INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Vercara LLC
(formerly Security Services LLC, formerly Neustar, Inc.)

v.

Republic of Colombia

(ICSID Case No. ARB/20/7)

Decision on Security for Costs

Members of the Tribunal

Professor Julian D M Lew, KC, President of the Tribunal
Professor Yves Derains, Arbitrator
Professor Dr. Kaj Hobér, Arbitrator

Secretary of the Tribunal
Veronica Lavista

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27 September 2023

1. This Decision records the Tribunal's determination of Respondent's Application for Security for Costs dated 19 April 2023. This Decision is issued without prejudice to the Tribunal's determination of Claimant's claims that Respondent allegedly breached the TPA,[1] including the obligations of fair and equitable treatment, national treatment standard and most favoured treatment minimum standard of treatment, and for damages in this Arbitration. Respondent's challenge to the Tribunal's jurisdiction will be dealt with in due course.

I. Procedural Background

2. On 19 April 2023, pursuant to the Tribunal's directions of 17 April 2023, Respondent filed its Request for Security for Costs (the Respondent's Application), with Legal Authorities RL-192 to RL-203.

3. On 10 May 2023, Claimant filed its Response to Respondent's Request for Security for Costs (the Claimant's Response), with Witness Statement of Megan Rodkin (CWS-1) dated 10 May 2023, Exhibits C-139 to C-158 and Legal Authorities CL-134 to CL-168.

4. On 15 May 2023, Respondent requested leave to make observations on Claimant's Response.

5. On 16 May 2023, Claimant objected to Respondent's request to file a reply and requested that, should the Tribunal grant Respondent's request, Claimant be permitted to file a rejoinder.

6. By letter of 19 May 2023, the Tribunal invited Respondent to submit its Reply to Claimant's Response by 26 May 2023 and Claimant to submit its final Rejoinder to Respondent's Reply by 2 June 2023.

7. On 26 May 2023, Respondent filed its Reply to Claimant's Response (the Respondent's Reply), with Legal Authorities RL-204 and RL-205.

[1] The Free Trade Agreement between the Republic of Columbia and the United States of America which entered into force on 15 May 2012 and under which this Arbitration has been brought.

8. On 2 June 2023, Claimant filed its Rejoinder to Respondent's Reply (the Claimant's Rejoinder), with Legal Authority CL-169.

9. Having deliberated, the Tribunal now issues this Decision determining Respondent's Application for security for costs (and a strike out request).

II. Relief Sought

10. Pending the Tribunal's decision as to whether it has jurisdiction over Security Services/Vercara and as a condition for the continuation of these arbitration proceedings, Respondent requests an Order from the Tribunal that *"Neustar and Security Services/Vercara … post security for costs in the amount of USD 3.5 million to cover a potential award of costs in favour of the Republic of Colombia*".[2] This security is "*to be deposited in an escrow account or provided as an unconditional and irrevocable bank guarantee*".[3]

11. In its Reply, Respondent maintains the relief sought in its Application, and requests that the Tribunal "*strike out the witness statement of Ms Megan Rodkin"* which it alleges was *"submitted by Claimant at this late stage of the proceedings*".[4]

12. Claimant 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*".[5]

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2 Respondent's Application § 63

3 *Idem*

4 Respondent's Reply, § 71, at § 5 of its Reply, Respondent also requested the strike out of the evidence filed by Claimant in its Reply together with Ms Rodkin's witness statement. This included the unredacted copy of the UPA and the email between counsel whereby Claimant had accepted to disclose this document to Respondent's counsel team, SEC filings of TransUnion before and after the sale of Neustar; extracts of webpages and press releases from a number of websites, the 2021 and 2022 consolidated financial statements of Aerial Blocker Corp and subsidiaries, as well as a 2023 bank statement and a 2022 account statement of Security Services. However, this was not included in Respondent's specific relief sought. Rather, Respondent stated that "*for the sake of the efficient administration of the proceedings, Respondent does not object to the inclusion on the record of the new exhibits, Claimant's procedural behaviour … should be taken into account by the Tribunal in reaching its decision on both security for costs and the allocation of costs*" Respondent's Reply § 13

