INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/20/7)

RESPONSE TO RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS AND COMMENTS RELATING TO APPLICABLE LAW ON JURISDICTION

10 MAY 2023

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1. This submission comprises the Claimant's response to the Respondent's Application for Security for Costs **("Application")** (Section III) and, per the Tribunal's direction, the Claimant's further comments as regards the effect of the Neustar Spin Out transaction on jurisdiction as a matter of Delaware and international law (Section IV).[1] Before addressing those matters, we first provide some introductory remarks (Section I) and then address the facts relevant to both of the above-listed issues (Section II).

2. As a preliminary matter, we note that this submission uses the following abbreviations (among others): Neustar, Inc. **("Neustar")**; Security Services, LLC, doing business as (d/b/a) Neustar Security Services **("Neustar Security Services")**; Vercara, LLC **("Vercara")**; and Golden Gate Private Equity, Inc. (**"Golden Gate"**). Further, although Neustar Security Services has recently changed its name to Vercara, in the facts section below, we use the name 'Neustar Security Services' when describing events and documents that preceded that change.

I. INTRODUCTION

3. As to the Respondent's Application, the essential points are as follows.

4. The Respondent's Application is based on an allegation that the Claimant is unable and/or unwilling to pay any costs that may be awarded to the Respondent at the conclusion of these proceedings. This is misplaced speculation. Worse, it is wilful.

5. The Claimant, during the Hearing, offered to provide the Respondent with its financial statements. Not only did the Respondent refuse to take up that offer, it now complains that it lacks visibility as to the Claimant's financial health. That is a problem of the Respondent's own making. Had the Respondent accepted the Claimant's offer, it would have discovered that, as of 31 December 2022, the Claimant had annual revenue

[1] *See* Letter from the Tribunal to the Parties (17 April 2023), para. 1 ("As agreed between the Parties, the Respondent shall submit an application for Security for Costs and comments on the Claimant's request that ICSID update the record of this arbitration on **19 April 2023**. The Claimant shall present its reply on the application on **10 May 2023**. In its reply, the Claimant will present details in relation to the relevant law of Delaware and the specific rules of international law as applicable to the transaction in relation to the claim…") (emphasis in original). The "Spin Out" transaction refers to the 1 December 2021 spin out of Neustar's legacy cloud-oriented security services business before Claimant's ultimate owners sold Neustar, Inc. and its fraud, marketing, and communications business to TransUnion.

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of USD [redacted], as well as USD [redacted] in cash / cash equivalents in the bank and USD [redacted] in other assets.[2] The Respondent's insinuation that the Claimant is a mere "empty shell"[3] is plainly wrong. To the contrary, it is a thriving business. The Claimant is more than capable of satisfying any costs award that might be made against it, even at the over-inflated cost of USD 3.5 million that the Respondent alleges.

6. Meanwhile, there is nothing whatsoever to suggest that the Claimant is unwilling to pay a costs award. It has paid its share of the advance payments, and the Respondent has been unable to point to any history of default. To evade these facts, the Respondent seeks to infer unwillingness from the Claimant's corporate history. That is misplaced. There is nothing unusual in incorporating in Delaware (as many other major corporations have). Likewise, there is nothing unusual in the way that the Claimant's business has been restructured over the years; these are ordinary transactions that have been widely reported in the press, not the stuff of conspiracy novels. Certainly, there is nothing to indicate that the Claimant is unwilling to pay any costs award that might be made against it.

7. In the circumstances, the Respondent has failed to discharge its heavy burden to establish sufficiently exceptional circumstances to justify a security for costs order.

8. Had the Respondent accepted the Claimant's offer to provide its financial statements, this whole Application (and thus significant additional costs) could have been avoided. Yet the Respondent chose to waste the Tribunal and Claimant's time. That decision should be penalised with an immediate order that the Respondent shall bear the costs associated with this incident, to be assessed at the conclusion of the case.

9. Further, we note the pejorative language used throughout the Respondent's submission. In this reply, we address the substance of the Respondent's arguments, and not the terms in which they were made. We trust that the Tribunal will understand that our lack of direct response is in no way intended as an acceptance of the Respondent's criticisms.

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[2] *See* para. 86 below.

[3] *See* Tr. Day 1 (27 March 2023), p. 106, lines 11-12 and p. 202, lines 1-3 [Final transcript] (which include the following assertion: "We would suggest [Neustar Security Services] is an empty shell which is just dealing with this arbitration").

10. As to the Respondent's objection to jurisdiction relating to the Spin Out, the essential facts are that Neustar assigned to its subsidiary Neustar Security Services (now Vercara) all of its "rights, obligations and liabilities" with respect to the claims in this arbitration, and then transferred ownership of that subsidiary to an affiliate under the same ultimate ownership as Neustar. In this way, the claim remained under that same ultimate ownership despite the subsequent sale of Neustar to TransUnion. Neustar, Neustar Security Services/Vercara, and its parent companies up to Golden Gate are all American, such that there has been no change in nationality. As will be seen, the assignment was valid under both Delaware law and under international law.

II. THE FACTS

11. The Respondent's Application for Security for Costs is based on various and significant misrepresentations of the facts. The Respondent's tactic is to sow confusion. That cannot stand. To assist the Tribunal in seeing through the Respondent's misrepresentations, this section sets out the relevant facts in chronological order. Having done so, the penultimate sub-section then addresses miscellaneous further matters which the Respondent has raised, and the final sub-section explains why the Claimant has provided new evidence to rebut the Respondent's Application.

A. Neustar Commenced the Arbitration

12. On 23 December 2019, Neustar, Inc. **("Neustar")** and .CO Internet SAS filed the Request for Arbitration **("RFA")** that gave rise to these proceedings. The materials accompanying that RFA included:

a. **Exhibit RFA-6**, being the State of Delaware's official record for Neustar, which listed, *inter alia*, the following details: File Number, 2975674; and Incorporation Date, 8 December 1998;

b. **Exhibit RFA-18**, being a Westlaw Record, which listed, *inter alia*, the same File Number and Incorporation Date as above; and

c. **Exhibit RFA-13/14**, being Neustar's Form 8-K as filed with the U.S. Securities Exchange Commission (**"SEC"**) on 8 August 2017, which stated that: **(i)** on that date, Neustar "has become a wholly-owned subsidiary of Parent [*i.e.* Aerial Topco, L.P.]" (p. 2, Introductory Note); **(ii)** the transaction by which this took place "was funded through a combination of equity contributions from funds associated with Golden Gate Private Equity, Inc., an entity affiliated with GIC Special Investments Pte. Ltd. and other co-investors, cash of Neustar, as well as proceeds from debt financing" (p. 3, Item 2.01); **(iii)** Aerial Topco, L.P. "is affiliated with investment funds advised by Golden Gate Private Equity, Inc. and an entity affiliated with GIC Special Investments Pte. Ltd" (p. 3, Item 5.01); and **(iv)** Neustar, Golden Gate Private Equity, Inc. and GIC Special Investments Pte. Ltd. had issued a joint press release announcing the completion of the merger, which was exhibited to the SEC filing (p. 4, Item 8.01). In turn, that

joint press release indicated that Golden Gate (a U.S. entity) was the lead purchaser, and that GIC (a Singapore entity) was a minority participant.

13. Thus, since the outset of these proceedings, the Respondent has known: **(i)** Neustar's Delaware File Number and Incorporation Date; and **(ii)** that from 8 August 2017, Neustar had been wholly-owned by Aerial Topco, L.P., which in turn was majority-owned by Golden Gate. For the avoidance of doubt, this ownership structure remained the same as of the date of the RFA (see below).

14. On 9 March 2020, the arbitration was registered with Neustar as the Claimant.

B. The Ownership Structure at the Date of the RFA

15. As of 23 December 2019, *i.e*. the date of the RFA, the relevant ownership structure was as follows:

a. Security Services, LLC **("Neustar Security Services")** (Delaware) was 100% owned by Neustar (Delaware);[4]

b. in turn, Neustar was 100% owned by Aerial Acquisition Corp. (Delaware);[5]

c. in turn, Aerial Acquisition Corp. was 100% owned by Aerial Intermediate Holdings Corp. (Delaware);[6]

d. in turn, Aerial Intermediate Holdings Corp. was 100% owned by Aerial Ultimate Holdings Corp. (Delaware);[7]

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[4] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(a), **CWS-1**. *See also* Agreement among Neustar, Inc., Aerial Security Intermediate, LLC, Aerial Blocker Corp., and Security Services LLC, dated 1 December 2021 (Unredacted) [**CONFIDENTIAL**] (hereinafter **"UPA (Unredacted)"**), Second Recital on p. 1, **Exh. C-140** (which establishes that Neustar owned Security Services, LLC pre- Spin Out).

[5] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(b), **CWS-1**.

[6] *See id.*, para. 6(c).

[7] *See id.*, para. 6(d). *See also* U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021), Item 1.01 on p. 2, **Exh. C-141** (which establishes that Aerial Ultimate Holdings Corp. owned Neustar) – this exhibit was previously hyperlinked to at footnote 7 of the Claimant's letter of 15 September 2022.

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e. in turn, Aerial Ultimate Holdings Corp. was 100% owned by Aerial Investors LLC (Delaware);[8]

f. in turn, the common equity of Aerial Investors LLC was 100% owned by Aerial Topco L.P. (Delaware);[9] and

g. in turn, Aerial Topco L.P. was majority owned by GGC Neustar Investors, LP (Delaware) (the "Fund"). An affiliate of GIC (Singapore), was a minority owner. Together, the Fund and GIC owned over 90% of Aerial Topco L.P. (Delaware).[10,11]

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[8] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(e), **CWS-1**. *See also* U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021), Item 1.01 on p. 2, **Exh. C-141** (which establishes that Aerial Investors LLC directly owned Aerial Ultimate Holdings Corp.) – this exhibit was previously hyperlinked to at footnote 7 of the Claimant's letter of 15 September 2022.

[9] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(f), **CWS-1**. *See also* U.S. Securities and Exchange Commission, Neustar, Form 8-K (8 August 2017), Item 5.01 on p. 3, **Exh. RFA-13/14** (which establishes that Neustar had become a wholly-owned subsidiary of Aerial Topco, L.P.).

[10] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(g), **CWS-1**. *See also* U.S. Securities and Exchange Commission, Neustar, Form 8-K 8 August 2017), Item 5.01 on p. 3, **Exh. RFA-13/14** (which establishes that Aerial Topco, L.P. was affiliated with Golden Gate – *see* para. 12.c above).

[11] The overall connection between Neustar and Golden Gate is further established by the following matters: **(i)** Neustar's Written Consent and Waivers, pp. 2-3, **Exh. RFA-7** (which establishes that Rishi Chandna and David Dominick were Members of Neustar's Board of Directors at the date of the RFA); and Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), p. 2, **Exh. C-135** (which establishes that Rishi Chandna was also a Managing Director at Golden Gate); and Golden Gate's Website Extract, as at 4 May 2023 (for example), **Exh. C-142** (previously hyperlinked to at footnote 4 of the Claimant's letter of 15 September 2022) (which establishes that David Dominick remains a Managing Director of Golden Gate) – together, these exhibits evidenced that Neustar was affiliated with Golden Gate. **(ii)** U.S. Securities and Exchange Commission, Neustar, Form 8-K (8 August 2017), Item 5.01 on p. 3, **Exh. RFA-13/14** (which establishes that Neustar had become a wholly-owned subsidiary of Aerial Topco, L.P., and that such company was affiliated with Golden Gate – *see* para. 12.c above) – this exhibit includes a press release which was itself previously hyperlinked to at footnote 5 of the Claimant's letter of 3 October 2022. **(iii)** U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021), Item 1.01 on p. 2, **Exh. C-141** (which establishes that Aerial Investors LLC "is a private investment group led by Golden Gate Capital") – this exhibit was previously hyperlinked to at footnote 7 of the Claimant's letter of 15 September 2022. **(iv)** Golden Gate's Website Extract, as at 18 October 2021 (for example), **Exh. C-142** (which listed Neustar as one of Golden Gate's assets). **(v)** The UPA (Unredacted), Section 7.2 on pp. 32-33, **Exh. C-140** (which establishes that notices to the parties, *i.e*. to Neustar, Aerial Security Intermediate, LLC, Aerial Blocker Corp., and Neustar Security Services, had to be sent "c/o Neustar Inc." and "c/o Golden Gate Private Equity Inc.",

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h. Golden Gate was the SEC-registered investment manager to the Fund.[12]

16. For a visual representation of this structure, and how it changed over time, see the organograms at para. 27 below.

C. The Ownership Structure Immediately Prior to the Spin Out

17. As of 30 November 2021, *i.e.* immediately prior to the Spin Out, the relevant ownership structure was the same as above.[13] In addition, Aerial Investors LLC also held two newly created holding company subsidiaries:

a. Aerial Security Intermediate, LLC (Delaware) was 100% owned by Aerial Blocker Corp. (Delaware); and

b. Aerial Blocker Corp. (Delaware) was 100% owned by Aerial Investors LLC (Delaware).[14]

D. The Spin Out Transaction

18. On 1 December 2021, Neustar and the majority of its business assets were sold to TransUnion. However, Neustar's previous ultimate owners **("the Claimant's Ultimate Owners")** were to retain Neustar's security services business.

19. More specifically, the Claimant's Ultimate Owners were to retain "the business of providing cloud security solutions and services, comprising Application & Network Security (BoT Management, DDoS Protection, Web Application Firewall), DNS Services, Threat Data Feeds (UltraThreat Feeds and custom security data feeds) and Web Performance Management as operated by Security Services, LLC and its Subsidiaries" (defined in the UPA as **"the Business"**).[15]

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including to the attention of Rishi Chandna) – this same detail is also apparent in the redacted copy of the UPA at **Exh. C-136**.

[12] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 6(h), **CWS-1**.

[13] *See id.*, para. 7.

[14] *See id.*, para. 7(a) and (b).

[15] UPA (Unredacted), Section 1.1, **Exh. C-140**.

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20. Prior to the sale to TransUnion: **(i)** a number of assets relating primarily to the Business were not held by Security Services, LLC **("Neustar Security Services")**, but by Neustar and its other subsidiaries (and vice versa);[16] and **(ii)** Security Services, LLC was a direct subsidiary of Neustar.[17]

21. Accordingly, in order for the Claimant's Ultimate Owners to retain the Business, it was necessary: **(i)** for Neustar and its other subsidiaries to first transfer to Neustar Security Services all assets relating primarily to the Business; and then **(ii)** for Neustar to transfer ownership of Neustar Security Services to an affiliate that would remain under the ownership of the Claimant's Ultimate Owners after the TransUnion sale completed. The first of these steps was effected by an Assignment and Assumption and Bill of Sale dated 1 December 2021 **("the Bill of Sale")**, and is confirmed in the Unit Purchase Agreement of the same date **("the UPA")**; and the second step was effected by the UPA. Each agreement will be discussed in turn.

22. The Bill of Sale is at **Exhibit C-143**,[18] and can be summarised as follows:

    a. It is an agreement between Neustar, Neustar Security Services, and various other affiliates as listed in the first paragraph of the agreement.

    b. Per Section 1: "Transfer of Assets. For true and lawful consideration paid to it by each applicable Transferee (as defined on Schedule A), the sufficiency of which is hereby acknowledged, each Transferor (as defined on Schedule A) hereby irrevocably assigns, transfers, conveys and delivers to each applicable Transferee all of such Transferor's right, title and interest in and to all of the assets set forth on Schedule A under the heading for each applicable transfer (collectively, the 'Transferred Assets'). Effective as of the date hereof, each Transferee hereby agrees (a) to accept the assignment, transfer conveyance and delivery of the applicable Transferred Assets and (b) to assume all rights,

[16] This is confirmed by the Bill of Sale and the UPA, as defined and described below.

[17] *See* para 15.a above.

[18] Assignment and Assumption and Bill of Sale (1 December 2021) [**CONFIDENTIAL**], **Exh. C-143**.

obligations and liabilities of the applicable Transferor with respect to the applicable Transferred Assets."

c. Thus, Section 1 established the framework for this step of the transaction, whereby the Transferors "assign[ed], transfer[ed], convey[ed] and deliver[ed]" specified assets to the Transferees, as further elaborated in Schedule A.

d. Schedule A, paragraph 1 then defined the term "Business" in the same terms as the UPA, as quoted above.

e. For present purposes, Schedule A, paragraph 5 is the key provision. It provided that: "Neustar, Inc. (a 'Transferor') hereby assigns, transfers, conveys and delivers to Security Services, LLC (a 'Transferee') such Transferor's right, title and interest in and to (i) each contract to which such Transferor is a party and (ii) each other asset held by such Transferor, in each case, which is primarily related to the Business."

f. Neustar's rights in relation to the present arbitration fall within the second category of asset. More specifically, it is an asset that was held by Neustar and which is "primarily related to the Business": the .CO Concession required Neustar to provide domain registry and DNS services; by the time of the Spin Out, the registry business had been sold to GoDaddy; accordingly, the MINTIC Claim was most closely connected to Neustar's then-remaining DNS business; [19] certainly, it was unrelated to those business lines sold to

[19] *See*, *e.g.*, the Respondent's Counter-Memorial on Jurisdiction and the Merits (25 February 2022), para 56 ("In light of MinTIC's primary objective of 'preserving the stability, security and reliability of the domain name system (DNS)', the bidders were required to have adequate experience in the technical operation of domain name registries in order to participate in the tender process."); IANA, Redelegation of the .CO domain representing Colombia to .CO Internet SAS, p. 5, **Exh. C-123** ("The operator [.CO Internet] 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."); the Claimant's Memorial on Jurisdiction and the Merits (22 October 2021), para 129, bullet 3 ("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. …"), and the related point made by the Respondent at para 129, bullet 4 of its Counter-Memorial on Jurisdiction and the Merits (25 February 2022) (emphases added).

