental or an administrative defect, this would not cure or ameliorate the violation.

261. Under the like circumstances and less favorable treatment legal standard, the investor is not required to show that the less favorable treatment is a result of the investor's

nationality; rather, it need show only that the elements of the test are met. That is, a claimant need not show nationality-based animus, or, indeed, any intent to discriminate.[353]

262. Tribunals have recognized that "requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason."[354] A tribunal's discrimination inquiry must focus on the discriminatory effect of the alleged violation on the investor and its investment, and not the government's intent.[355]

263. To be sure, several tribunals have relied upon evidence of intent in finding the requisite discrimination.[356] Where the government's intent to discriminate based on nationality is demonstrated, this can be dispositive in establishing discrimination based on

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[353] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 183, **CL-070**. See also *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), paras. 176-177, **CL-059**; Todd Weiler, "*Treatment No Less Favourable and International Investment Law*," THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT (Martinus Nijhoff Publishers, 2013), p. 434, **CL-079** (explaining that in applying the standard of 'treatment not less favorable' under international investment law, "[t]here is not even so much as a hint in such texts that the aim or intent of the State responsible for the impugned measure should be relevant in the determination of prima facie compliance.")

[354] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 183, **CL-070**. *See also International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), paras. 176-177, **CL-059**.

[355] Meg Kinnear, et al., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, SUPPLEMENT NO. 1 (Kluwer Law International 2006), pp. 1102-1124, **CL-080**.

[356] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 194, **CL-032**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), paras. 181-182, **CL-070**.

nationality. Accordingly, proof of intent to discriminate based on nationality is sufficient to establish the requisite discrimination, but it is not necessary to the Tribunal's analysis.

264. Finally, Neustar notes that even if Respondent has not violated the non-discrimination provided for in Article 10.3 and 10.4, Respondent still has an obligation to protect confidential business information under Article 10.14. Article 10.14(2) provides:

> "Notwithstanding Articles 10.3 and 10.4, a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law."

265. Here, Respondent violated the terms of Article 10.14, notwithstanding its conduct pursuant to Articles 10.3 and 10.4 of the TPA for the reasons set out above.

C. Colombia Failed to protect Neustar's investment against unreasonable measures in Violation of Article 4(1) of the Swiss-Colombia BIT

266. Article 4(1) of the Swiss-Colombia BIT, applicable to the case by operation of the MFN clause of the TPA, sets out the prohibition of interfering with qualified investments through "unreasonable" measures. Article 4(1) of the Swiss-Colombia BIT provides:

> "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."

267. In *Glencore v Colombia I*, the tribunal confirmed that the "set of unreasonable measures is wider than that of arbitrary measures" so that "all measures which are arbitrary are also unreasonable - but not vice-versa."[357] In addition, with respect to the meaning of the term "unreasonable," the tribunal referred to the finding of the tribunal in *LG&E v. Argentina*, noting that unreasonable measures those measures that "are irrational in themselves or result from an irrational decision-making process."[358]

268. Applying this standard here, Respondent's refusal to extend the Concession and refusal to negotiate in good faith was "unreasonable" and "the result of an irrational decision-making process." The 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, while Neustar was investing substantial amounts of time and money into .CO Internet and the .CO domain. The refusals were also unreasonable and a result of an irrational decision-making process because the reasons for the refusal to extend the Concession and negotiate in good faith were based on political decisions by the Colombian president and involved dubious circumstances with respect to another potential bidder, AFILIAS.

269. Respondent cannot be said to have acted reasonably when it did not provide a rationale explanation for its decision not to extend the Concession or even negotiate the extension in good faith, especially in light of its practice to routinely extend these concessions for

[357] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para 1446.

[358] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para 1452; *see also LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1. Decision on liability (3 October 2006) para. 158.

other investors. Nor can the Respondent's refusal to negotiate or discuss the offer made by .CO Internet be considered to be reasonable or rational.

270. Therefore, for the reasons set out above in relation to the standards of fair and equitable treatment, arbitrariness, transparency, due process, and discrimination, Colombia also failed to protect Neustar's investments against unreasonable measures in violation of Article 4(1) of the Switzerland-Colombia BIT.[359]

V. RELIEF REQUESTED

271. For the reasons stated, Claimant respectfully requests that the Tribunal render an Award ordering:

a. that Respondent has violated the TPA and customary international law;

b. Respondent to pay compensation and damages in the amount to be determined;

c. Respondent to pay pre- and post-award interest;

d. Respondent to pay all legal fees and costs associated with this arbitration; and

e. such other relief that the Tribunal may deem appropriate.

Dated: 22 October 2021
Washington, D.C.

Respectfully submitted,

Steptoe & Johnson, LLP
Teddy Baldwin

[359] Neustar similarly invokes other substantive protections provided for in other treaties between Colombia and other countries, such as the good faith requirement in Article 10 of the Swiss-Colombia BIT, as well as the full protection and security clause in the Colombia-Peru BIT.