5 Claimant's Response, § 186

13. In its Rejoinder, Claimant requests the Tribunal to*:*

> *a. Dismiss the Respondent's request to strike the witness statement of Ms. Rodkin from the record;*
>
> *b. Dismiss the Respondent's Application for Security for Costs; and*
>
> *c. 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.*[6]

14. This Decision discusses and determines only Respondent's Application for Security for Costs and its request to strike out the witness statement of Ms Rodkin. This Decision does not address or determine the Respondent's challenge to the jurisdiction over the Claimant in view of the changes in the name and assignment of rights under the TPA from Neustar Inc, to Security Services LLC and to Vercara LLC. The issues and effect of those changes will be discussed and determined in due course.

III. Parties' positions

A. RESPONDENT'S POSITION

15. Respondent contends that the Tribunal has authority to order security for costs as it requests. It contends that the essential criteria for such order have been shown, i.e., the circumstances of this case are exceptional, the order sought is necessary and proportionate, and the Application was brought on a timely basis. These issues are discussed in turn below.

(1) The Tribunal has the authority to order security for costs

16. Respondent states that the Tribunal has the "*wide discretion*" to order provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules.

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6 Claimant's Rejoinder, § 70

17. Respondent contends that these two provisions require a two-step analysis to determine whether provisional measures are required, i.e., (i) is there is a "*right to be preserved*" by the provisional measures requested, and (ii) do the "*circumstances [...] require*" that the requested provisional measures be ordered.[7]

18. Respondent submits that, pending the Tribunal's determination on jurisdiction, the Tribunal should exercise its authority and order Neustar and Security Services/Vercara to post security for costs because the circumstances of this case warrant such order.

19. Respondent contends that the first criterion is satisfied, i.e., Respondent is entitled to claim reimbursement of the costs it incurs in the course of these proceedings. Respondent rejects Claimant's contention that the costs of the arbitration must be "*prospective*" to be eligible for protection under Article 47. Rather, tribunals have "*unanimously*" held that the right to have an enforceable award of costs against a claimant is a right which can be protected under Article 47, irrespective of the stage at which the request is made.[8]

(2) Criteria required for an order for security for costs

20. Respondent states that ICSID tribunals have determined that the "*controlling criterion*" to assess whether security for costs should be granted is whether "*exceptional circumstances*" exist. This includes proving that the requested measure is necessary, urgent and proportional.[9] Respondent submits that the Tribunal should order security for costs because (i) the circumstances of this case are exceptional, (ii) the requested measures are necessary and proportional, and (iii) Respondent's Application is timely. Respondent argues that these requirements should not be given equal weight to the

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7 Respondent's Application, § 35, Respondent relies on the case law in support of this contention recorded in *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017, § 32 [**RL-194**] and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, § 59 [**RL-195**]

8 See e.g., *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, § 66 [**CL-141**]; *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 Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, § 53 [**RL-201**]

9 Respondent's Application, § 40 – for the case law relied on by Respondent in this regard see footnotes 43 and 44

requirement of "*exceptional circumstances*". Rather, the focus is on establishing the existence of "*exceptional circumstances*" warranting an order for security for costs, and then within that context discussing whether the other requirements are satisfied.[10]

21. Respondent's contention with respect to these criteria are summarized in turn.

i. Exceptional Circumstances

22. According to Respondent, in determining whether security for costs should be ordered, tribunals take into account the following factors to determine if "*exceptional circumstances exist*", i.e., whether (i) claimant had failed to pay former counsel, (ii) criminal investigations had been initiated against a company group associated with claimant, (iii) claimant had previously moved assets across different jurisdictions, and (iv) there had been unusual transactions involving claimant's assets,[11] with emphasis on this last circumstance.