TransUnion. This is confirmed by the UPA, in which Neustar and Neustar Security Services (among others) expressly acknowledged and agreed that Neustar's rights in relation to this arbitration had been transferred to the Neustar Security Services group (see below).

g. Per Section 5, the Bill of Sale is governed by Delaware law.

23. Thus, by way of the Bill of Sale and as recorded in the UPA, Neustar assigned all of its "rights, obligations and liabilities" with respect to the present arbitration to Neustar Security Services.

24. Meanwhile, the UPA is at **Exhibit C-136 (redacted) & C-140 (unredacted)**, and can be summarised as follows:

a. It is an agreement between Neustar, Aerial Blocker Corp., Aerial Security Intermediate, LLC, and Neustar Security Services.

b. Per the first paragraph (p. 1), it became effective on the same day as the Bill of Sale, and immediately following that agreement's effective time.

c. By Section 2.1 (p. 8), the parties (in essence) acknowledged and agreed that prior to the consummation of the UPA, the Neustar group had re-organised its assets by way of the Bill of Sale.

d. Before addressing the text of Section 2.1, it is necessary to first set out Section 5.10 (p. 29): "The International Centre for Settlement of Investment Disputes claim by Neustar and .CO Internet S.A.S. against the Colombian Ministry of Information Technology and Communications (MINTIC) (the "MINTIC Claim") shall be a Transferred Security Asset and Security Liability. …".[20]

e. With that in mind, the following parts of Section 2.1 (p. 8) are relevant: "[T]he Parties acknowledge and agree that, prior to the consummation of the

[20] The fact that the MINTIC Claim is a "Transferred Security Asset" is further confirmed by Annex I, Transferred Security Assets, Item 5 (PDF p. 44), read alongside the definition of "Transferred Security Assets" in Section 1.1 on p. 7 of the UPA, **Exhs. C-136** and **C-140**.

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Transaction [*i.e.* the UPA[21]], Neustar has caused: … (iii) the Transferred Security Assets [including the MINTIC Claim] to be transferred and assigned to a member of the Company Group [*i.e.* Neustar Security Services and its subsidiaries[22]]…, and (iv) the Security Liabilities [including the MINTIC Claim] to be assumed by a member of the Company Group …".

f. Accordingly, by the UPA, Neustar and Neustar Security Services acknowledged and agreed that the former had caused the MINTIC Claim to be transferred and assigned to the Neustar Security Services group.

g. Further, per Section 2.2 (p. 8): "Neustar hereby sells, transfers, assigns and delivers to Intermediate [*i.e.* Aerial Security Intermediate, LLC[23]], and Intermediate hereby accepts, assumes and receives from Neustar, the Security Units in exchange for the Note." The "Security Units" were defined as "all of the issued and outstanding units of the Company [*i.e.* Neustar Security Services]" (recitals, p. 1).

h. Accordingly, by the UPA, Neustar transferred its interest in Neustar Security Services to Aerial Security Intermediate, LLC.

i. Per Section 5.8 (p. 28), Neustar granted Neustar Security Services and its subsidiaries a licence to use certain trademarks for defined periods. We return to this in Section II.J below, in the context of the Respondent's assertions as to the Vercara name change.

j. Per Section 7.8 (p. 34), the UPA is governed by Delaware law.

[21] *See* definition of "Transaction" in the recitals on p. 1 of the UPA, **Exhs. C-136** and **C-140**.

[22] *See* definition of "Company" in the first paragraph on p. 1 of the UPA, and the definition of "Company Group" in Section 1.1 on p. 2 of the UPA, **Exhs. C-136** and **C-140**.

[23] *See* definition of "Intermediate" in the first paragraph on p. 1 of the UPA, **Exhs. C-136** and **C-140**.

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25. Subsequent to the Bill of Sale and the UPA, Neustar was sold to TransUnion for approximately USD 3.1 billion.[24] However, as set out above, by that time Neustar Security Services and this arbitration claim had already been transferred out of Neustar's ownership, such that they were retained by the Claimant's Ultimate Owners. In addition to there being continuity of ultimate ownership, there was also substantial continuity of management.[25]

26. As explained in the Claimant's letter of 15 September 2022, there is nothing irregular about transactions such as this. To the contrary, HoganLovells, which holds itself out as experts on carve-outs and spin-offs, has stated that "[i]n 2021 we saw an increasing number of carve out transactions".[26] Again, this is not intended as a criticism of HoganLovells, but merely serves to highlight the regular nature of spin out transactions. In the instant case, this is further confirmed by the fact that the Spin Out and sale to TransUnion were widely reported, including in filings with relevant government authorities such as the U.S. SEC.[27]

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[24] *See*, *e.g.*, U.S. Securities and Exchange Commission, TransUnion, Form 8-K (1 December 2021), p. 3, Item 2.01, **Exh. C-144**; TransUnion, "TransUnion and Neustar Announce Transaction Close" (1 December 2021), **Exh. C-145**.

[25] For example, the President of Neustar's security business, Brian McCann was appointed CEO of Neustar Security Services (*see* **Exh. C-135**); Neustar's Executive Vice President, General Counsel and Corporate Secretary, Kevin Hughes, took the same positions at Neustar Security Services (*see* the Respondent's *Dramatis Personae* which accepts this); and Neustar's President and CEO, Charlie Gottdiener, was appointed to Neustar Security Services' Board of Directors (*see* **Exh. C-135**, and the Respondent's *Dramatis Personae* which accepts this).

[26] HoganLovells, "Carve outs, Divestments and Spin-Offs – How to Sell Businesses and Assets" (10 February 2022), **Exh. C-146**, available at: https://www.hoganlovells.com/en/events/carve-outs-divestments-and-spin-offs; HoganLovells, "Carve-outs, Spin-offs, and Split-offs", **Exh. C-147**, available at: https://www.hoganlovells.com/en/aof/carve-outs-spin-offs-and-split-offs ("Whether you are looking to spin-off a business to shareholders or undertake a carve-out through a public offering, we advise companies globally on these complex equity transactions." (emphasis added)).

[27] *See*, *e.g.*, Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), **Exh. C-135**, and the various materials hyperlinked to in the Claimant's letter of 15 September 2022, at footnotes 4 to 9, which include: U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021), now exhibited as **Exh. C-141**. *See also* U.S. Securities and Exchange Commission, TransUnion, Form 8-K (1 December 2021), **Exh. C-144**.

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E. The Ownership Structure Immediately After the Spin Out

27. As of 2 December 2021, *i.e.* immediately after the Spin Out, the relevant ownership structure was as follows:

a. Neustar Security Services (Delaware) was 100% owned by Aerial Security Intermediate, LLC (Delaware);[28]

b. in turn, Aerial Security Intermediate, LLC was 100% owned by Aerial Blocker Corp. (Delaware);[29]

c. in turn, Aerial Blocker Corp. was 100% owned by Aerial Investors LLC (Delaware);[30]

d. in turn, Aerial Investors LLC was 100% owned by Aerial Topco L.P. (Delaware);[31] and

e. in turn, Aerial Topco L.P. was majority owned by GGC Neustar Investors, L.P. (Delaware) (the "Fund"). An affiliate of GIC (Singapore) was a minority owner. Together, the Fund and GIC owned over 90% of Aerial Topco L.P.[32,33]

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[28] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 8(a), **CWS-1**. *See also* the UPA (Unredacted), Second Recital on p. 1 and Section 2.2 on p. 8, **Exh. C-140** (which establish that Aerial Security Intermediate, LLC acquired Security Services, LLC).

[29] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 8(b), **CWS-1**. *See also* the UPA (Unredacted), Section 6.2 on p. 29 and Signature Block on PDF p. 41, **Exh. C-140** (which establish the close connection between these companies given that they gave a joint indemnity and that they shared the same President, Secretary and Treasurer).

[30] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 8(c) and n. 1, **CWS-1** ("Note that Aerial Investors L.P. was subsequently converted from an LLC, on 3 March 2022.").

[31] *See id.*, para. 8(d).

[32] *See id.*, para. 8(e).

[33] The overall connection between Neustar Security Services and Golden Gate is further established by the following matters: **(i)** UPA (Unredacted), Signature Block on PDF p. 41, **Exh. C-140** (which establishes that Rishi Chandna was the President, Secretary and Treasurer of both Aerial Security Intermediate, LLC and Aerial Blocker Corp.); and Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), p. 2, **Exh. C-135** (which establishes that Rishi Chandna was also Managing Director at Golden Gate) – together, these exhibits evidenced that Aerial Security Intermediate, LLC and Aerial Blocker Corp. were affiliated with Golden Gate. **(ii)** Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), p. 2, **Exh. C-135** (which

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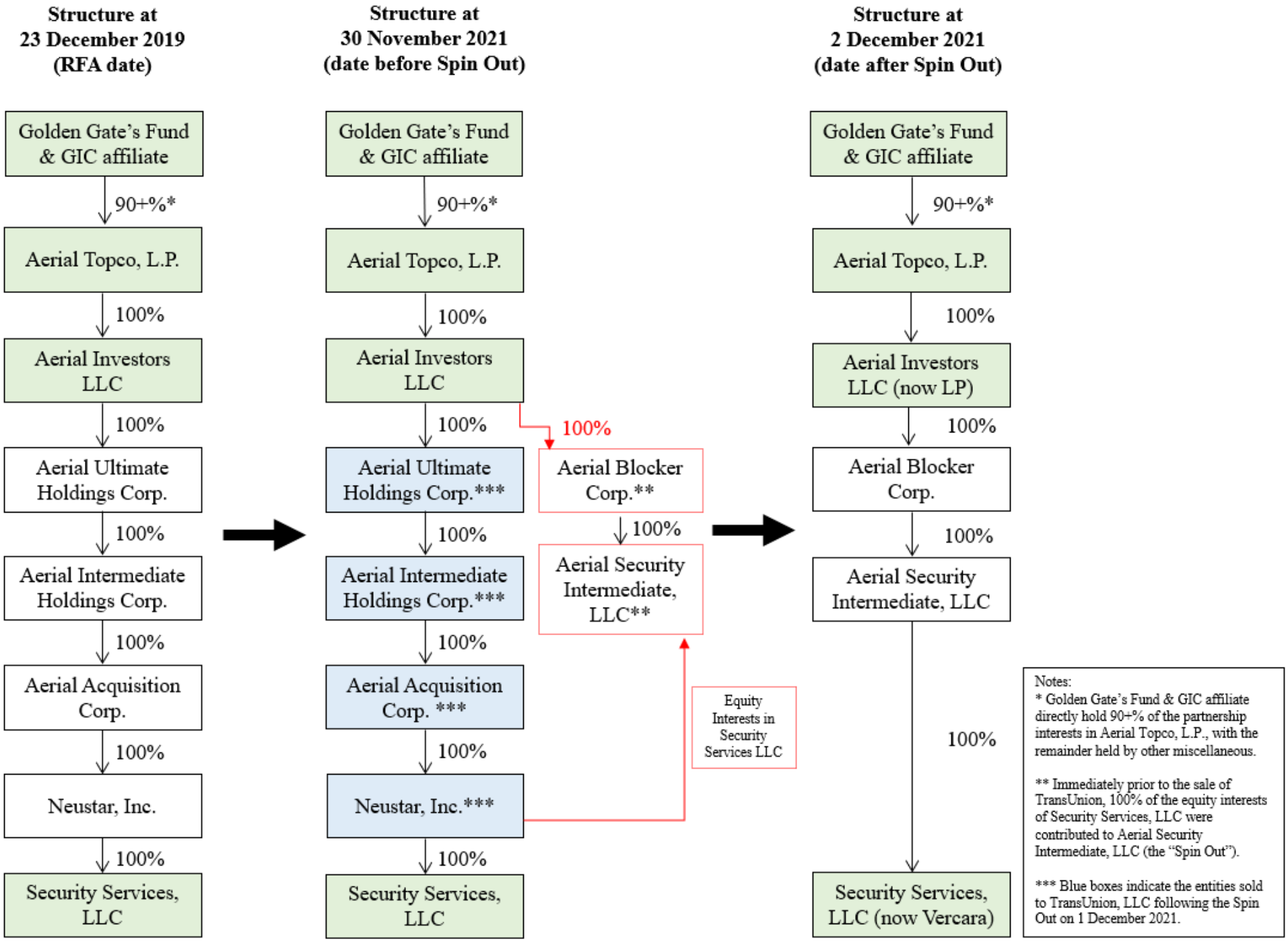
f. Golden Gate was the U.S. SEC-registered investment manager to the Fund.[34]

28. This structure, and those which preceded it, can be seen in the following organograms:[35]

describes Neustar Security Services as "a Standalone Portfolio Company Backed by Golden Gate Capital"). **(iii)** Golden Gate's Website Extract, as at 4 May 2023 (for example), **Exh. C-142** (which lists Neustar Security Services as one of Golden Gate's assets). **(iv)** The UPA (Unredacted), Section 7.2 on pp. 32-33, **Exh. C-140** (which establishes that notices to the parties, i.e. to Neustar, Aerial Security Intermediate, LLC, Aerial Blocker Corp., and Neustar Security Services, had to be sent "c/o Neustar Inc." and "c/o Golden Gate Private Equity Inc.", including to the attention of Rishi Chandna) – this same detail is also apparent in the redacted copy of the UPA at **Exh. C-136**.

[34] *See* Witness Statement of Megan Rodkin (10 May 2023), para. 8(f), **CWS-1**.

[35] *See id.*, para. 9.


Structure at
23 December 2019
(RFA date)
Golden Gate's Fund & GIC affiliate
90+%*
Aerial Topco, L.P.
100%
Aerial Investors LLC
100%
Aerial Ultimate Holdings Corp.
100%
Aerial Intermediate Holdings Corp.
100%
Aerial Acquisition Corp.
100%
Neustar, Inc.
100%
Security Services, LLC
Structure at
30 November 2021
(date before Spin Out)
Golden Gate's Fund & GIC affiliate
90+%*
Aerial Topco, L.P.
100%
Aerial Investors LLC
100%
Aerial Ultimate Holdings Corp.***
100%
Aerial Intermediate Holdings Corp.***
100%
Aerial Acquisition Corp. ***
100%
Neustar, Inc.***
100%
Security Services, LLC
100%
Aerial Blocker Corp.**
100%
Aerial Security Intermediate, LLC**
Equity Interests in Security Services LLC
Structure at
2 December 2021
(date after Spin Out)
Golden Gate's Fund & GIC affiliate
90+%*
Aerial Topco, L.P.
100%
Aerial Investors LLC (now LP)
100%
Aerial Blocker Corp.
100%
Aerial Security Intermediate, LLC
100%
Security Services, LLC (now Vercara)
Notes:
* Golden Gate's Fund & GIC affiliate directly hold 90+% of the partnership interests in Aerial Topco, L.P., with the remainder held by other miscellaneous.
** Immediately prior to the sale of TransUnion, 100% of the equity interests of Security Services, LLC were contributed to Aerial Security Intermediate, LLC (the "Spin Out").
*** Blue boxes indicate the entities sold to TransUnion, LLC following the Spin Out on 1 December 2021.

29. As can be seen from the above, at all relevant times, Neustar Security Services has remained under the ultimate ownership of the Claimant's Ultimate Owners, via their indirect subsidiary Aerial Topco, L.P.

30. Further, post- Spin Out, there has been continuity of the Claimant entities' board and management, as evidenced by **Exhibits C-134**,[36] **C-135**,[37] and **RFA-13/14**[38] (the latter, of course, being exhibits on the record from the outset of these proceedings).[39]

F. The Claimant's Notification of the Spin Out

31. On 29 July 2022, the Claimant filed its Reply Memorial on Jurisdiction and the Merits. Simultaneous to that filing, the Claimant also wrote to ICSID and the Tribunal to advise them of the effect of the Spin Out. The Respondent asserts that this letter "misleadingly presented [the Spin Out] as a change of '[t]he name of Claimant'",[40] and goes on to claim that it was not until sometime after 12 August 2022 that it "was … able to confirm" that there had in fact been a change of claimant, and not merely a change of name.[41] As will be seen, this is untrue.

[36] Neustar Security Services, "Security Outlook for DDoS Disruptions", **Exh. C-134**.

[37] Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), **Exh. C-135**.

[38] U.S. Securities and Exchange Commission, Neustar, Form 8-K (8 August 2017), **Exh. RFA-13**; and Neustar, Certificate of Incorporation and Bylaws, **Exh. RFA-14**.

[39] *See* Claimant's Opening Presentation (27 March 2023), Slides 133-146. For example: Brian McCann, who served as President of Neustar's security business was appointed CEO of Neustar Security Services; Neustar President and CEO, Charlie Gottdiener, serves as a Director on the Neustar Security Services Board of Directors; Kevin Hughes was the Executive Vice-President, General Counsel and Corporate Secretary of Neustar took the position of Executive Vice-President, General Counsel and Corporate Secretary of Neustar Security Services. Golden Gate Managing Director, David Dominik, signed the internal approvals for Neustar to initiate this arbitration, and remains in that position today. *See also* Tr. Day 1 (27 March 2023), p. 76, lines 6-17 [Final transcript].

[40] Respondent's Application for Security for Costs (19 April 2023), para. 7.

[41] *Id.*, paras. 9-10.

32. While it is correct that the Claimant's letter began by noting that "[t]he name of the Claimant in this arbitration has changed", that sentence must be read in context. As such, the Claimants' letter bears quoting in full:

> "The name of the Claimant in this arbitration has changed to 'Security Services LLC, doing business as Neustar Security Services.' On December 1, 2021, the owners of Claimant sold [Neustar] and the majority of its business assets previously held under the umbrella of Neustar, including the rights to the name Neustar, to TransUnion. The key part of that sale was the sale by Claimant's owners of Neustar's fraud, marketing, and communications businesses to TransUnion (the 'Transaction'). The Transaction excluded Neustar's legacy cloud-oriented security services business (the 'Security Business'). To effectuate the Transaction, therefore, Claimant's owners spun out Neustar Security Services, concurrently with the sale to TransUnion, to operate the Security Business as a **standalone** portfolio company (the 'Spin Out'). Under the terms of the Spin Out, the Claimant (now 'Security Services LLC, d/b/a/ Neustar Security Services,' a U.S. limited liability company) retained and continues to retain the rights to this arbitration. For the avoidance of doubt, the Claimant remains under the same ownership as Neustar prior to the Spin Out. As is evident on its website, Neustar Security Services is a successor of Neustar with regard to the assets it retained to operate the Security Business, noting its 'over 20 years of experience.'" (emphasis added)

33. Read as a whole, the letter clearly described a change of claimant company: it makes clear that Neustar had been sold, that the Security Business (including the rights to this arbitration) had been excluded from that sale, and that this had been achieved by spinning out Neustar Security Services as a "*standalone* portfolio company" (emphasis added) which was henceforth under different ownership to Neustar. Thus, the letter clearly pointed to Neustar Security Services being a different entity to Neustar.

34. This was clearer still when the letter was read alongside the exhibits to it.

35. Most obviously of all, a redacted version of the UPA was filed as **Exhibit C-136**. One need only read the title to see that Neustar and Neustar Security Services were separate entities: "Unit Purchase Agreement by and among **[i]** Neustar, Inc., **[ii]** Aerial Blocker Corp., **[iii]** Aerial Security Intermediate, LLC, and **[iv]** Security Services, LLC dated as of December 1, 2021" (emphasis added). This division is further apparent by the very nature of the UPA. For example, the recitals (p. 6) explain: "Neustar owns beneficially … all of the issued and outstanding units of [Security Services, LLC] (the "Security Units") … [and] Neustar desires to sell to [Aerial Security Intermediate, LLC], and [Aerial Security Intermediate, LLC] desires to acquire from Neustar, the Security Units". In other words, the very first pages of the UPA made clear **(i)** that not only was Neustar separate from Neustar Security Services, but also that **(ii)** Neustar was (prior to the Spin Out) the immediate parent of Neustar Security Services, and **(iii)** the UPA's purpose was to cause the sale of Neustar's interest in Neustar Security Services to Aerial Security Intermediate, LLC.

36. Further, Neustar Security Services' Certificate of Formation was filed as **Exhibit C-137**. It is a short document, but the salient features include: that its Date of Formation was 12 April 2017; and that its Delaware File Number was 6375088. It does not take much effort to compare those details to those which had originally been supplied for Neustar along with the RFA (*see* paragraph 12 above). Doing so reveals that both the Dates of Formation/Incorporation and the File Numbers are completely different:

	Neustar	**Neustar Security Services**
Date of Formation / Incorporation	8 December 1998	12 April 2017
File Number	2975674	6375088
Source	RFA-6 & RFA-18	C-137

37. Accordingly, the Claimant's primary position is that it was apparent from the face of its letter of 29 July 2022 both that Neustar Security Services was a different entity to Neustar *and* that it was intended that the former replace the latter as Claimant. Alternatively, this was apparent when the letter was read alongside the exhibits thereto.

38. Either way, the Respondent is plainly wrong to claim that it was unable to verify this until sometime after 12 August 2022. It has failed to point to any new information received after that date which finally enabled it to understand what had happened. To the contrary, in its letter dated 5 September 2022 (at p. 2), the Respondent acknowledged that it was able to appreciate from the UPA that there had been a change of entity.[42] It appears that the Respondent simply failed to read or appreciate the materials it was provided until well after they were filed. The Claimant cannot be penalised for that.

G. The Case Name was Changed

39. On 8 August 2022, ICSID wrote to the Parties in the following terms:

> "We acknowledge receipt of the Claimant's letter of 29 July 2022 notifying the change of name of Neustar, Inc., the Claimant in this proceeding, to 'Security Services LLC, doing business as Neustar Security Services'. Unless we hear otherwise from the Parties by 15 August 2022, ICSID will proceed to update the record of this arbitration accordingly. This proceeding shall be referred to as 'Security Services, LLC d/b/a/ Neustar Security Services v. Republic of Colombia'."

40. On 12 August 2022, the Respondent replied:

> "While Respondent reserves all of its rights in relation to the corporate changes referred to in Claimant's letter of 29 July 2022, Respondent kindly requests that for administrative purposes and in order to avoid any confusion to members of the public who might seek information about the case, the proceeding be referred to as 'Security Services, LLC d/b/a Neustar Security Services (formerly Neustar, Inc.) v. Republic of Colombia'."

[42] *See* Letter from the Respondent to the Tribunal (5 September 2022) ("Respondent has reviewed this exhibit [*i.e.* the UPA] and it appears that, far from being a simple change of name, Neustar Inc. (which still exists) in reality made arrangements to transfer its claim in these arbitration proceedings … to another entity, purportedly Security Services LLC.").

41. On 19 August 2022, ICSID confirmed that it had amended the record of the arbitration in line with the case title as proposed by the Respondent.

42. We address the effect of this correspondence in paragraphs 173-181 below.

H. The Respondent's Application for Documents re the Spin Out

43. On 5 September 2022, the Respondent applied for disclosure of additional documents regarding the Spin Out. By subsequent letters dated 15 and 28 September and 3 October 2022,[43] the Parties provided further briefing on the Respondent's application, which was then decided by way of Procedural Order No. 3. That correspondence speaks for itself and need not be repeated here.

44. It is, however, necessary to address a repeat allegation that the Respondent has made, to the effect that the Claimant's notification of the Spin Out on 29 July 2022 "depriv[ed] Respondent from the opportunity … to request that Claimant disclose information relating to this transfer during the document production phase".[44] That is untrue. As noted above, the Respondent did in fact make such a request by way of its application dated 5 September 2022, which sought document production in relation to this issue, as it readily admits.[45] Indeed, the Respondent's application expressly asserted (on p. 3) that the Tribunal had authority to order additional disclosure. Its application was duly considered and ultimately rejected by the Tribunal in Procedural Order No. 3, but not on the basis that the Tribunal lacked authority to order further disclosure. Thus, the notion that the Respondent was "deprived" of procedural opportunity to request production of documents following the Claimant's notification of the Spin Out is false.

[43] Letter from the Claimant to the Tribunal (15 September 2022); Letter from the Respondent to the Tribunal (28 September 2022); Letter from the Claimant to the Tribunal (3 October 2022).

[44] Respondent's Application for Security for Costs, para. 45.

[45] *Id*., para. 11.

(continued)

I. The Unredacted UPA was Provided to the Respondent

45. On 27 October 2022, the Respondent accepted the Claimant's offer (of 15 September and 3 October 2022) to disclose an unredacted copy of the UPA to the Respondent's counsel. The Claimant provided such copy the following day.[46]

J. Neustar Security Services Changed Name to Vercara, LLC

46. On 4 April 2023, Neustar Security Services changed its name to Vercara, LLC. On 7 April 2023, the Claimant wrote to ICSID to notify this change of name, attaching **Exhibit C-139** as proof of this. That exhibit is the Certificate of Amendment to the Certificate of Formation of Security Services, LLC.

47. On 19 April 2023, the Respondent stated by email to ICSID that "[w]hile the Respondent reserves all of its rights in relation to this further change, it confirms that the record may be updated for purely administrative purposes".

48. On 3 May 2023, ICSID updated the record of the arbitration so that the case title now reads: "Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia".

49. Nevertheless, the Respondent's Application for Security for Costs sought to cast doubt on this change of name. In particular, the Respondent asserted that it "knows little to nothing about this change and the underlying reasons or potential corporate consequences behind such modification, and much less about Vercara, LLC".[47]

50. Yet again, the Respondent displays its wilful ignorance of facts disclosed long ago.

51. First, in the Claimant's letter of 29 July 2022, it explained that "the owners of Claimant sold [Neustar] and the majority of its business assets previously held under the umbrella of Neustar, <u>including the rights to the name Neustar</u>, to TransUnion" (emphasis added). It should have been obvious even then that Neustar Security Services would eventually have to drop "Neustar" from its name.

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[46] *See* Email from Steptoe & Johnson LLP to HoganLovells (28 October 2022), **Exh. C-148**. *See also* Respondent's Application for Security for Costs (19 April 2023), n. 9.

[47] Respondent's Application for Security for Costs, para. 5. *See also id*., para. 19.

52. Regardless, this would certainly have been obvious had the Respondent read the unredacted UPA when it received it on 28 October 2022. That is because it was an express term of the UPA that Neustar Security Services could only use the "Neustar Security" brand for a period of up to 18-months following the date of the UPA (*i.e.* from 1 December 2021):

> Section 5.8(b): "Neustar hereby grants to the [Security Services, LLC] and its Subsidiaries, for a period of twelve (12) months (subject to the below) following the date of this Agreement, a non-exclusive, non-sublicensable, non-transferable, paid-up, royalty-free license to use any Trademarks containing the "NEUSTAR SECURITY" brand and name, solely in connection with the Business in a manner consistent with past practice. Upon request by [Security Services, LLC], Neustar shall grant to [Security Services, LLC] and its Subsidiaries a six (6)- month extension of this license."[48]

53. This section could not be clearer. Neustar Security Services could use the "Neustar Security" brand until up to 1 June 2023. A name change was always anticipated. The Respondent has known that for several months.

54. Having regard to Section 5.8(b), the Respondent's claim to "know[] little to nothing about this [name] change and the underlying reasons" indicates that it is either not reading the materials that it is provided, or is failing to understand their plain terms. In any event, the Respondent could have obtained the information it claims is lacking by performing an internet search: had it done so, it would have encountered the page on Vercara's website which explains the change of brand, and which ties that change to the Spin Out from Neustar.[49]

55. Further, the Claimant does not understand the Respondent's suggestion that it does not know the "potential corporate consequences" behind the name change. As the certificate at **Exhibit C-139** shows, this was a straight-forward change of name. Indeed, that is further confirmed by the fact that the Delaware File Number (6375088)

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[48] UPA (Unredacted), **Exh. C-140**.

[49] Alice Palmer, "Anatomy of a Brand Transformation: Our Journey to Vercara" (3 April 2023), **Exh. C-149**.

is identical between the name change certificate **(Exhibit C-139)** and the original certificate of formation **(Exhibit C-137)**. Thus, to be clear, there has been no further change of claimant entity. This was a name change, pure and simple. It is regrettable that the Respondent has sought to confuse this matter.

K. Rebuttal to Miscellaneous Assertions by the Respondent

56. The preceding sections have set out the relevant facts in chronological order. For its part, the Respondent has made a large number of factual assertions. Where possible, we have addressed those in the chronological analysis above. However, the nature of the Respondent's approach is such that it is necessary to address various other of its positions separately. While the following examples are not exhaustive, they serve to highlight the inadequacy of the positions that the Respondent has put forward in support of its Application for Security for Costs.

57. *First*, the Respondent complains that, "[r]egrettably, while Mr. Hughes [Claimant's General Counsel and party representative] was indeed present at the Hearing, Claimant carefully refrained from offering him up for questioning by either the Tribunal or Respondent".[50] The Claimant did no such thing. In fact, and as the Respondent notes, the Claimant wrote to the Tribunal and the Respondent on 15 September 2022 (after the Respondent first raised its concerns) confirming that "the now General Counsel of Neustar Security Services, Kevin Hughes, will be at the hearing and could be questioned by the Tribunal or the Respondent regarding [the Spin Out]".[51] That offer was repeated at the Hearing.[52] Nevertheless, the Respondent did not seek to question Mr. Hughes, or directly address him, despite making accusations about his place of employment based on an outdated LinkedIn profile[53] (subsequently retracted[54]).

[50] Respondent's Application for Security for Costs (19 April 2023), para. 17.

[51] Letter from the Claimant to the Tribunal (15 September 2022), p. 1.

[52] Tr. Day 2 (28 March 2023), p. 300, lines 11 to 23 [Final transcript]. *See also* paras. 61-62 below.

[53] Tr. Day 1 (27 March 2023), p. 201, lines 13-18 [Final transcript].

[54] Respondent's Closing Statement (29 March 2023), Slide 10, confirming "Kevin Hughes (With Neustar since 2013 and now Security Services' General Counsel)").

(continued)

Having done so, the Respondent cannot now be heard to complain that it was the Claimant preventing it from questioning Mr. Hughes.

58. *Second*, the Respondent has repeatedly mischaracterised the purpose of **Exhibit C-135**, which is a joint press release by Neustar and Neustar Security Services providing background information on the Spin Out, the Claimant's Ultimate Owners, and information on key employees and the company's headquarters.[55] To repeat, this joint press release was submitted by the Claimant on 29 July 2022, alongside the UPA.

59. The Respondent continues to assert that "this single exhibit" is "insufficient" to demonstrate the details of the Spin Out and the Claimant's retention of its claim,[56] and "[f]ails to confirm that Security Services LLC has any substantial business operations or at the very least enough assets to cover an adverse award of costs."[57] Yet, the Claimant never suggested that **Exhibit C-135** was intended to do so. In fact, the Respondent's assertion that the Claimant submitted during the Hearing that **Exhibit C-135** "contained 'all the answers' necessary to alleviate the Respondent's concerns"[58] is a fabrication. The phrase "all the answers", quoted by the Respondent,[59] does not exist in the transcript. Instead, the exchange on **Exhibit C-135** was as follows, as the Tribunal can see from the transcript itself:

a. Counsel for the Respondent commented that "[w]e were told for the first time that this is a portfolio company of Golden Gate Capital".[60] To be clear, when

[55] Joint Press Release, "Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth" (1 December 2021), **Exh. C-135**.

[56] Respondent's Application for Security for Costs (19 April 2023), para. 16.

[57] *Ibid*.

[58] *Ibid*.

[59] *See* Respondent's Application for Security for Costs (19 April 2023), para. 16, n. 18 ("Transcript, Day 1 [Gouiffés/T. Baldwin], 203: 9-16; Day 2 [Gouiffés/T. Baldwin], 292."). Neither of these citations contain the quote "all the answers" and in fact, p. 292 of the draft transcript on Day 2 is simply a read out of the Respondent's own correspondence.

[60] Tr. Day 1 (27 March 2023), p. 201, lines 9-10 [Final transcript].

(continued)

the Respondent said "first time", it was referring to the Claimant's Opening Statement at the Hearing.[61]

b. Counsel for the Claimant replied: "Mr President, I would just point counsel to exhibit C-135, is that correct, which provides -- it is already an exhibit in the record -- provides many of the clarifications that he talked about, including Golden Gate Capital, its role as the former owner, its role as the owner of Neustar Security Services."[62]

60. The Claimant's reference to **Exhibit C-135** was directed toward a specific purpose, the ultimate ownership of the Claimant by Golden Gate. The Respondent's continued attempt to mischaracterize **Exhibit C-135** as the "single" exhibit relevant to assessing the Application for Security for Costs,[63] and broader issues of jurisdiction, lacks merit.

61. *Third*, the Respondent asserts that the Claimant "failed to provide any financial information", and that it "could have avoided the present [Application for Security for Costs] by producing convincing and reliable evidence of its assets."[64] The first time the Respondent raised its intention to bring an Application for Security for Costs was on the first day of the Hearing in March 2023, despite being aware of the Spin Out transaction since 29 July 2022. Further to the Respondent's announcement, and after receiving an email at 9pm that day demanding for the first time evidence of the

[61] *Id*., p. 201, lines 5-10 [Final transcript] ([Gouiffés] "Mr. Chairman, yes. We just have one clarification, I would say, around Security Services LLC and what was said this morning in the presentation at various stages. We were told for the first time that this is a portfolio company of Golden Gate Capital…").

[62] *Id*., p. 203, lines 14-21 [Final transcript] (emphasis added).

[63] Respondent's Application for Security for Costs (19 April 2023), para. 16 ("As explained at the Hearing, this single exhibit is not only insufficient for Claimant to meet its burden of proving that 'it remains entitled to present and recover in respect of the claims presented in this Arbitration following the corporate restructuring', but it is also insufficient to confirm that Security Services LLC has substantial business operations.").

[64] *Id*., paras. 49, 51.

(continued)

Claimant's finances,[65] the Claimant offered on the second day of the Hearing to provide financial statements or information to satisfy the Respondent's concern, stating:

> "But more fundamentally this question of the financials or whatever else was asked at 9pm last night, and you know we mentioned – I mentioned to Mr. Laurent that Security Services is a private company so we have to have appropriate confidentiality things, but mentioned to him and I will reiterate here, we are happy to give him financial statements so he can make his determination, but to act like this has been that long coming when it came at 9pm last night, I wouldn't accept that assertion at all."[66]

62. The Respondent, instead of accepting this offer, insisted on bringing its Application for Security for Costs in ignorance of relevant facts. It lies ill in the mouth for the Respondent to now complain that it lacks financial information regarding the Claimant, when it chose not to receive such information.

L. Claimant's New Exhibits

63. The Tribunal will no doubt have noticed both that the Claimant has exhibited to this submission several documents which the Respondent requested in September 2022, and that the Claimant had previously resisted that request essentially on the basis that such documents were unnecessary because the evidence then-filed was sufficient to prove the Claimant's case. The Claimant maintains its position in this regard. In particular, the redacted UPA proved both the assignment of the MINTIC Claim to Neustar Security Services group and the subsequent transfer of that group into the ownership of Aerial Security Intermediate, LLC. Meanwhile, the UPA, the further exhibits provided alongside (and before) the UPA and the documents hyperlinked in the Claimant's letters of 15 September and 3 October 2022 proved continuity of ultimate ownership of the MINTIC Claim by the Claimant's Ultimate Owners, and that such Claim had at all

[65] *See* Tr. Day 2 (28 March 2023), p. 293, line 5 to p. 294, line 17 [Final transcript].