23. In the present case, Respondent argues that Claimant's combined actions and omissions with regard to its ICSID claim warrant the Tribunal to order security for costs. This is for the following reasons:

(i) First, the original Claimant (Neustar Inc) transferred its claim to a new entity on 1 December 2021. Instead of notifying Respondent immediately, it did so more than 6 months later, thereby depriving Respondent of the opportunity to address the issue in its Counter-Memorial or to request Claimant to disclose information relating to this transfer during the document production stage.

(ii) Second, Claimant misrepresented this transfer as a "*simple change of name*" without providing any documentary evidence of the terms of transfer, the new intended claimant's business operations, or its ability to satisfy an adverse cost award.

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10 Respondent's Reply, §§ 16-21

11 Respondent's Application, § 43, citing *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on Respondent's Application for Security for Costs, 13 April 2020, §§ 32-60 [**RL-198**]

(iii) Third, Claimant refused to provide additional documentation on the alleged transfer and failed to provide any concrete explanations of the mechanism of the transfer at the Hearing (despite its promise that it would do so).[12]

(iv) Fourth, Respondent contends that Claimant's "*opaque behaviour*", which continued at the Hearing, justifies the order of security for costs. Claimant refused to provide additional information and clarification despite Respondent's requests to this end. Further, Claimant stated during its Closing Presentation at the Hearing that Neustar, the original claimant, "*has no rights and/or obligations in this proceeding*",[13] thereby casting doubts on Neustar's own willingness to comply with an adverse cost award.[14]

(v) Fifth, Claimant changed its name once again (after the Hearing); again, providing no details on who the new claimant is or the reasons behind such change or any corporate reorganization.

24. Respondent further argues that the financial documents provided by Claimant with its Response are in any event insufficient to disprove the necessity for security for costs. This is because Respondent has already established that "*exceptional circumstances*" exist in this case which warrant the order of security for costs.[15]

25. For the above reasons, Respondent submits that the lack of information and documentation on the record regarding Claimant's transfer of its ICSID claim and Claimant's reluctance to provide any further financial records "*casts strong doubts on its ability and willingness to comply with an adverse award of costs*".[16] Thus, Claimant's refusal to provide any concrete information beyond its initial limited disclosure confirms that there are exceptional circumstances warranting an order for security for costs.

12 Respondent's Application, §§ 46-47
13 Transcript, Day 3, page 428, lines 1-8
14 Respondent's Application, § 49
15 Respondent's Reply, §§ 28-31
16 Respondent's Application, § 51

ii. Necessary and Proportionate Measures

26. Respondent submits that ordering security for costs is both necessary and proportionate because of Claimant's "*unclear dealings*" with respect to its ICSID claim and unwillingness to disclose any financial information. Absent such order, there is a material risk for Respondent not recovering from Claimant any of the costs incurred in defending its case in this Arbitration.

27. Respondent also argues that the order is proportionate because it does not create any undue burden on Claimant as it is for USD 3.5 million posted in the form of a bank guarantee. A nearly identical amount and such manner of deposition were found "*proportionate*" in other cases in which security for costs was ordered.[17] Further, in this case an order would not "*thwart in any manner Claimant's intended participation to the proceeding*".[18]

iii. Timely Application

28. Finally, Respondent contends that its Application was submitted in a timely manner. Respondent argues that there is no requirement for a request for security for costs to be "*urgent*"; what matters is that there are "*exceptional circumstances*" requiring the granting of such order.

29. Second, and in any event, Respondent's Application was submitted "*timely*" and meets "*any applicable requirement of urgency*".[19] Claimant first informed Respondent of the first name change on 29 July 2022. Since then, Claimant has changed its name once more. Thus, Respondent's "*specific suspicion*" has "*progressively emerged in light of Claimant's increasingly doubtful behaviour towards the proceedings*",[20] refusal to provide concrete information, and providing unclear explanations at the Hearing. This

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17 Respondent's Application, § 55, citing *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 Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, § 65 [**RL-201**]

18 Respondent's Application, § 55

19 Respondent's Reply, §§ 33-34

20 Respondent's Application, § 61

rendered the present Application "*urgent and necessary due to the potential implications*"[21] of such behaviour and the risk of not paying a potential cost award.