[66] *Id*., p. 403, line 25 to p. 404, line 10 [Final transcript] (emphasis added). The Tribunal may note that the financial statement as exhibited to this pleading post-dates this offer; nevertheless, to be clear, had the Respondent accepted the Claimant's offer, it would have been possible to provide unaudited financial statements at that time.

(continued)

times remained in U.S. hands.[67] Nevertheless, in its Application for Security for Costs, the Respondent has persisted in its strategy of seeking obfuscate the facts, including by mischaracterising the exhibits it has now had for several months. In light of that, the Claimant is compelled to provide further evidence herein in order to rebut the assertions set out in the Respondent's Application for Security for Costs, set out in the following section.

[67] *See* nn. 4, 8, 9, 10, 11, 28, 29, 33 above.

III. RESPONSE TO RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

64. As demonstrated in the foregoing section, the Respondent has based its Application for Security for Costs on various and significant misrepresentations of the facts. Once corrected, the Respondent's position that there is "complete uncertainty" about the Claimant in these proceedings, justifying an order for security for costs, falls flat.

65. Moreover, the Respondent's Application lacks any basis in law. The legal standards applicable to determining requests for security for costs is addressed in Section III.A. As described in Section III.B, the Respondent has failed to meet the high burden required to satisfy this legal standard, and has not demonstrated the existence of a right in need of protection at this stage of the proceedings or that an order for security for costs is necessary, urgent, or would be proportionate in the circumstances of this dispute.

A. Legal Standard

66. Article 47 of the ICSID Convention expressly provides that an ICSID tribunal may order provisional measures, and states:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

67. The supporting procedural rule to Article 47 is contained in Rule 39 of the ICSID Arbitration Rules ("Provisional Measures"),[68] reproduced in relevant part as follows:

> "At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to

[68] As set out in Procedural Order No. 1, these proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006. *See* Procedural Order No. 1 (9 July 2021), para. 1.1. As such, the Respondent's reference to the 2022 ICSID Arbitration Rules is irrelevant. *See* Respondent's Application for Security for Costs (19 April 2023), para. 40, n. 43.

(continued)

be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

68. The Parties agree security for costs have been recognized by ICSID tribunals as a form of provisional measures, governed by both of these provisions.[69]

69. As the Respondent also admits,[70] however, ICSID tribunals considering applications for security for costs have "consistently applied a high threshold",[71] confirming that security should only be granted in "exceptional", "rare", or "extreme" circumstances.[72] So exceptional are these circumstances that only *four* ICSID tribunals have ever

[69] *See* Respondent's Application on Security for Costs (19 April 2023), paras. 33-34.

[70] *Id*., para. 40.

[71] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 388, **CL-134**.

[72] *See*, *e.g*., *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), para. 123, **RL-203**; *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), para. 46, **RL-197**; *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), para. 10, **CL-135**; *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures requested by the Parties (25 September 2001), para. 86, **CL-136**; *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.17, **RL-196**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 34, **CL-137**; *Guaracachi America and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14 (11 March 2013), para. 6, **CL-138**; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/ 06/8, Decision on Preliminary Issues (23 June 2008), para. 57, **CL-139**; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (20 September 2012), para. 45, **CL-140**.

(continued)

deemed it fit to order security for costs,[73] out of nearly 50 known cases.[74] As the tribunal in *Libananco v. Turkey* stated:

> "[I]t would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all."[75]

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[73] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs (13 August 2014), **CL-141**; *Luis García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, Procedural Order No. 8 (20 June 2018), **CL-142**; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), **RL-201**; and *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), **RL-198**.

[74] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), Annex 1: ICSID Decisions on Security for Costs (1984-2019), **CL-134** (identifying 43 cases involving a request for security for costs). Since this list was published, the Claimant is aware of at least another five decisions on applications for security for costs. *See Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 7, **CL-143**; Respondent's Application for Security for Costs (14 October 2019); *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020) , **RL-201**; *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020) , **RL-198**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020) , **CL-144**; *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4 (12 May 2021), **CL-145**.

[75] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/ 06/8, Decision on Preliminary Issues (23 June 2008), para. 57, **CL-139**. *See also RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.20, **RL-196** ("It is difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable, but it seems clear to us that more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award."); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2: Decision on Respondent's Application for Provisional Measures (13 February 2016), para. 61, **CL-146** ("[E]ven if it were assumed that the Claimants have insufficient assets, this would not be enough in and of itself. Something more is required."); *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 7: Respondent's Application for Security for Costs (14 October 2019), para. 8, **CL-143**; *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (11 January 2016), para. 59, **CL-147** ("In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high

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70. In considering applications for security for costs, ICSID tribunals have generally accepted that the Respondent bears the burden of demonstrating that:[76]

a. there is a right to be preserved;

b. provisional measures in the form of security for costs is necessary, giving rise to exceptional circumstances;

c. the request is urgent in the circumstances of the dispute; and

d. granting the requested measures is proportional, and balances the rights of both parties in the arbitration.[77]

71. While the Respondent acknowledges these four principles,[78] it attempts to downplay the specific requirements set out in (b) to (d) above by compressing them into a general

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real economic risk for the respondent and/or that there is bad faith on the part[y] from whom the security for costs is requested.").

[76] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), paras. 50, 53, **RL-201**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 37, **CL-137**; *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), para. 10, **CL-135**.

[77] *See*, *e.g.*, *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), para. 72, **RL-197**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 34, **CL-137**; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), para. 36, **RL-194** ("A recommendation of provisional measures should be issued only where doing so is *necessary* to preserve identified rights and *urgently* required for that purpose, in the sense that the requested measure is needed prior to issuance of an award. Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them." (emphasis in original)); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2: Decision on Respondent's Application for Provisional Measures (13 February 2016), para. 54, **CL-146** (citing *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order No. 9 (28 February 2007), para. 38; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1: Burlington Oriente's Request for Provisional Measures (29 June 2009), para. 51); *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), paras. 31, 36, **RL-202**.

[78] Respondent's Application for Security for Costs (19 April 2023), para. 41.

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assessment of whether the Tribunal is satisfied that the "circumstances […] require" that provisional measures be ordered.[79] In adopting this approach, the Respondent presents its Application as one giving rise to "exceptional circumstances",[80] treating the questions of necessity, urgency, and proportionality as secondary concerns to the Respondent's alleged factual narrative.[81] These three tests, however, provide the foundation for a finding of exceptional circumstances, not the inverse. To adopt the Respondent's preferred framework of first asserting exceptional circumstances, and only then considering necessity, urgency, and proportionality as a secondary matter, is akin to putting the cart before the horse.

72. In any event, and as demonstrated in the following section, the Respondent has failed to fulfil any of these requirements, and thus its Application is entirely unsupported.

B. The Respondent Has Failed to Meet the High Burden Required to Satisfy Its Request

1. The Respondent's cursory description of its so-called "right to be preserved" is insufficient in the circumstances of this dispute

73. The Respondent asserts that the right it seeks to preserve by way of its Application is "its right to claim reimbursement of the costs it has and continues to incur in the course of the present proceeding".[82] In support, the Respondent points to *Quiborax v. Bolivia*, which in turn cites *Plama v. Bulgaria*.[83] However, both of these citations do not go to the question of a "right to claim reimbursement", but instead address procedural rights

[79] *Id.*, para. 35.

[80] *Id.*, paras. 42-51.

[81] *Id.*, Sections 4.2(a) ("There are exceptional circumstances warranting an order for security for costs"), (b) ("The requested security for costs is necessary and proportional") and (c) ("Respondent's application is timely").

[82] *Id.*, para. 38.

[83] *Id.*, n. 39.

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associated with the preservation of the *status quo* and the non-aggravation of the dispute.[84]

74. The Claimant does not dispute that—as a general matter—procedural rights are "rights to be preserved" under Article 47 of the ICSID Convention. However, provisional measures are "intended to preserve parties' rights, not to protect their mere expectations".[85] There is no presumption on the award of costs in ICSID proceedings, and Article 61(2) of the ICSID Convention provides the Tribunal with the discretion to allocate costs between the Parties. Indeed, in a publication from 2019, the ICSID Secretariat reported that "only 50% of … awards rendered in cases where a request for security for costs was made awarded costs (in full or partially) in favor of the requesting party."[86]

75. In this respect, the Respondent's position is based on two hypothetical scenarios: that it will prevail on jurisdiction and/or the merits of this dispute; and that it will be awarded costs. Several tribunals have held that the existence of these contingent rights must be *prima facie* established, including whether the party seeking the security is, *at the time of filing the request*, in fact incurring costs that can be awarded to it.[87]

76. At the time of filing its Application, after the Hearing, the Respondent had already incurred the vast majority of its costs for this phase of the arbitration. The timing of the Respondent's Application not only raises issues with respect to the criterion of "urgency" (discussed in Part 3 below), but also with respect to the alleged rights to be

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[84] *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 Provisional Measures (26 February 2010), paras. 117-118, **RL-199**.

[85] *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Decision on Provisional Measures (5 November 2008), para. 21, **CL-148** (citing *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), **CL-135**).

[86] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 390, **CL-134**.

[87] *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Procedural Order No. 6, Decision on the Respondent's Application for Provisional Measures (1 February 2017), paras. 29, 35-39, **CL-149** (where the tribunal found that Nigeria could not have any legal costs to recover at the time of the request for security for costs since it was represented by a firm at no cost).

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preserved under Article 47 of the ICSID Convention. As explained by Martina Polasek, the Deputy Secretary-General at ICSID:

> "An order for security for costs addresses the risk of noncompliance with an adverse costs award. It requires a party to provide a guarantee **early** in the proceeding to cover the **prospective** arbitration costs and legal fees of the other party, to ensure that the other party can recover these costs in case of a favorable costs award."[88]

77. The costs of this arbitration are no longer prospective, and the Respondent itself has contributed significantly to the costs of these proceedings by choosing to over-litigate its alleged jurisdictional objections.[89]

78. Further, as the tribunal in *Eskosol v. Italy* observed:

> "The Tribunal accepts that respondent States have genuine concerns about their ability to enforce an eventual costs award against unsuccessful claimants, and some States are starting to raise the possibility of reforms to the ICSID system to protect themselves more systematically. But at the same time, such States would be unhappy to see a similar argument about a right to effective relief used against them, for example by claimants worried about collection risk associated with any final merits award of compensation. Article 53(1) of the ICSID Convention imposes an obligation on '*each party*' (States and investors alike) to 'abide by and comply with the terms of the award,' and Article 54(1) obliges all Contracting States to 'enforce the pecuniary obligations imposed by [an] award within its territories as if it were a final judgement in that State.' But the Convention generally does not concern itself with *collection risk*, and indeed, Article 54(3) makes explicit that '[e]xecution of the award' is to be governed by national law, including

[88] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 387, **CL-134**.

[89] *See* para. 118 below.

(as confirmed in Article 55) national law related to the immunity of State assets.

Against this backdrop, therefore, there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant's ability to collect on a possible merits award, nonetheless should intervene to protect a State's asserted 'right' to collect on a possible costs award. For this reason, some tribunals have expressed doubt about whether there really is a 'right' in play for security-for-costs that is entitled to protection under Article 47 and Rule 39(1)."[90]

79. Given the late stage of the proceedings of this dispute, the Respondent's Application seems less concerned with preserving its "rights" than an opportunistic attempt to reduce its collection risk, to reiterate its points on jurisdiction, and to make preliminary submissions to the Tribunal on costs. This should not be condoned.

80. In any event, even assuming that the Respondent in fact holds a "right to be preserved" in these proceedings (*quod non*), it has failed to demonstrate any substantive support for its Application with respect to the requirements of necessity, urgency, and proportionality, as discussed in the following sections.

2. The Respondent has failed to demonstrate the necessity of its request, and the existence of "exceptional circumstances"

81. The threshold question of whether it is appropriate to order security for costs is whether the measures sought are *necessary*. As explained by the Deputy Secretary-General of ICSID, Martina Polasek, in 2019:

"Necessity in the context of security for costs is typically described as the inability to collect on a potential award of costs due to a party's insolvency or lack of sufficient assets to satisfy the award. Most ICSID cases involving security for costs concerned claimants allegedly in

[90] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), paras. 34-35, **RL-194**; cited by *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 34, **RL-202**.

> financial difficulty or possessing no substantial assets. This was evidenced by the existence of bankruptcy proceedings, allegations that the corporate party was a shell company, the existence of third-party funding (TPF) or by a history of financial default."[91]

82. As Ms. Polasek further notes, tribunals have "consistently required insufficient assets as a condition for security for costs".[92]

83. Similarly, commentators have considered that tribunals:

> "[M]ust first and foremost determine whether there is a serious risk that the non-applicant's financial situation endangers the enforcement of an adverse costs award."[93]

84. The Respondent's Application fails at the very first hurdle of "necessity", because: **(i)** the Respondent's attempt to infer impecuniosity based on speculation is contrary to precedent; **(ii)** in any event, the Claimant has the ability to pay an adverse costs award, if so required; and **(iii)** even if the Claimant were impecunious (which it is not), that alone is not sufficient, and there are no grounds to infer that the Claimant will be unwilling to comply with an order of the Tribunal on costs. Each point will be addressed in turn.

85. *First*, ICSID tribunals have rejected attempts by respondent States to obtain orders for security for costs based on argument and speculation alone. For example, in one of the most recent ICSID decisions on security for costs, *Bay View v. Rwanda*, the tribunal found that the claimants before it were not in liquidation, and rejected Rwanda's submission that the tribunal should nonetheless "infer" impecuniosity based merely on

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[91] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 390, **CL-134** (emphasis added).

[92] *Id*., p. 391 (emphasis added).

[93] Jan Heiner Nedden and Inga Witte, "Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective", in Axel Calissendorff and Patrik Schöldström (eds), Stockholm Arbitration Yearbook 2022, Stockholm Arbitration Yearbook Series, Volume 4 (Kluwer Law International 2022), p. 43, **CL-150**.

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the respondent's speculation.[94] Similarly, in *Burimi v. Albania*, the tribunal rejected the respondent's arguments based on its *belief* that the claimants did not own any assets, had never generated any profits, and that third parties were funding the arbitration. The tribunal found that the claimants had paid their advance on costs under the ICSID Rules as required,[95] and that it stated that it was "unwilling to find imminent danger of harm based on the Respondent's speculation about the Claimants' future conduct".[96] The Respondent's speculative approach in this proceeding mirrors that of Rwanda and Albania, and should be rejected on similar grounds.

86. *Second*, in any event, although the burden to prove its Application rests solely on the Respondent,[97] the Claimant provides herewith evidence of its financial status which confirms that, as of 31 December 2022:[98]

[94] *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), para. 59, **CL-144**. Notably, the tribunal also confirmed that the claimants were "under no obligation to disclose documents evidencing their financial position". *See id*., para. 60.

[95] *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), paras. 39, 41, **CL-137**.

[96] *Ibid*.

[97] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), para. 53, **RL-201** ("[T]he Tribunal finds that Turkmenistan bears the burden to demonstrate exceptional circumstances justifying the provisional measures sought".); *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 37, **CL-137** ("The burden of proving necessity and urgency falls upon the party requesting the provisional measures".); *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), para. 10, **CL-135** ("The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application".).

[98] Aerial Blocker Corp. and Subsidiaries, Consolidated Financial Statements December 31, 2022 and 2021, and Year Ended December 31, 2022, Audited by Pricewaterhouse Coopers LLP (29 April 2023), **Exh. C-150 [CONFIDENTIAL]**. [redacted]

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a. it has USD [redacted] cash / cash equivalent reserves, as well as USD [redacted] in other assets;

b. it is [redacted]; and

c. it is not subject to any bankruptcy or insolvency proceedings.

87. In these circumstances, and contrary to the Respondent's unsupported speculations,[99] there can be no question of the Claimant's ability to pay an adverse costs award, if so ordered.[100] If the Respondent had simply asked the Claimant before 9pm on the first day of Hearing for the relevant financial statements,[101] and/or accepted the Claimant's offer to provide them on the second day of Hearing,[102] it could have avoided the waste of time and resources of the Parties and the Tribunal in considering this Application.

88. *Third*, even if there *is* impecuniosity on the part of a claimant (again, which is not the circumstance here), ICSID tribunals have been clear that this fact alone is not sufficient, and that a tribunal's authority to order security for costs should only be exercised in "exceptional circumstances". The vast majority of ICSID tribunals have denied requests for security for costs on this basis.[103] For example, and like the findings of the

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[99] *See* Respondent's Application for Security for Costs, para. 51.

[100] *See*, *e.g.*, *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.20, **RL-196** (where the respondent had not established the impecuniosity of the claimants or their unwillingness to pay a costs award).

[101] *See* Tr. Day 2 (28 March 2023), p. 293, line 5 to p. 294, line 17 [Final transcript].

[102] *Id*., p. 403, line 1 to p. 404, line 10 [Final transcript].

[103] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 392, **CL-134**.

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tribunals in *Bay View v. Rwanda* and *Burimi v. Albania* discussed in paragraph 85 above:

a. in *Libananco v. Turkey*, the tribunal considered that the claimant's corporate structure as a shell company incorporated in Cyprus, without assets and financed by a third party, were not convincing facts supporting an order for security for costs,[104] noting that such investment vehicles were common for the purposes of investment transactions.[105]

b. in *BSG v. Guinea*, the respondent contended that the sole claimant's corporate structure permitted the transfer of assets to other companies in the group; its ultimate beneficiary was allegedly investigated for tax evasion maneuvers, was shielding assets to avoid enforcement, and there were multiple proceedings pending against BSG that could lead to large liability claims. In rejecting the request for security for costs, the tribunal found that the claimant's structure of a holding company was not unusual or exceptional; the alleged transfer of assets did not pose an extraordinary risk considering that the claimant had never defaulted on its financial obligations; and the tribunal could not foresee the outcome of the multiple proceedings nor their impact on the claimant's financial condition.[106]

c. in *RSM v. Grenada*, the tribunal declined the respondent's request for security for costs, stating that "it is doubtful that a showing of an absence of assets alone would provide sufficient basis for such an order" because "it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment

[104] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/ 06/8, Decision on Preliminary Issues (23 June 2008), para. 59, **CL-139**.

[105] *Ibid*.

[106] *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), paras. 26, 78, 79, **RL-197**.

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vehicle, with few assets, that was created or adapted specifically for the purpose of investment".[107]

d. in *Lighthouse v. Timor-Leste*, the tribunal considered that—even if the respondent had established that the claimants' assets were insufficient to meet a hypothetical future award (which it had not)—"something more is required."[108] The tribunal declined to order security for costs, finding that the respondent's arguments of the existence of a default judgment against the claimants, and transfer of assets, were insufficient to support a finding of exceptional circumstances.[109]

89. The jurisprudence thus confirms, *inter alia*, that: **(i)** an order for security for costs is extraordinary, rare, and requires exceptional circumstances to be granted;[110] **(ii)** a lack of resources (even if it exists) is not in and of itself enough for an order for security for

[107] *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.19, **RL-196**.

[108] *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2: Decision on Respondent's Application for Provisional Measures (13 February 2016), para. 61, **CL-146**.

[109] *Ibid*.

[110] *See*, *e.g.*, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), para. 57, **CL-139**; *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.19, **RL-196**; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), para. 50, **RL-201**; *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs (13 August 2014), para. 75, **CL-141**; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), para. 121, **RL-203**; *Luis García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, Procedural Order No. 8 (20 June 2018), para. 251, **CL-142**; *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 7: Respondent's Application for Security for Costs (14 October 2019), para. 4, **CL-143**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), paras. 49, 52, **CL-144**. *See also* cases conducted under the UNCITRAL Rules: *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award (7 July 2017), paras. 377-378, **CL-151**; *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (11 January 2016), paras. 60-61, **CL-147**; *Tennant Energy LLC v Canada*, PCA Case No 2018-54, Procedural Order No. 4 (27 February 2020), para. 173, **CL-152**.

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costs;[111] and **(iii)** conduct not connected to the arbitration is not enough to justify such an order.[112] Moreover, the following circumstances, individually or collectively, are not enough to lead to the conclusion that exceptional circumstances exist:[113] **(a)** the claimant not disclosing information in regard to its activities or assets;[114] **(b)** the claimant not providing its own financial statements;[115] **(c)** the claimant not funding any part of the case;[116] and **(d)** the claimant being a shell company without resources or assets.[117]

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[111] *See*, *e.g.*, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (20 September 2012), paras. 48-49, **CL-140**; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), paras. 123-124, **RL-203**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), paras. 49-52, **CL-144**.

[112] *See*, *e.g.*, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2: Decision on Respondent's Application for Provisional Measures (13 February 2016), para. 61, **CL-146**.

[113] *See*, *e.g.*, *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (11 January 2016), paras. 60-62, **CL-147** (summarizing cases considered by ICSID tribunals).

[114] *See*, *e.g.*, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), para. 59, **CL-139**; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2: Decision on Respondent's Application for Provisional Measures (13 February 2016), para. 61, **CL-146**; *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), paras. 26, 78, 79, **RL-197**.

[115] *See*, *e.g.*, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), paras. 59-60, **CL-144**.

[116] *See*, *e.g.*, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), para. 37, **RL-194**; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), paras. 122-123, **RL-203**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), paras. 59-60, **CL-144**.

[117] *See*, *e.g.*, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), para. 58, **CL-139**; *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), paras. 26, 78, 79, **RL-197**; *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.19, **RL-196**.

(continued)

90. In fact, ICSID tribunals have found that exceptional circumstances giving rise to necessity have existed in only four specific situations:

a. *RSM v. St. Lucia*: where the company (by this point) had a history of failing to honour awards in ICSID arbitrations, as well as numerous other proceedings. The tribunal found there was a consistent disregard of orders to pay costs, a lack of assets, and reliance on third-party funding.[118]

b. *Garcia Armas v. Venezuela*: where the tribunal considered that the claimants' reliance on third-party funding could be a sign of lack of funds, exacerbated by the fact that the funding agreement did not cover adverse costs.[119]

c. *Herzig v. Turkmenistan*: where the company was insolvent, the claim was being funded by a third-party funder, and the funding agreement expressly provided that the third-party funder had no liability for adverse costs.[120]

d. *Kazmin v. Latvia*: where the tribunal considered that criminal investigations into the claimant's companies and preliminary findings of fraud for the purposes of tax evasion were sufficient to raise justified and serious concerns about the claimant's business practices and eventual willingness to comply with a costs order. In addition, the evidence demonstrated that the claimant had transferred the company to his wife, to reduce the available assets for enforcement.[121]

91. None of these circumstances exist here, and the Respondent has not alleged otherwise. In particular, the Respondent does not allege that the Claimant is insolvent, that this case is funded by a third-party, that the Claimant has failed to pay its advances on costs

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[118] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs (13 August 2014), paras. 77-87, **CL-141**.

[119] *Luis García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, Procedural Order No. 8 (20 June 2018), paras. 184-260, **CL-142**.

[120] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), paras. 47-67, **RL-201**.

[121] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), paras. 27-62, **RL-198**.

(continued)

to ICSID,[122] that the Claimant has any history of failing to comply with its financial obligations in connection with ICSID proceedings, that any findings of tax evasion have been made against the Claimant, or that the Claimant has attempted to reduce its assets so as to undermine the Respondent's ability to enforce any costs award against it. In these circumstances, the Respondent is wrong to assert that an order for security for costs is "necessary". The circumstances here bear no resemblance to the rare few cases where security has been ordered, and simply cannot be described as "exceptional".

92. To avoid this conclusion, the Respondent seeks to rely on various factors concerning the Claimant's corporate history. No case has ever awarded security on such facts. In any event, and as described in Section II above, the so-called "exceptional circumstances" identified by the Respondent rest on its incorrect and misleading characterization of the facts. For example, in explaining why it believes that exceptional circumstances exist, the Respondent incorrectly asserts:

a. that the "Claimant elected to disingenuously present [the Spin Out] as a simple change of name."[123] However, as described in detail in paragraphs 31-38 above, this is a misrepresentation of the Claimant's correspondence, which made clear that the name of the Claimant had changed for purposes of these proceedings, in light of the Spin Out transaction and the sale of Neustar to TransUnion. To repeat, the Respondent itself accepts that it understood from the UPA that there had been a change of claimant entity, and that document was provided at the time of the Claimant's notification to ICSID (*see* paragraph 35 above).

[122] *See*, *e.g.*, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), para. 123, **RL-203** (where the tribunal rejected the respondent's allegation that the claimants had a history of reneging on payment obligations and lacked means to pay the arbitration, which was funded by a third party, because the claimants had not defaulted on their payment obligations in the ICSID or other arbitration proceedings.).

[123] Respondent's Application for Security for Costs (19 April 2023), para. 46.

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b. that the Claimant "failed to provide any documentary evidence of the terms of the transfer".[124] However, as discussed in paragraphs 18-38 and 45 above, this is untrue.

c. that the Claimant "referred Respondent to Exhibit C-0135 (the joint press release titled 'Neustar Security Services Spins Out with Focused Investment to Foster Accelerated Growth')", which the Respondent considered "insufficient to alleviate any of its concerns".[125] However, as discussed in paragraphs 58-62 above, the Respondent's position on this point is misleading, and contradicted by the transcript of the Hearing.

d. that the fact that the Claimant is "a limited liability company incorporated in Delaware, a jurisdiction characterized by the very limited disclosure obligations"[126] is somehow sufficient to justify "exceptional circumstances". However, this argument is non-sensical; there is no correlation between laws on disclosure of financial information and the Claimant being unable to meet its obligations. If there were, on the Respondent's logic the 1.8 million companies incorporated in Delaware could all be accused of acting in an "opaque" manner, simply by existing.[127] Clearly, such a claim is not only illogical but manifestly deficient to discharge the Respondent's burden of proof in demonstrating the necessity of an order for security for costs.

e. that the Claimant is a "shell" company. While the Respondent made this argument on several occasions during the Hearing,[128] the Claimant notes that it now does not appear in the Respondent's Application for Security for Costs, and for good reason. Instead, the Respondent has pivoted to asserting that the Claimant "failed to provide any financial information", and that it "could have avoided the present [Application] by producing convincing and reliable

[124] *Ibid*.

[125] *Id*., para. 48.

[126] *Id*., para. 47.

[127] Delaware Division of Corporations, Annual Report Statistics (2021), **Exh. C-153**.

[128] *See* Tr. Day 1 (27 March 2023), p. 106, lines 11-12 and p. 202, lines 1-3 [Final transcript].

(continued)

evidence of its assets".[129] However, as described in paragraphs 61-62 above, the Claimant offered to provide such information. The fault lies with the Respondent for refusing to receive it.

93. For the reasons stated, the Respondent has failed to discharge its burden of demonstrating that its Application satisfies the very first hurdle of necessity. On this basis alone, the Tribunal can and should reject the Respondent's Application.

3. The Respondent has failed to demonstrate why its request is "urgent"

94. The Respondent has also failed to demonstrate why its request for security for costs is "urgent" in the circumstances of this dispute. In its Application, the Respondent advanced two reasons why it considered its request to be submitted in a "timely" manner, neither of which is convincing.

95. The Respondent first asserts that "tribunals have not necessarily required that the requested security be urgent",[130] citing a single case: *Herzig v. Turkmenistan*.[131] The approach of the *Herzig* tribunal was undeveloped (one sentence noting that it was "not persuaded" that an applicant "must prove an urgent need"[132]), and stands in contrast to the weight of legal authority on this point.[133]

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[129] Respondent's Application for Security for Costs (19 April 2023), paras. 49, 51.

[130] *Id*., para. 58.

[131] *Ibid*. In that dispute, and as described in paragraph 90.c above, the tribunal focused on the fact that the company was insolvent, the claim was being funded by a third-party funder, and the funding agreement expressly provided that the third-party funder had no liability for adverse costs.

[132] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), para. 67, **RL-201** ("Insofar as the element of urgency is concerned, the Tribunal is not persuaded that Turkmenistan must prove an urgent need for the provisional measure of security for costs.").

[133] *See*, *e.g*., *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), para. 32, **RL-194**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), para. 63, **CL-144**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 34, **CL-137**; *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3: Respondent's Request for Provisional Measures (25 November 2015), para. 72, **RL-197**; *Lao Holdings N.V. and Sanum*

(continued)

96. In fact, in a decision rendered after the comments were made by the *Herzig* tribunal, the tribunal in *Bay View v. Rwanda* identified "urgency" as a key issue in its analysis. The tribunal first noted that:

> "The Claimants submit that an application for security for costs should normally be made as early as possible. The Commentary on Article 4 of the CIA Guideline cited by the Claimants provides:
>
> > Applications for security for costs should be made promptly, that is, as soon as the risk or facts giving rise to the application are known or ought to have been known. Arbitrators should consider whether an application has been made at an appropriate time. If the application is made after significant expense has been incurred, they may consider that this unfairly disadvantages the other party and refuse the application unless there is good reason for delay.
>
> This makes sound sense. The Tribunal accepts the Claimants' proposition on this point."[134]

97. The *Bay View* tribunal went on to state that, in addition to the respondent's failure to demonstrate exceptional circumstances:

> "There is a further factor that weighs against such an order. The Respondent has not brought its application promptly. The Respondent submits that it was reasonable (and sensible) for the Respondent to wait to consider the pleadings and evidence relevant to the Claimants' current (and historic) financial position before making this application. The

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Investments Limited v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 42, **RL-202**; *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), paras. 29-30, **RL-198**.

[134] *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), para. 50, **CL-144**.

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> Tribunal does not agree. The Tribunal does not believe that anything has been disclosed in the pleadings and evidence that bears on the matters relied upon by the Respondent in its application. The Respondent has permitted the Claimants to invest heavily in these proceedings before bringing its Application and the Claimants are justified in attacking the fairness of this course."[135]

98. Similar circumstances exist with respect to the Respondent's Application. As described in paragraphs 31-38 above, the Claimant provided notification of the Spin Out on 29 July 2022. 264 days (nearly nine months) elapsed between this notification and the Respondent filing its Application. Even if the Tribunal considers that the Respondent did not have "full" knowledge until its counsel had been provided with the unredacted UPA on 28 October 2022, this still leaves a gap of 173 days (nearly six months) before the Respondent submitted its Application. In either of these circumstances, the Respondent's Application cannot be said to be "timely".

99. This is particularly the case in light of the fact that there were no further pleadings from the Claimant between the period of 29 July 2022 until the Hearing held on 27-29 March 2023. Like the circumstance in *Bay View*, there was thus nothing that could have been disclosed in the pleadings and evidence that bear on the matters relied upon by the Respondent in its Application.[136]

100. This was also the view taken by the tribunal in *Sanum II v. Laos*, which found that the respondent had not demonstrated any "newly discovered information" underpinning its request which was filed more than six months after pertinent information was discovered. As the *Sanum* tribunal noted:

> "As for Respondent's two other stated reasons for its Application – LHNV's status as a "corporate investment vehicle" allegedly with limited assets and likely dependent on its shareholder(s) for arbitration financing – Respondent has not suggested any of this is newly discovered information. Nor has it suggested any changed

[135] *Id*., para. 63 (emphasis added).

[136] *Ibid*.

> circumstances in recent months that have left it less likely to be able to collect on any eventual cost award. Most importantly, Respondent has not suggested any rapidly developing circumstances that are likely to change the *status quo* between now and the conclusion of this case, creating a sudden urgency to obtain relief."[137]

101. In a bid to overcome the lack of urgency to its request, the Respondent as a secondary point asserts that its Application is timely because its "suspicions" "progressively emerged in light of Claimant's increasingly doubtful behaviour towards the proceedings and repeated unwillingness to provide any concrete information".[138] The Respondent has failed to adduce any evidence in support of these contentions as a factual matter. Instead, the Respondent rests on mischaracterizations of the evidence on the record of these proceedings, and its own misplaced "beliefs", "doubts", and "suspicions".[139]

102. Moreover, the sole legal authority cited by the Respondent also does not support its position. In *Kazmin v. Latvia*, certain facts about the claimant were "revealed in the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction" dated 19 September 2019. The *Kazmin* tribunal found it reasonable that the information was "reviewed only in the larger context of the Respondent's preparation of its Rejoinder on the Merits and Reply on Jurisdiction which was due on 27 February 2020",[140] and that the respondent thus filed its application for security for costs on 17 January 2020 in a timely way. The respondent did so after it had gathered additional information, including the discovery of the existence of criminal investigations.[141] Indeed, this discovery "was the last puzzle piece which pushed the Respondent to file the

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[137] *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 42, **RL-202** (emphasis added).

[138] Respondent's Application for Security for Costs (19 April 2023), para. 61.

[139] *See*, *e.g.*, *id*., paras. 4 ("ubiquitous doubts"), 20 ("serious doubts"), 47 ("all the more suspicious"), 49 ("casting doubts"), 51 ("casts strong doubts"), 58 ("casting serious doubts"), 61 ("Claimant's increasingly doubtful behaviour" and Respondent's "suspicions").

[140] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), para. 29, **RL-198**.

[141] *Ibid*.

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Application, more than a month before the due date of its Rejoinder on which the work was proceeding in parallel",[142] and therefore the tribunal found that there was no lack of urgency in the circumstances.[143]

103. The circumstances in *Kazim* relied upon by the Respondent are thus entirely different to those in issue in these proceedings. The Respondent was advised of the Spin Out on 29 July 2022,[144] and was provided further information throughout September and October 2022.[145] The Respondent had ample opportunity to consider this information, and in fact dedicated a section of its Rejoinder to this issue.[146] Notably, the Rejoinder was filed 4 November 2022, over five months before the Respondent filed its Application for Security for Costs on 19 April 2023.

104. If the Respondent truly believed it was necessary to file its Application, it could have done so at the same time it filed its Rejoinder (as was the case in *Kazmin v. Latvia*). Instead, the Respondent waited until the first day of Hearing, on 27 March 2023, to announce for the first time that "a security for costs order might make sense against the other side".[147] The circumstances and timing of this announcement point toward arbitral gamesmanship, rather than any sense of urgency for the alleged protection of a right of the Respondent.

105. Thus, the Respondent has failed to overcome the third limb (urgency) of the test required to sustain a request for security for costs; this constitutes a further, and independent, reason its Application should be rejected.

106. Alternatively, at a minimum, the Respondent's delay impacts the nature of any security that might be ordered. The fact is that the Respondent's tactical delay caused both

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[142] *Ibid*.

[143] *Id*., para. 30.

[144] Letter from the Claimant to the Tribunal (29 July 2022).

[145] Letter from the Claimant to the Tribunal (15 September 2022); Letter from the Claimant to the Tribunal (4 October 2022).

[146] Respondent's Rejoinder on Jurisdiction and Merits (4 November 2022), Section 2.1 ("Claimant fails to prove that it is entitled to bring claims after its improperly documented purported transfer of the 'ICSID Claim' midway the proceedings [*sic*]").

[147] Tr. Day 1 (27 March 2023), p. 204, lines 13-15 [Final transcript].

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Parties to continue to incur costs as they prepared for the Hearing. As is often the case in domestic courts considering security for costs applications, this delay should—at the very least—bar the Respondent from claiming costs already incurred in the proceedings and limit any order for security to future costs only.[148] In light of the fact that the only immediate costs left for the Respondent to incur at the time it filed its Application is with respect to the post-hearing brief, any order for security—if made (*quod non*)—should be significantly less than the USD 3.5 million requested by the Respondent.

4. Granting the Respondent's request would be disproportionate in the circumstances of this arbitration

107. Even if the Respondent had satisfied the requirements of necessity and urgency (which it has not), granting its request would be disproportionate in the circumstances of this arbitration.