30. Finally, Respondent denies that the requested USD 3.5 million is disproportionate in the circumstances of this case. This is because Respondent has demonstrated that (i) Claimant would be unable or unwilling to pay, (ii) Claimant's uncooperative procedural behaviour casts doubts over its willingness to comply with potential adverse awards on costs, and (iii) posting the security by bank guarantee would not create any burden on Claimant (and Claimant has failed to prove the opposite).[22]

(3) The Tribunal has Jurisdiction over Claimant

31. Respondent's "primary" position is that any award on costs should be rendered first against Neustar. "*However, pending the Tribunal's decision on whether it has jurisdiction over Security Services, both Neustar and Security Services/Vercara should be ordered to post security for costs to ensure that Colombia will be able to recover any favourable award of costs against any of these would-be claimants*".[23]

32. Respondent contends that the Tribunal retains jurisdiction over Neustar, Inc. for the purposes of cost allocation. This is for two reasons. First, from a legal standpoint, Security Services LLC and/or Vercara LLC cannot be the legal successor of Neustar, Inc. because Neustar had not stopped existing, and its rights and obligations had not been transferred to another company. Security Services LLC existed since April 2017, "*long in advance of the purported spin out*"; Neustar, Inc. had similarly continued to exist (although under a different ownership) after the completion of the transaction.

33. Second, from a factual perspective, the documents disclosed by Claimant show that the issue at stake is not "*a simple change of name of the claimant but an intended change of claimant*".[24] To this end, Respondent contends that the Tribunal lacks jurisdiction *ratione voluntatis* over this intended new claimant (Security Services/Vercara) as consent to

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21 *Idem*
22 Respondent's Reply, § 35
23 Respondent's Application, §21
24 Respondent's Application, § 24

arbitrate under the TPA and the ICSID Convention is necessarily limited to a specific party.

34. Further, Neustar, Inc. has not "*formally discontinued*" its participation in this Arbitration and cannot do so unilaterally to avoid liability for a potential adverse costs award. This is prohibited under Article 25 of the ICSID Convention.[25] Respondent argues that previous tribunals have held that a claimant could only discontinue participating in proceedings if the respondent had no objections to such discontinuance pursuant to the procedure under Rule 44 of the ICSID Arbitration Rules. Even when such discontinuance is accepted, ICSID tribunals have held that the withdrawing claimant would remain liable for costs.[26]

35. Finally, Respondent denies that its Application for security for costs constitutes consent to having Security Services/Vercara appear as Claimant. Respondent's Application was made "*pending*" the Tribunal's determination who is "*the legitimate claimant*".

36. It is also denied that the Tribunal cannot order security for costs against Neustar, Inc. because it no longer has jurisdiction over this entity.

37. Respondent contends that Claimant has failed to establish that the transfer/assignment of rights was valid and/or effective under Delaware law. The Bill of Sale and the UPA that Claimant relies on are "*extremely general*" with respect to the precise terms of the assignment. Respondent states that this is insufficient to confirm whether Neustar, Inc. effectively transferred the ICSID claim, and if so to which entity.[27] Further, Delaware law imposes several limitations on the types of claims that can be assigned and (where the

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25 It provides that "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally." In line with this principle, ICSID Arbitration Rule 44 regarding the "discontinuance at request of a party" provides that "if a party requests the discontinuance of the proceeding, the Tribunal […] shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. [...] If objection is made, the proceeding shall continue."

26 Respondent's Application, §§ 26-28; See *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, § 346 [**RL-121**]; *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §§. 628- 639 [**RL-057**]; *Theodoros Adamakopoulo and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, §§ 327-328 [**RL-193**]

27 Respondent's Reply, §§ 42-44; Respondent refers to section 5.10 of the UPA for the last argument [**C-140**]

claim is assignable) conditions for the assignment to be valid.[28] Respondent submits that in the present case, there is no proof that Security Services/Vercara had any interest in the ICSID claim prior to the assignment.