108. ICSID tribunals have often considered the proportionality of the provisional measure to ascertain whether potential harm to the party against whom the measure is sought substantially outweighs the potential harm to the requesting party.[149] In the case of security for costs, "that analysis translates into balancing the probability of the harm of non-recovery of the costs incurred in the arbitration against the harm of not being able

[148] *See*, *e.g.*, THE WHITE BOOK SERVICE: CIVIL PROCEDURE, VOL. 1 by Lord Justice Coulson (ed.) (Sweet & Maxwell, March 2023), Section 25.12.6, **CL-153** ("The court may refuse to order security if the delay has deprived the claimant of time to collect the security, if it has led the claimant to act to their detriment, or may cause them hardship in the future conduct of the action. In other circumstances delay may deprive the applicant for security of some or all of the costs already incurred in the proceedings, security being given for future costs only", citing *Everwarm Ltd v BN Rendering Ltd [2019] EWHC 1985 (TCC)*, Cockerill J, at [15]–[16]; *Re Bennet Invest Ltd* [2015] EWHC 1582 (Ch) at [28]); *RBIL v Ryhurst* [2011] EWHC 2209 (TCC); [2011] B.L.R. 721; *Warren v Marsden* [2014] EWHC 4410 (Comm); *Re Bennet Invest Ltd* [2015] EWHC 1582 (Ch) (Richard Millett QC))).

[149] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), para. 72, **CL-154**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), para. 35, **CL-137**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1: Burlington Oriente's Request for Provisional Measures (29 June 2009), para. 81, **CL-155**; *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant Request for Provisional Measures (29 March 2017), paras. 238-242, **CL-156**.

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to pursue the claims if the security is not provided."[150] As put by the tribunal in *Eskosol v. Italy*:

> "[P]roportionality is a critical part of any provisional measures analysis, and a party seeking provisional measures must demonstrate that its need for the measures are not outweighed by the hardships to which the other party would be subjected if the measures are granted. This type of proportionality analysis would be particularly critical where the burden of a potential measure is one that is said to impinge, at least potentially, on a party's ability to pursue its claims or defenses at ICSID. A tribunal should not lightly recommend a provisional measure that could impede access to justice."[151]

109. Thus, an assessment of proportionality is dependent on the circumstances of the dispute in issue, and involves a weighing and balancing exercise of both parties' rights.

110. In this respect, the Respondent is not facing any potential harm of non-recovery of its costs. As described in paragraphs 81-93 above, the Respondent has not demonstrated that the Claimant would be unable or unwilling to pay costs if ultimately awarded.

111. Instead, the Respondent argues that an order for security for costs is proportionate because "there is no allegation (much less proof) that it would thwart in any manner Claimant's intended participation to the proceeding".[152] The fact that the Claimant is able and willing to pay any costs ordered (a fact which, as above, fundamentally undermines the Respondent's Application) does not mean that an order for security for costs imposes no burden on the Claimant. The requested order of USD 3.5 million is a substantial amount, which could be utilized by the Claimant in a number of different ways (including, for example, by making additional investments or growing its existing

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[150] Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 400, **CL-134**.

[151] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), para. 38, **RL-194**.

[152] Respondent's Application for Security for Costs (19 April 2023), para. 55.

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investments). Further, the Respondent's position that an order for security for costs would be "proportionate and not create any undue burden" on the Claimant because the security "could be posted in the form of a bank guarantee" is erroneous,[153] given that even such a guarantee would most likely still come at significant cost.

112. In these circumstances, the Respondent has failed to demonstrate why an order for security for costs would be proportionate in this dispute. That the Respondent has unsubstantiated "doubts" about the Claimant's ability and willingness to pay any costs award that might be made against it is not an exceptional circumstance. In the words of the *Herzig* tribunal, "every party in arbitration faces some risk that it will not be able to collect on a costs award, whether due to the opposing party's intransigence or insolvency".[154] This uncertainty alone is not sufficient to warrant a finding that awarding security for costs is proportionate.

113. Further, the Respondent's assertion that the need for security for costs is "all the more necessary in light of Colombia's recent experiences of being unable to recover a favourable award on costs against an opaque claimant" is irrelevant.[155] Even if it had produced any evidence in support of this contention (which it has not[156]), the circumstances of an unrelated dispute is entirely immaterial to the case-specific question of proportionality before this Tribunal. In any event, the Respondent's complaint in this regard lies ill in the mouth given that it has recently tried to avoid paying a USD 19 million award issued against it by an ICSID tribunal,[157] contrary to the Respondent's statement during the Hearing that "there is no risk that Colombia will not pay as a State".[158]

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[153] *Ibid*.

[154] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Requests for Security for Costs and the Claimant's Request for Security for Claim (27 January 2020), para. 59, **RL-201**.

[155] *See* Respondent's Application for Security for Costs (19 April 2023), para. 6.

[156] *See id*., n. 2.

[157] *See*, *e.g*., Caroline Simson, "Colombia Can't Get $19M Glencore Award Axed" (24 September 2021), LAW 360, **Exh. C-154**.

[158] Tr. Day 1 (27 March 2023), p. 204, lines 15-16 [Final transcript].

114. Thus, the Respondent has failed to overcome the fourth limb (proportionality) of the test required to sustain a request for security for costs; this constitutes a further, and independent, reason its Application should be rejected.

5. Conclusion

115. For the reasons stated, the Respondent has failed to meet the high burden required to satisfy its request for security. There is no right to preserve, no necessity, no urgency, and such an order would be disproportionate in the circumstances.

C. Even if the Tribunal Were Minded to Award Security for Costs (*Quod Non*), the Respondent has Failed to Substantiate the Amount of its Requested Order

116. Moreover, the Respondent has failed to substantiate its alleged costs. It merely asserts its figure of USD 3.5 million but gives no explanation or evidence in support. Had this been a case where the Application had been brought at the outset, before the majority of costs had been incurred, a lack of evidence might be justifiable; but that is not the situation we have here.

117. Further, even if this figure is correct, it is over-inflated. As far as the Claimant can tell, the Respondent has been awarded costs in five cases that are public. Across those five cases, its costs awarded have been on average reduced to 60% of those claims.[159]

118. In the event that costs are awarded to the Respondent in this case, such a reduction should also ultimately occur here too, given that the Respondent has over-litigated this

[159] *Naturgy (formerly Gas Natural) v. Colombia*, ICSID Case No. UNCT/18/1, Award (12 March 2021), paras. 630-632, **CL-157** (where Colombia claimed USD 4.3 million in costs, and the tribunal ordered that each party bear their own costs, effectively a reduction to 0%); *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award (19 April 2021), paras. 226, 238, **CL-158** (where, in proceedings covering jurisdictional issues only, Colombia claimed USD 1.4 million, and was awarded USD 760,000, a 50% reduction); *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award (7 May 2021), paras. 494, 500, **CL-159** (where Colombia claimed USD 4.2 million, and was awarded USD 2 million, a 50% reduction); *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Award (7 May 2021), para. 263, **CL-160** (where Colombia claimed USD 1.3 million, and was awarded the full amount, 100%); and *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award under Rule 41(5) (24 February 2022), paras. 346-347, **CL-161** (where Colombia claimed USD 20,269, and was awarded the full amount, 100%).

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dispute, and has failed to take any steps to mitigate the costs that it has incurred.[160] The Respondent seeks to preempt this by claiming that it could not have raised any of its jurisdictional objections on an expedited basis.[161] However, that is not correct. The Respondent has raised seven jurisdictional objections,[162] and—by its own account—"each of them [are] dispositive of the entirety of the case".[163] Notwithstanding the fact that these jurisdictional objections all lack merit, if the Respondent believed each of its objections were dispositive, then it could have utilized procedural mechanisms available to it to lessen the length and cost of these proceedings. It chose not to do so. In the Claimant's view, that choice was most likely taken in the knowledge that the Respondent had no basis to succeed on an expedited objection. Thus, even if the Tribunal were minded to order security for costs (*quod non*), the requested amount should be significantly discounted in light of the procedural conduct of the Respondent.

D. Even if the Tribunal Were Minded to Award Security for Costs (*Quod Non*), it Would be Inappropriate to Make Such an Order Against Neustar, Inc.

119. The preceding sections have addressed the Respondent's request that Vercara provide security. It remains to address the Respondent's further request that Neustar be ordered to provide security too.[164] That must likewise be rejected on the following grounds.

120. *First*, and for the reasons outlined in Section IV.D below, the Tribunal no longer has jurisdiction over Neustar.

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[160] *See*, *e.g.*, *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 43, **RL-202** ("Finally, with respect to the issue of proportionality, the Tribunal considers Respondent's refusal to contribute to the case deposits to be a further equitable factor militating against its request for the provisional measures it seeks."). *See* with respect to costs generally *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), para. 424, **CL-162** ("fundamental fairness likewise requires that the Respondent reimburse the Claimant for attorneys' fees and other arbitration costs which the Claimant would not have incurred but for the Respondent's irregular behavior in mounting this defense.").

[161] Respondent's Application for Security for Costs (19 April 2023), n. 33.

[162] Tr. Day 1 (27 March 2023), p. 139, lines 2-5 [Final transcript].

[163] Tr. Day 3 (29 March 2023), p. 441, lines 20-21 [Final transcript].

[164] Respondent's Application for Security for Costs (19 April 2023), paras. 22-27.

121. *Second*, even if the Tribunal does have jurisdiction over Neustar (which is denied), the Respondent has failed to even allege any exceptional circumstances justifying such an order. In particular, it does not make any argument specific to Neustar's circumstances to suggest that Neustar is either unable or unwilling to pay any costs award; the specific allegations all relate to Vercara.

E. Request for Relief re Security for Costs

122. For the reasons stated, the Claimant respectfully requests the Tribunal to:

a. Dismiss the Respondent's Application for Security for Costs; and

b. Order that the Respondent will bear all costs associated with this incident (including those of the Tribunal and the Claimant's legal fees) to be assessed at the conclusion of this arbitration.

IV. COMMENTS ON LAW APPLICABLE TO THE SPIN OUT

123. At the Hearing, the Tribunal asked: "What is the applicable law to determine who is the proper claimant in the arbitration?"[165] In the closing session, the Claimant explained that the Tribunal's jurisdiction is determined by international law, but that the effect of the Spin Out and how that might affect the international law jurisdictional analysis is governed by the laws of Delaware.[166] The Tribunal directed the Claimant to provide more details of the relevant rules of Delaware and international law in this respect.[167] We do so below.

A. Delaware Law Permits Assignments of Claims

124. As explained at paragraphs 21-24 above, Delaware law governed the Spin Out, including the assignment of this arbitration claim to Vercara. The Respondent has not denied that. Nor has it asserted that the assignment was invalid as a matter of Delaware law (instead focussing its attention solely on the international law aspect). The absence of such a challenge alone suffices to dispose of this point. In any event, Delaware law

[165] Tr. Day 2 (28 March 2023), p. 396, lines 3-6 [Final transcript] ("Third question: what is the applicable law to determine who is the proper Claimant in this arbitration?"). *See also* Email from the Tribunal to the Parties (28 March 2023).

[166] Tr. Day 3 (29 March 2023), p. 425, line 5 to p. 426, line 17 [Final transcript].

[167] *See*, *e.g.*, Letter from ICSID to the Parties (31 March 2023), Item 1.

(continued)

permits the assignment of claims.[168] Indeed, it is far from being an outlier in this regard.[169]

125. This suffices to dispose of the Respondent's objection to jurisdiction in relation to the Spin Out. In the same way that the legal existence of a claimant company is a matter governed by the law of its state of incorporation,[170] domestic law likewise governs the validity and effect of a transfer of a companies' assets, including legal claims. In any event, as set out below, the Tribunal has jurisdiction over Vercara from the perspective of the international law analysis too.

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[168] As an initial matter, it has been held that under Delaware common law, "contract rights and other property rights are freely alienable". *See Hawkins v. Daniel*, 273 A.3d 792 at 823 (Del. Ch. 4 April 2022) (Laster, V.C.), **Exh. C-155** (citing *Tracey v. Franklin*, 67 A.2d 56, 58 (Del. 1949) and *P.C. Connection, Inc. v. Synygy Ltd*., 2021 WL 57016 at *13 (Dee. Ch. 7 January 2021)). This includes property rights in relation to litigation. For example, in *In re Emerging Communications, Inc. Shareholders Litigation,* WL 1305746, memo. op. at *29-30 (Del. Ch. 4 June 2004) (Jacobs, J.), **Exh. C-156**, it was held that "it is established Delaware law that choses in action that survive the death of the victim are validly assignable". To be clear, the term "choses in action" includes legal claims; indeed, in the aforementioned case the choses in action were breach of fiduciary duty and fraud claims. As to the issue of survivability, under Delaware law: "All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued." (*see* 10 Del. C. § 3701, August 2021, **Exh. C-157** (emphasis added)). *See also* the Superior Court of Delaware's judgment in *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194 (2020), **Exh. C-158**, which held (at p. 203) that "Delaware courts permit[] conveyance of a lawsuit so long as the transferor possesses and conveys a complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation itself". Here, Neustar assigned and fully conveyed to Vercara, by way of the UPA and Bill of Sale, Neustar's complete interest in the MINTIC Claim as a claimant thereunder, including the assets and liabilities relating thereto held by Neustar, making Vercara the bona fide owner of and claimant under the MINTIC Claim, as permitted by Delaware law.

[169] *See* E.M. Borchard, *Diplomatic Protection of Citizens Abroad* (1st edn 1919, reprinted in 2003 by William S. Hein & Co), pp. 636-637, **CL-163** (quotation at para. 131 below).

[170] *See*, *e.g*., *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding (10 May 1988), para. 104, **CL-168** ("Generally speaking, the question of whether a corporation has been terminated or suspended is determined by the local law of the state of incorporation ... The analysis would not be different under Indonesian law. In the view of the Tribunal, the same rule applies to the question of whether that corporation is still an existing legal entity for a particular purpose. The rule as it applies to the effect of dissolution should not be different from the rule applied, in international contracts, to the effect of creation of such a corporation. When a company enters into an agreement with a foreign legal person, the legal status and capacity of that company is determined by the law of the state of incorporation. Similarly, one should apply the law of the state of incorporation to determine whether such a company, though dissolved, is still an existing legal entity for any specified legal purpose."). In that dispute, the tribunal applied Delaware law. *See id*., para. 105.

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B. International Law Permits Assignments of Claims

126. As to the international law analysis, the Respondent (in its Rejoinder and at the Hearing) has advanced essentially three grounds in support of its position: **(i)** that it is "highly questionable" whether an assignment of a claim is possible at all;[171] **(ii)** that, in any event, previous decisions show that a claimant cannot be replaced midway through proceedings absent the respondent's consent;[172] and **(iii)** that the terms of the ICSID Convention and the TPA further support these conclusions.[173] The Claimant disagrees on each count.

1. There is no general prohibition on the assignment of claims under international law

127. First, there is no general prohibition on the assignment of claims under international law. Indeed, the Respondent itself appears to recognise the weakness of its position in this regard by having placed it in a footnote in the Rejoinder,[174] and did not maintain the point at the Hearing. In any event, the two authorities it relies on are unavailing.

128. The Respondent's first authority is the award in *Mihaly v. Sri Lanka*.[175] There, Sri Lanka presented an objection *ratione personae*, alleging that the true nationality of the claim was Canadian, and that its assignment to a U.S. company was to circumvent the fact that Canada was not (then) a party to the ICSID Convention.[176] The tribunal began by noting that Canada was not a party to the Convention, so both Canada and its nationals could not invoke it,[177] then finding: "It follows that as neither Canada nor Mihaly (Canada) could bring any claim under the ICSID Convention, whatever rights

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[171] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), para. 28 and n. 47 thereto.

[172] *See id*., para. 33; Tr. Day 1 (27 March 2023), pp. 142-144 [Final transcript].

[173] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), paras. 30-32; Tr. Day 1 (27 March 2023), pp. 142-144 [Final transcript].

[174] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), para. 28 and n. 47 thereto.

[175] *See Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), **RL-119**. The Respondent cites para. 24.

[176] *Id*., paras. 11-12.

[177] *Id*., para. 23.

(continued)

Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment with or without, and especially without, the express consent of Sri Lanka, on the ground that ... no one could transfer a better title than what he really has."[178] That alone is the *ratio* of this case on this issue. Simply put, the Canadian claimant did not have a claim that could be assigned, so the validity of the assignment was irrelevant. Thus, when the tribunal stated a few lines later that an ICSID claim "is not a readily assignable chose in action" (which the Respondent relies on here),[179] that statement was plainly limited to the situation before it. Indeed, the tribunal expressly indicated that its concern was that the Convention was "not intended to create rights and obligations for non-Parties" such as Canada.[180] Alternatively, to the extent that the tribunal did consider all assignments to be prohibited (which is denied), such finding would have been *obiter dicta* for the reasons stated above, and in any event is contradicted by the cases discussed below.

129. The Respondent's second authority is a text by the late Judge Crawford.[181] The passage it relies on is principally concerned with the rule of continuous nationality in the context of diplomatic protection.[182] Having addressed that rule, Judge Crawford then noted in passing, in a single sentence, without citation, that there are "limits" on the assignability of BIT claims such that "great care is required"; but there is no discussion as to what those limits are. Indeed, the fact that he referred merely to "limits" and not a total prohibition tends to suggest he did not consider such a prohibition to exist.

130. In fact, there is ample authority for the proposition that an investment treaty claim is capable of assignment, including the following examples.

[178] *Id*., para. 24.

[179] *Ibid*.

[180] *Ibid*.

[181] *See* J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed. (2012), **RL-120**. The Respondent cites p. 704.

[182] *Id*., pp. 701 (heading "Diplomatic Protection"), 704 (re "Assignment of claims").

131. First, as a matter of customary international law, the assignability of claims has been recognised since at least 1919. Borchard's *Diplomatic Protection of Citizens Abroad* put this as follows:

> "The assignability of claims is fully recognized by practically all systems of municipal law and by international law. In Anglo-American law the test in determining the assignability of a chose in action is whether or not it would survive and pass to the personal representative of a decedent. If it would so survive, it may be assigned so as to pass an interest to the assignee which he can in most jurisdictions enforce in his own name; if it does not so survive, it is not assignable. The common-law rule as to the non-assignability of choses in action, first modified by courts of equity, has been practically abandoned, and rights of action arising out of contract or out of torts which are injuries to property, are now generally recognized as assignable. So in international law claims arising out of concession contracts or arising from the tortious taking of property may be assigned, so as to vest the legal title in the assignee."[183]

132. Borchard goes on to explain that there must, however, be continuity of citizenship. "The assignment of a claim, therefore, from one citizen to another of the same country will not affect its national character."[184] A similar theme can be seen in investment treaty decisions.

133. For example (and second), in *African Holding v. DR Congo*, the tribunal accepted the validity of an assignment of a claim.[185] The relevant facts were as follows. In the 1980s, the DRC and SAFRICAS (a DRC company) entered into construction contracts (albeit they had been lost by the time of the arbitration).[186] Prior to 2000, SAFRICAS

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[183] *See* E.M. Borchard, *Diplomatic Protection of Citizens Abroad* (1st edn 1919, reprinted in 2003 by William S Hein & Co), pp. 636-637, **CL-163** (emphasis added).

[184] *Id*., p. 638.

[185] *See African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility (29 July 2008), **CL-164**.

[186] *Id*., paras. 24-25, 56.

(continued)

was owned by a Belgian company.[187] In 2000, SAFRICAS was purchased by U.S. nationals.[188] In 2004, SAFRICAS "assigned, without any reservation, its claim" to African Holding (a U.S. company), and this was subsequently notified to the DRC.[189] (It should be noted that there is no indication in the decision that the DRC consented to the assignment.) In 2005, African Holding and SAFRICAS commenced proceedings at ICSID pursuant to the U.S.-DRC BIT, claiming monies owed pursuant to the construction contracts.[190]

134. The DRC objected to jurisdiction on various grounds. Most relevant for present purposes is the objection pertaining to the assignment. In the DRC's view, by reason of the assignment, the tribunal lacked jurisdiction over SAFRICAS (since it had given away its claim) and African Holding could not claim either (since it had not made an "investment" per ICSID Convention Article 25(1)).[191]

135. In considering this, the tribunal began by distinguishing *Mihaly* as follows:

> "[A]ll the rights held by SAFRICAS were assigned to African Holding, including claims and consent to arbitration, given that the State whose nationals benefit from the expressed consent under the bilateral investment treaty has not changed. The situation in this case is clearly different from that of the *Mihaly* and *Banro* cases, in which a Canadian company was attempting to cede rights it did not have."[192]

136. Consequently, the tribunal concluded that only African Holding had standing to bring the arbitration, and declined jurisdiction in relation to SAFRICAS.[193]

137. The tribunal then proceeded to consider whether African Holding could be said to have made an "investment". It held that SAFRICAS' rights under the contracts had been

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[187] *Id*., paras. 62, 87.

[188] *Ibid*.

[189] *Id*., paras. 57.

[190] *Id*., para. 1.

[191] *Id*., paras. 57, 58.

[192] *Id*., para. 63 (emphasis added).

[193] *Id*., para. 73.

(continued)

"investments" under the BIT, and that upon African Holding being assigned those rights it became a protected investor under the BIT.[194] In the tribunal's words:

> "… [T]he assignment of the claim is not a simple transfer of debt. It is also the transfer of the economic value of work performed and not compensated. … The assignee therefore has exactly the same interest as the original investor and the assignor is for this very reason an investor himself. This is particularly true in the context of these proceedings in which the same family retains an interest in the case under a different legal provision. Mr. David Blattner testified in the course of the hearing that 'in both situations we own both companies, we are owners of both enterprises, we hold in each case nearly 100% …. [As] owners of the two companies … the assignment is an accounting arrangement between one company and another'."[195]

> "… In fact, the legal nature of these rights and obligations, notably the right to present a claim and the arbitration clause, have not changed in the light of the facts here … [T]he debt is still the same debt and is still owed by the DRC to the recipient."[196]

138. Ultimately, the tribunal declined jurisdiction over African Holding, but it did so on the basis that the dispute had arisen at a time when SAFRICAS had been owned by a Belgian company, so as to take the claim outside of the BIT's temporal provisions.[197] Nevertheless, this decision confirms that an investment treaty claim can be assigned. The tribunal's findings in this regard cannot be said to be *obiter dicta*, given that they constitute the basis on which jurisdiction was declined over SAFRICAS.

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[194] *Id*., para. 75.

[195] *Id*., paras. 78-79.

[196] *Id*., para. 84 (emphasis added).

[197] *Id*., paras. 108-121.

(continued)

139. Third, further confirmation can be found in *Renée Rose Levy v. Peru*,[198] a case concerning Peru's alleged conduct leading to the liquidation of a Peruvian bank (BNM).[199] As of 2000, Mr. David Levy Pesso (a French national[200]) had held an indirect interest in the bank.[201] In 2005, he assigned his shares in the holding company to his daughter, Ms. Renée Rose Levy.[202] Ms. Levy commenced the arbitration in 2010.[203]

140. Peru objected to jurisdiction, arguing that **(i)** Ms. Levy was not a protected "investor" under the France-Peru BIT because she acquired her indirect interest in the bank long after the impugned events, **(ii)** that her interest did not qualify as an "investment" under the BIT or the ICSID Convention (particularly as the bank had been insolvent since 2000), and **(iii)** that the assignment was an abusive attempt to "manufacture jurisdiction".[204] The tribunal began its analysis by finding that Ms. Levy had proven her French nationality.[205] It then found that the timing of the assignment (5 years after the alleged breach) was no bar to jurisdiction.[206] Likewise, it disagreed with Peru's argument that Ms. Levy did not have a qualifying "investment". As to the BIT, the tribunal observed that although Ms. Levy had acquired "her rights and shares" free of charge, "this does not mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the Claimant by perfectly legitimate legal instruments".[207] As to the ICSID Convention, the tribunal held that it was sufficient that the assignor had made a

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[198] *See Renée Rose Levy de Levi v. Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014), **RL-164**.

[199] *Id*., para. 2.

[200] *Id*., para. 141.

[201] *Id*., para. 56. More specifically, Mr. David Levy Pesso held such interest through his shareholding in Holding XXI S.A, which in turn held 52% of the shares in Nuevo Mundo Holding S.A., which was BNM's shareholder. *Id*., paras. 35, 38, 56, 73.

[202] *Id*., para. 112.

[203] *Id*., para. 5.

[204] *Id*., para. 118.

[205] *Id*., para. 143.

[206] *Id*., para. 145.

[207] *Id*., para. 148.

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qualifying investment.[208] Lastly, the tribunal rejected Peru's argument that there had been an abuse of process, noting in particular that the assignment had been between close family members.[209] Indeed, unlike in *Mihaly*, the assignment here was between two French nationals. Accordingly, the tribunal affirmed its jurisdiction over the claim.[210]

141. Although the assignment was of shares, it is apparent from the fact that the claim was brought in Ms. Levy's own name and from the tribunal's analysis as described above that such assignment included an assignment of the rights to arbitrate and to the claim itself. Indeed, as quoted above, the tribunal expressly spoke of Ms. Levy as having acquired "shares and rights".

142. Fourth, by way of further examples, in *LESI & Astaldi v. Algeria* and *Pantechniki v. Albania*, the tribunals accepted jurisdiction in circumstances where the company that had originally been (allegedly) mistreated by the respondent (Dipenta and CI Sarantopoulos, respectively) had, after such events had occurred, been merged into other companies bearing the same nationality. Each case concerned at least some alleged mistreatment that preceded the merger. Nevertheless, both tribunals accepted jurisdiction without temporal limitation in this regard.[211]

143. Lastly, see also the discussion of *Wintershall*, *Quasar de Valores* and *Vivendi II* at paragraphs 149 and 157 *et seq* below. They each recognise that claims can be transferred.

144. In sum, international law claims are capable of assignment, including in circumstances where such claim arises under an investment treaty.

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[208] *Id*., para. 151.

[209] *Id*., para. 154.

[210] *Id*., para. 163.

[211] *See LESI S.p.A. & Astaldi S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006), paras. 3-18, 92-94, **CL-8**; and *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), paras. 6, 12-27, 30, 72, **RL-131**.

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2. A claimant *can* be replaced midway through proceedings, even without the Respondent's consent

145. The Respondent is also wrong to contend that a claimant cannot be replaced midway through proceedings absent the respondent's consent, and the four authorities it relies on for this proposition are inapposite.[212]

146. The Respondent's first authority is the joinder decision in *Sumrain v. Kuwait.*[213] There, the claim had been brought by four Egyptian nationals, each bearing the "Sumrain" surname.[214] Subsequently, the claimants filed a "Request for Joinder of Third Party as Claimant" on behalf of a Ms. Hamid, which Kuwait objected to.[215] The tribunal first observed that there are no specific provisions dealing with the joinder of a "third party" in the ICSID Convention or Arbitration Rules, but accepted that such matter could fall within Article 44's residual powers.[216] Nevertheless, it declined the request on the basis that Ms. Hamid was not a party to the arbitration agreement between the Sumrains and Kuwait.[217] As the Respondent has noted, the tribunal considered that joinder in such circumstances would constitute a modification of such agreement, which the tribunal could not do absent the original parties' consent.[218]

147. However, *Sumrain* is distinguishable from the present case. Here, we are not concerned with the joinder of an entirely new claimant, but rather with the substitution of the original claimant with its assignee. Indeed, the very point is that Vercara *is* a party to the original arbitration agreement; there has been no modification, but merely an assignment of the rights and obligations arising from it. This conclusion is supported by the findings in *African Holding* described at paragraph 133 *et seq* above; in particular, that tribunal's findings that "consent to arbitration" had been transferred to

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[212] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), para. 33; Tr. Day 1 (27 March 2023), pp. 142-144 [Final transcript].

[213] *See Sumrain et al v. Kuwait*, ICSID Case No. ARB/19/20, Decision on the Joinder Application (5 October 2020), **RL-122**. The Respondent cites para. 21.

[214] *Id*., para. 1.

[215] *Id*., paras. 3, 7-8, 15.

[216] *Id*., paras. 16-18.

[217] *Id*., paras. 19-21.

[218] *Id*., para. 21.

(continued)

the assignee, and that the "the right to present a claim and the arbitration clause have not changed". In any event, whereas Ms. Hamid was consistently described as a "third party",[219] such description cannot be applied here: as explained at paragraphs 15-17 and 28 above, Neustar Security Services was Neustar's subsidiary at the time of the assignment; again, the facts here are similar to those in *African Holding*, where the assignment was between affiliates under the same ultimate ownership.

148. The Respondent's second authority is the award in *Wintershall v. Argentina.*[220] That arbitration was commenced in 2004 by Wintershall Aktiengesellschaft **("Wintershall")**.[221] In November 2006, a new legal entity titled Wintershall Holding Aktiengesellshaft **("W.Holding")** was registered, and Wintershall's rights and liabilities in relation to the arbitration were assigned to that new entity.[222] In May 2007, this was notified to ICSID with a request that the case be continued with W.Holding as claimant.[223] Argentina objected.

149. Contrary to *Mihaly* (which Argentina had relied on),[224] the tribunal began by accepting the assignability of ICSID claims:

> "If the applicable law so permits – there is nothing to prevent the Claimant (who is a beneficiary under the Argentine – Germany BIT) from voluntarily assigning his/its ICSID Claim to a third party; whether or not that third party be only a partial successor-in-interest of the Claimant."[225]

[219] Indeed, the tribunal's decision does not identify any connection between the Sumrains and Ms. Hamid, other than the latter's alleged indirect minority ownership of a party to the BOT contract at issue in the case. *Id*., para. 14.

[220] *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), **RL-123**. The Respondent cites para. 59.

[221] *Id*., paras. 1, 14-15.

[222] *Id*., para. 45.

[223] *Id*., paras. 31, 45.

[224] *Id*., para. 51(a).

[225] *Id*., para. 56.

(continued)

150. The question, however, was whether the original claimant could be substituted in circumstances where there had been such an assignment mid-claim. On that point, the tribunal received expert evidence from Professor Schreuer, who confirmed that he was not aware of any principle under international law which would impede W.Holding from being substituted or joined to the case.[226] For its part, the tribunal stated as follows:

> "In the present case, an objection to the substitution of the Claimant by a new entity during the course of ICSID arbitration proceedings may be well-taken – for lack of empowerment of a Tribunal to do so, absent consent (See Article 44 of the ICSID Convention). But in the Tribunal's view there is no obstacle to its directing (in this Arbitration Case) that both the Claimant and Wintershall Holding AG do continue with the ICSID proceedings as Joint Claimants …"[227]

151. The Respondent relies on the first sentence so quoted. The immediate problem with that is that the tribunal *expressly* did not take a definitive stance on this issue. In particular, it did not reject Professor Schreuer's evidence, and merely acknowledged that the objection "may well be taken". Indeed, that issue did not require determination given the tribunal's finding that W.Holding would be added as a second claimant, rather than substituted. Thus, the passage relied upon by the Respondent is *obiter dicta.* Indeed, more generally, the tribunal characterised the entirety of its analysis on these matters as "academic" in light of its other findings.[228]

152. Nevertheless, to the extent that the *Wintershall* decision establishes precedent, it stands for the principles that ICSID claims are assignable so long as the assignment is valid under the domestic law governing the assignment, and that the assignee can be joined to the arbitration even without the respondent's absolute consent. This latter point is expanded on at paragraph 179 below.

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[226] *Id*., para. 52 (quoted in n. 271 below).

[227] *Id*., paras. 59-60.

[228] *Id*., para. 55. *See also* paras. 26 and 29.

(continued)

153. The Respondent's third authority is Schreuer et al's Commentary on the ICSID Convention.[229] It is illustrative to quote the entire paragraph that the Respondent has part-quoted from:

> "If the host State is aware of and agrees to the assignment of rights and duties, the approval of the extension of jurisdiction *ratione personae* to the successor will be assumed. If the host State is unaware of an assignment or has resisted succession, it is less likely that a tribunal will decide that party status under the Convention has been transferred. If the successor to rights and obligations is closely affiliated to the party named in the consent agreement, either as a parent company or as a subsidiary, the standards will be less stringent."[230]

154. Two points bear noting here. *First*, even the middle sentence which the Respondent quotes[231] does not support an absolute requirement for respondent consent to an assignment, but merely opines that claimants are "less likely" to succeed when the host state is unaware or has resisted. Indeed, this statement should also be read in light of Professor Schreuer's expert evidence in *Wintershall*, discussed at paragraph 150 above and footnote 271 below. *Second*, the third sentence of the quotation above specifically notes that different standards apply where the transfer is between close affiliates including to a subsidiary. In this regard, it should be recalled that Neustar Security Services was Neustar's subsidiary at the time of the assignment.[232]

155. The Respondent's fourth authority is the jurisdiction decision in *Ambiente Ufficio v. Argentina.*[233] That case had originally been brought by 119 claimants.[234] Argentina

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[229] *See* C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (Second Edition) (2009), 'Article 25 – Jurisdiction', **RL-44**. The Respondent cites p. 185, para 362.

[230] *Id*. (emphasis added).

[231] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), para 34 and n. 53 thereto.

[232] *See* paras. 15-17, 28 above.

[233] *See Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), **RL-121**. The Respondent cites para. 123.

[234] *Id*., para. 113.

(continued)

argued that neither the ICSID Convention nor the applicable investment treaty permitted a claim to be filed on mass like this.[235] However, as the tribunal noted, its task was complicated by the fact that the parties had relied on a multiplicity of terms to describe the case (*e.g.* mass claim, class action, multi-party *etc.*), such that the tribunal felt compelled to clarify which terminology it intended to use to give sense to its subsequent reasoning.[236] The passage part-quoted by the Respondent falls within the course of those clarifications. In that context, the tribunal noted that multi-party proceedings can result from the consolidation or joinder of multiple ongoing proceedings, and stated that this would require the parties' consent (citing *Wintershall*); however, it then stated that this was *not* the situation before it, such that the tribunal "d[id] not deal with the question of what kind of consent is needed for a subsequent joinder or consolidation".[237] Accordingly, at most, this decision merely recites the finding in *Wintershall*, without any analysis or comment of its own. Indeed, it is unsurprising that the tribunal did not provide such analysis given that the issue simply did not arise for decision on the facts before it. Thus, the passage part-quoted by the Respondent is *obiter dicta.*

156. For these reasons, the authorities cited by the Respondent do not assist it. Further, other authorities confirm that an investment treaty claim is capable of assignment mid-proceeding. We provide two examples below.

157. First, *Quasar de Valores v. Russia*. The relevant facts were as follows. The RFA was lodged on 25 March 2007.[238] At first, there were seven claimant companies.[239] On 20 March 2009, the tribunal issued its decision on jurisdiction, finding that it had jurisdiction in relation to four of the claimants, including Rovime Inversions SICAV

[235] *Id.*, paras. 111, 122.

[236] *Id.*, paras. 112-113.

[237] *Id.*, paras. 123-125.

[238] *See Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections (20 March 2009), para. 6, **CL-165**.

[239] *Id.*, para. 1.