38. In any event, irrespective of whether the assignment is effective and/or valid under Delaware law, Respondent contends that Claimant failed to explain how this assignment in a private agreement between private parties could validly serve as basis for the substitution of the claimant party in ICSID proceedings governed by international law, absent Respondent's consent. Respondent argues that a claimant cannot be replaced midway through proceedings without the respondent's consent (which in this case has not been given). Further, international law imposes certain limits on assigning BIT claims. Thus, Respondent contends Claimant has failed to prove that its assignment of rights was valid under international law.

39. Further, Claimant's assertion that the "*[t]he arbitration agreement containing Neustar's consent to arbitration [...] has been assigned to Vercara*" would amount to a unilateral modification of the agreement without the consent of all the Parties to that agreement. This would be a breach of the numerous conditions on the Respondent State's consent enumerated by Section B of Chapter 10 of the TPA.[29]

(4) Request to strike out evidence submitted by Claimant

40. In its Reply, Respondent contends that Claimant improperly introduced new and late evidence in the proceedings with its Response of 10 May 2023 which should be struck out. This specifically includes: the witness statement of Ms Rodkin, the unredacted copy of the UPA and the email between counsel whereby Claimant had accepted to disclose this document to Respondent's counsel team, SEC filings of TransUnion before and after the sale of Neustar; extracts of webpages and press releases from a number of websites, the 2021 and 2022 consolidated financial statements of Aerial Blocker Corp and

[28] Respondent's Reply, §47, citing *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194 (2020), [**C-158**]

[29] Respondent's Reply, § 61

subsidiaries, as well as a 2023 bank statement and a 2022 account statement of Security Services ("Additional Evidence").[30]

41. Respondent contends this evidence was submitted at a late stage of the proceedings, and without prior leave from the Tribunal or establishing that there were "*special circumstances*" warranting a late submission, as required under Sections 16.3 and 17.2 of Procedural Order No 1. Further, Respondent contends that these documents were not responsive to Respondent's security for costs Application, nor were they referenced by Claimant at any stage of this Arbitration. [31] Thus, Claimant deprived Respondent of the opportunity to comment on the introduction of this large amount of new evidence both at the Hearing and otherwise. Accordingly, Respondent states Claimant's procedural behaviour "*is improper and should not be condoned*".[32]

42. Finally, Claimant has failed to establish "*special circumstances*" allowing the presentation of new evidence and witness statements outside of the agreed procedural timetable. Respondent contends that this is because there are no such circumstances.[33]

43. Nevertheless, Respondent stated that for the purposes of having "*efficient administration of the proceedings, Respondent does not object to the inclusion on the record of the new exhibits*".[34] However, it requests the Tribunal take into account Claimant's procedural behavior when reaching its decision on the security for costs application and the allocation of costs. Thus, Respondent only requests that the witness statement of Ms Rodkin be struck out from the record "*as a matter of principle*", or "*at the very least*" is not given "*any evidentiary weight*".[35]

30 Respondent's Reply, § 5
31 Respondent's Reply, §§ 7-8
32 Respondent's Reply, §§ 5-7
33 Respondent's Reply, § 12
34 Respondent's Reply, § 13
35 *Idem*

B. CLAIMANT'S POSITION

(1) The Tribunal should not order security for costs

44. Claimant confirms that the Tribunal can order security for costs (as a form of provisional measure) if so warranted, pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.[36] However, Claimant argues that when considering security for costs applications, ICSID tribunals have generally accepted that the respondent bears the burden of demonstrating that:[37]

> *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.*

45. These four principles are acknowledged by Respondent. However, Claimant disagrees with Respondent's interpretation of requirements (a) to (d). Claimant argues that these criteria provide "*the foundation for a finding of exceptional circumstances*" not the opposite. For this reason, Respondent has failed to discharge its burden of proving the need for a security for costs order.

i. No "right to be preserved"

46. Claimant contends that the provisional measures that a tribunal can order under Article 47 are intended to protect the parties' actual rights, not their expectations. Respondent's position is essentially based on two hypothetical scenarios: that it will prevail on jurisdiction and/or merits of this dispute, and that it will be awarded costs. However, this