(continued)

S.A. **("Rovime")**.[240] Subsequently, on 21 May 2010, Rovime was liquidated.[241] Its BIT claim was assigned to its majority shareholder, ALOS 34 S.L. **("ALOS 34")**.[242] As the award records: "ALOS 34 now seeks to replace Rovime in this arbitration, and the Respondent objects."[243]

158. The tribunal rejected Russia's objection.[244] It began by observing that "in essence" this was a situation where the original claimant had merged into its owner.[245] It went on to reject Russia's argument that the assignment was invalid under Spanish law (Spain being the place where Rovime was incorporated).[246] The tribunal then summarised its conclusions as follows:

> "In sum, the Tribunal considers that (a) it was a universal succession, (b) if this was not so, ALOS 34 under these circumstances could nonetheless, given its legal title to the credito litigioso [i.e. the arbitration claim[247]], assume Rovime's position irrespective of consent by the Respondent, (c) there are no special circumstances that cut the other way; to the contrary, (d) ALOS 34 qualifies under the BIT just as Rovime did."[248]

159. Having so held, the tribunal went on to award damages to ALOS 34.[249]

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[240] *Id*., para. 155(iii).

[241] *See Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC No. 24/2007, Award (20 July 2012), para. 35, **CL-165**.

[242] *Id*., para. 35.

[243] *Id*., para. 36. *See also* para. 39.

[244] *Id*., para. 40.

[245] *Ibid*.

[246] *Id*., paras. 39-40.

[247] *Id*., para. 35.

[248] *Id*., para. 40 (emphasis added). Notably, although this tribunal was operating under the SCC Rules, its analysis is not predicated on any specific provision thereunder, and is thus relevant to an analysis in the ICSID context also.

[249] *Id*., para. 227. Although the Svea Court of Appeal later annulled the award, it did not address this issue; rather, its decision was based on the point that the BIT in that case limited jurisdiction to disputes relating to the compensation due upon an expropriation (*see The Russian Federation v. Quasar de Valors SICAV S.A*., Svea Court of Appeal, Decision (18 January 2016), **CL-166**).

(continued)

160. In other words, *Quasar de Valores* is a case where, during the pendency of the arbitration, the original claimant assigned its title to a BIT claim to an affiliate, it attempted to swap in the new claimant, the respondent withheld its consent, but the tribunal permitted the assignee to join the case and ultimately awarded it damages.

161. Second, *Vivendi II v. Argentina*.[250] The relevant facts were as follows. The RFA was lodged in 1996, in the name of Compañía de Aguas del Aconquija, S.A. **("CAA")** and Compagnie Générale des Eaux **("CGE")**.[251] In 1998, CGE changed its name to Vivendi S.A. **("Vivendi")**.[252] In November 2000, the first tribunal rendered an award upholding jurisdiction, but dismissing the claim on the merits.[253]

162. In December 2000, Vivendi "merged with several other companies to form Vivendi Universal [S.A. **("Universal")**]".[254] The decision does not discuss the mechanics of that merger, but they can be gleaned from public records.[255] They establish that the merger agreement was entered into by Vivendi S.A. **("Filer")**, Canal Plus S.A., Sofiée S.A. **("Sofiée")**, Vivendi Universal Exchangeco Inc. and The Seagram Company Ltd.[256] Prior to the merger, Sofiée was a wholly-owned subsidiary of Vivendi S.A.[257] Pursuant to the merger, among other matters: "the Filer [*i.e.* Vivendi S.A.] will merge with and into Sofiée, with Sofiée being renamed Vivendi Universal S.A.".[258] Thus, Universal was a different legal entity to the original claimant Vivendi.

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[250] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005), **RL-42**.

[251] *Id*., para. 1.

[252] *Id*., para. 82.

[253] *Id*., paras. 1, 3.

[254] *Id*., para. 82.

[255] *See In the Matter of Vivendi S.A., Vivendi Universal Holdings Company, Vivendi Universal ExchangeCo Inc. and the Seagram Company Ltd*., Manitoba Securities Commission Decision (6 December 2000), **CL-167**.

[256] *Id*., para. 14.

[257] *Ibid*.

[258] *Id*., para. 15.

(continued)

163. In 2001, the claimants sought partial annulment of the first tribunal's merits findings.[259] It appears that the first notification of their corporate changes was made at the time of filing for annulment.[260] In 2002, the first award was partially annulled, resulting in re-submission of certain merits issues to a second tribunal.[261] The claimants named in the re-submission request were CAA and Universal.[262]

164. Argentina objected to jurisdiction in this regard, noting the "series of complicated corporate changes that occurred after the filing of the [RFA]".[263] The second tribunal rejected that objection. It began by holding that the determination of whether a party has standing "is made by reference to the date on which such proceedings are deemed to have been instituted", that the "critical date" for determining nationality is the date of consent to arbitration, and that "once established, jurisdiction cannot be defeated [and] is simply not affected by subsequent events".[264] It then observed that the first tribunal had found jurisdiction and that such finding had been endorsed by the first annulment committee.[265] The second tribunal then considered whether such findings were binding upon it, observing that the question of *res judicata* depended in part on whether the parties to the original decision were the same as those before it.[266] Hence, the critical question was whether Universal (the new claimant) was the successor of CGE (the original claimant).[267] It answered this in the affirmative. It considered that the effect of the merger was that Universal was Vivendi's universal successor, such that the parties before it were "the same" as those to the first proceeding.[268] Accordingly, the "identity of parties" test was satisfied, such that the first tribunal's findings on

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[259] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005), para. 2, **RL-42**. Indeed, the First Award was issued in the name of CAA and CGE, not Vivendi or Universal.

[260] *Ibid*.

[261] *Id*., paras. 3, 5.

[262] *Id*., para. 5.

[263] *Id*., para. 10(a).

[264] *Id*., paras. 60, 64.

[265] *Id*., paras. 66-70.

[266] *Id*., paras. 71-72.

[267] *Id*., para. 73.

[268] *Id*., paras. 82-86.

(continued)

jurisdiction were *res judicata* and thus binding on the second tribunal.[269] In this regard, the second tribunal further clarified that it did not consider the change of claimant to be a "new fact" so as to potentially disapply the doctrine of *res judicata*.[270] The second tribunal went on to issue an award on the merits, awarding separate sums of damages to CAA and Universal, and this award survived further annulment proceedings.

165. Accordingly, *Vivendi II* stands for the proposition that in circumstances where the original claimant is merged into a new entity mid-proceeding, the new entity can be substituted as claimant, even against the objection of the respondent. Further, in such circumstances, jurisdiction is to be assessed based on the position as it was upon commencement of the arbitration (*i.e.* by reference to the status of the original claimant alone). Thus, the tribunal recognised that, following the merger, the new entity stepped into the shoes of the original claimant for the purposes of the arbitration.

166. There is no good reason that the same conclusions should not also apply in situations where the original claimant undergoes a de-merger, whereby certain assets are spun out. Indeed, this was Professor Schreuer's view (as expert) in *Wintershall*.[271] The situation in the present case is, in essence, a de-merger. Neustar's businesses were broken up, with the majority being sold to TransUnion and the security businesses remaining with the Claimant's Ultimate Owners (through Vercara).

167. Accordingly, the substitution of Vercara for Neustar as claimant was valid, even absent the Respondent's consent.

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[269] *Id*., paras. 73, 78, 87.

[270] *Id*., paras. 79-81.

[271] *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 52, **RL-123** ("**Q.:** "Are you aware of any principle under international law that would impede [W.Holding], which is the company to which the assets of [Wintershall], the original Claimant, were spun off, … from being a sole Claimant, or a co-Claimant together with [Wintershall]? **A.:** "No. I am not aware of any such rules. There have been a few cases that do not cover exactly this situation, but that also cover succession incorporations, notably Vivendi II, and LESI Astaldi that indicate that this is possible, and that indicate in particular that the law of the incorporation of the company is the applicable law." (emphasis added)).

(continued)

3. The specific provisions of the ICSID Convention and TPA upon which the Respondent relies do not support it

168. The Respondent is also wrong to contend that the terms of the ICSID Convention and the TPA further support its position.[272] In this regard, the Respondent relies on the following provisions:

a. ICSID Convention Article 36(2)'s requirement that an RFA must contain information concerning the identity of the parties and their consent to arbitration;

b. TPA Article 10.16.2's requirement that the notice of intent must include the name and address of the claimant; and

c. TPA Article 10.18's requirement that the RFA must be accompanied by a claimant's written waiver in relation to domestic proceedings.

169. As to the first of these two arguments, the fundamental flaw with the Respondent's position is that these provisions are mere formality requirements, which do not go to the Tribunal's jurisdiction. As held in *UAB v. Latvia*:

> "Article 36(2) of the ICSID Convention (and Institution Rule 2) deal with the registration procedure, not with the jurisdiction of a tribunal constituted under the ICSID Convention. Jurisdiction is dealt with in Article 25 of the ICSID Convention. Insofar as the Respondent's 'preliminary objection' is based on Article 36(2) of the ICSID Convention and Institution Rule 2, such objection must therefore fail."[273]

[272] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), paras. 30-32; Tr. Day 1 (27 March 2023), pp. 142-144 [Final transcript].

[273] *See UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal (22 December 2017), para. 506, **CL-124** (emphasis added).

(continued)

170. Other tribunals have made substantially the same findings.[274] Given that compliance with Article 36(2) is a matter of "registration procedure", not jurisdiction, it follows that such rule cannot prevent substitution of a claimant. In any event, Article 36(2) was complied with at the relevant time (*i.e*. when the RFA was filed), and it does not prevent the subsequent substitution of the claimant with a new entity; indeed, like with joinder, [275] there is no express prohibition on substitution in either the ICSID Convention or the Arbitration Rules.

171. The cases discussed above deal with the ICSID Convention, but their reasoning applies with equal force to the Respondent's reliance on the TPA. The provisions it relies on deal with procedural formalities alone, not matters of jurisdiction. Indeed, at the Hearing, the Respondent itself characterised its complaint as "a procedural issue … governed by international law here, ICSID Convention and the TPA".[276]

172. Moreover, the Respondent's reliance on the TPA's waiver requirement fails for the reasons discussed in relation to *Sumrain* above: to recall, per the Bill of Sale and UPA, Vercara has "assume[d] all rights, obligations and liabilities of [Neustar]" with respect to these proceedings (*see* paragraph 22.b above). Thus, by reason of the assignment, Vercara *is* a party to the original arbitration agreement, and with it the connected waiver (*i.e*. an assumed "obligation"). Alternatively, to the extent that Neustar's waiver did not pass to Vercara (which is denied),[277] this can be remedied should the Tribunal so direct.[278]

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[274] *See e.g. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005), paras. 22-3, 45-9 & 98-104, **RL-42**.

[275] As to which, see the discussion of *Sumrain* at para. 146 above.

[276] *See* Tr. Day 3 (29 March 2023), p. 444, lines 18-20 [Final transcript] (emphasis added).

[277] For the avoidance of doubt, the Claimant maintains its position that the waiver executed by Neustar, Inc. contains no formal or material defects. *See*, *e.g*., Claimant's Reply on Jurisdiction and the Merits (29 July 2022), paras. 50-80.

[278] *See Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), paras. 186-190, **RL-113**. There, the claimant's alleged damages included those arising from its ownership interest in a Canadian company (Harmac), which was later merged with another of the claimant's indirect Canadian subsidiaries (Pope & Talbot, Ltd). The tribunal raised with the parties the issue of a then-absence of the required waiver under the NAFTA in respect of the claim concerning Harmac, which was then resolved to the tribunal's satisfaction by the filing of a new waiver by the post-merger entity. This case confirms that a defect in the waiver required by the NAFTA (similar to the TPA) can be cured during the course of the arbitration.

4. Alternatively, the Respondent *did* consent to Vercara becoming a party to these proceedings, and even now maintains such consent by way of its demand that Vercara be ordered to provide security and ultimately pay its costs

173. If, contrary to the above, the substitution of Vercara as claimant to these proceedings did require the Respondent's consent, sufficient consent was in fact given.

174. To recall, following the Claimant's notification of the Spin Out, the Respondent replied as follows on 12 August 2022:

> "While Respondent reserves all of its rights in relation to the corporate changes referred to in Claimant's letter of 29 July 2022, Respondent kindly requests that for administrative purposes and in order to avoid any confusion to members of the public who might seek information about the case, the proceeding be referred to as 'Security Services, LLC d/b/a Neustar Security Services (formerly Neustar, Inc.) v. Republic of Colombia'."

175. That was plainly a consent to the change of claimant. The general 'reservation of rights' does not change the fact that the Respondent expressly agreed that the title of the proceeding be changed. It was not an option for the Respondent to agree to change the case title but withhold consent to the change of claimant that underlay that. Likewise, the fact that the Respondent's message was couched as being for "administrative purposes only" matters not: the change of claimant *was* an administrative matter.

176. The Respondent now seeks to downplay its prior statement by claiming that, at that time, it was not aware that there was a new claimant entity, and that it had assumed that there was a mere name change. However, it has already been shown, at paragraphs 31-38 above, that such position is without merit. The correct position was apparent on the face of the Claimant's notification, especially when read alongside the exhibits thereto (in particular, just the cover page of the UPA listed Neustar and Neustar Security Services as separate parties).

177. In the circumstances, the Respondent's email of 12 August 2022 constituted its consent to the change of claimant, subject only to its reservation of position as to whether the new claimant was *entitled* to claim.

178. Further or alternatively, the Respondent has confirmed (or now provided) its consent by way of its subsequent conduct in these proceedings, as will be seen.

179. It is useful to begin by returning to the *Wintershall* decision. As discussed above, that tribunal ultimately agreed to join the assignee of the claim to the proceedings as an additional claimant. The basis on which it did so is interesting. The award records that the claimant had offered a compromise whereby both companies would remain as claimants, but Argentina had refused to consent to this.[279] Later, in its post-hearing brief, Argentina maintained this position, but requested "in the alternative" that the new entity merely be joined to the case, not substituted for the original claimant.[280] The tribunal considered such alternative submission as amounting to consent to joinder, and thus proceeded to direct that the assignee be joined to the claim.[281]

180. Similar circumstances arise in the present case. Here, the Respondent has sought an order for security against both Neustar and Vercara,[282] and has indicated that it intends to seek a final costs award against them both.[283] The Tribunal can only make such orders against a party to the case before it. Accordingly, the effect of the Respondent's position is to consent to the joinder of Vercara to the arbitration.[284] Of course, the Respondent cannot have it both ways: it cannot be heard to suggest that Vercara is only

[279] *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 54, **RL-123**.

[280] *Id*., para. 59(ii).

[281] *Id*., paras. 59-60.

[282] *See* the Respondent's Application, paras. 2 and 63.

[283] *See* Tr. Day 2 (28 March 2023), p. 303, lines 17-19 [Final transcript] ("We note that the award of costs should be granted not only against Security Services LLC, but also against Neustar Inc."); and p. 306, lines 7-17 [Final transcript] ("[I]f and when, which we are confident you should, find costs in favour of Colombia, that that cost should be found against both entities. … [T]his Tribunal has authority in the award to issue the award against both of these entities so we are not left chasing one or the other in terms of that.").

[284] Furthermore, the fact that the Respondent accepts that Vercara is a claimant is further confirmed by, for example, the following statement it made during the course of the Hearing: "Security Services LLC, which is the Claimant currently appearing in these proceedings, and which is different from Neustar Inc, the party that initiated the arbitration, have simply failed to prove any entitlement to bring the claims." (*See* Tr. Day 1 (27 March 2023), p. 140, lines 1-5 [Final transcript] (emphasis added.)) In other words, the Respondent's position is that Vercara is a claimant, but one that has failed to prove an entitlement to claim.

a party for the purposes of security and costs but not for the claims, and indeed it (rightly) makes no such assertion.

181. In sum, to the extent that the Respondent's consent was a necessary condition to Vercara being added to these proceedings, such consent was in fact provided, either through its initial response to the Spin Out notification or by way of its subsequent submissions as to security and costs.

C. Conclusion as to Jurisdiction re Vercara

182. For the reasons set out above, the Tribunal has jurisdiction over Vercara.

D. Jurisdiction in the Event that the Tribunal Declines Jurisdiction in Respect of Vercara

183. As for Neustar, the Claimant's position is that the Tribunal no longer has jurisdiction over Neustar. First, per the Bill of Sale and UPA, Vercara has "assume[d] all rights, obligations and liabilities of [Neustar] with respect to the applicable Transferred Assets", which include those in relation to the MINTIC Claim (*see* paragraph 22.b above). Accordingly, Neustar has no obligations or liabilities with respect to this claim. In particular, contrary to the Respondent's assertions, this means that the Tribunal cannot order it to pay the Respondent's costs; and, for the same reason, Neustar cannot be ordered to provide security in the meantime either. Further, as explained above, Vercara was properly substituted in place of Neustar in these proceedings.

184. For its part, the Respondent has relied on ICSID Convention Article 25's rule that "[w]hen the parties have given their consent [to submit to ICSID], no party may withdraw its consent unilaterally",[285] but this misses the point. The arbitration agreement containing Neustar's consent to arbitration has not been withdrawn, but rather it has been assigned to Vercara. This is not a case of unilaterally withdrawing consent to arbitration, or discontinuance by a claimant;[286] rather, there is a mere substitution of the original claimant with its assignee. In fact, as explained at

[285] *See* Tr. Day 3 (29 March 2023), p. 445, line 19 *et seq*. [Final transcript].

[286] *Cf* Respondent's Application for Security for Costs (19 April 2023), paras. 28-30.

paragraphs 173-181 above, as much as the Respondent may wish to deny it now, such substitution occurred with its consent.

E. Conclusion as to Jurisdiction re the Spin Out

185. For the reasons stated, the Respondent's objection to jurisdiction arising from the Spin Out should be dismissed.

V. REQUEST FOR RELIEF

186. For the reasons set out in Section III, the Claimant respectfully requests the Tribunal to:

a. Dismiss the Respondent's Application for Security for Costs; and

b. Order that the Respondent will bear all costs associated with this incident (including those of the Tribunal and the Claimant's legal fees) to be assessed at the conclusion of this arbitration.

187. For the reasons set out in Section IV, the Respondent's objection to jurisdiction arising from the Spin Out should be dismissed.

Dated: 10 May 2023
London, UK

Respectfully submitted,

[Signed]

Steptoe & Johnson UK LLP
Thomas Innes