[36] Claimant's Response, §§ 66-68
[37] Claimant's Response, § 70 referring to several cases in fn 66 and 68

presumption fails because there is no presumption of an award of costs in ICSID proceedings.[38]

47. Further, the existence of such "*contingent rights*" must be established *prima facie*, including whether at the time of filing a request for security for costs the requesting party is actually incurring costs that can be awarded to it.[39] Respondent filed this Application after it had already incurred the vast majority of its costs for this phase of the Arbitration; the security costs orders are typically made at the beginning for any "*prospective costs*". Respondent's arbitration costs are no longer prospective. (Claimant also comments that Respondent has contributed significantly to the costs of these proceedings by choosing to "*over-litigate its alleged jurisdictional objections*"[40]).

48. In any event, Claimant argues that even if Respondent does have a "*right to be preserved*"[41] (which is denied), it has failed to establish any of the other requirements.

ii. No "exceptional circumstances"

49. Claimant submits that Respondent's Application fails to meet the standard of necessity. This is because Claimant has the ability to pay a potential award on costs, if so required; but even if this was not the case (which is denied), this alone is not a sufficient ground to infer that Claimant would be unwilling to comply with an order of the Tribunal on costs.

50. Claimant contends that Respondent has provided no evidence to substantiate its allegations. Tribunals have "*consistently required insufficient assets as a condition for*

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38 Claimant's Response, §74. Article 61(2) of the ICSID Convention provides the Tribunal with the discretion to allocate costs between the Parties. *See*, 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**]

39 Claimant's Response, §75, citing *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, §§ 29, 35-39 [**CL-149**]

40 Claimant's Response, § 77

41 Claimant's Response, § 80

security for costs"[42] and have rejected security for costs applications based on arguments and speculations alone.[43]

51. Claimant states that it has the ability to pay a potential adverse award on costs and provides the following evidence showing its financial situation as of 31 December 2022:[44]

> *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.*

52. Further, Respondent has provided no evidence that Claimant would be unwilling to comply with any potential adverse cost award. In fact, Claimant has already agreed to comply with the award by consenting to ICSID arbitration.[45]

53. Claimant also contends that factors such as refusal to disclose financial information, or claimant's inability to fund part of the case, or being a shell company, do not suffice to

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42 Claimant's Response, § 82, citing 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 391 [**CL-134**]

43 Claimant's Response, § 85. 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 [**CL-144**]; *Burimi SRL and Eagle Games SH.A v. Republic of Albania,* ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012 [**CL-137**]

44 Claimant's Response, § 86 relying on 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, [**C-150**] [CONFIDENTIAL]. [redacted]

45 Claimant's Rejoinder, § 33. Article 53 of the ICSID Convention expressly requires that the parties to an arbitration shall "*abide by and comply with*" the terms of the award

establish "*exceptional circumstances*".[46] Rather, the determinative factors are whether there has been a consistent disregard of orders to pay costs, a lack of assets, and reliance on third-party funding, and where the third-party funder is not covering an adverse costs award.[47] None of these circumstances exist here and Respondent has not alleged otherwise. Respondent's reliance on Claimant's corporate history and change of name is not sufficient to establish "*exceptional circumstances*" and warrant an order for security for costs.[48]

54. For the above reasons, Respondent has failed to show that its Application satisfies the requirement of necessity. Claimant has the ability and is willing to pay any potential adverse award on costs, should such be issued.[49] On this basis alone, the Tribunal can and should reject the Respondent's Application.

iii. The request is not "urgent"

55. Claimant submits that Respondent's Application fails to meet the requirements of being "*urgent*" and made "*timely*".[50]

56. Respondent was first notified of Claimant's change of name (the Spin Out) on 29 July 2022 (almost nine months before Respondent's Application). However, even if the Tribunal considers that 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 nearly six months before Respondent submitted its Application. Either way, Respondent's Application cannot be considered "*timely*".[51] Further, Respondent provided no evidence to substantiate these "*doubts*" or "*suspicions*". If Respondent truly believed it was necessary to file its Application, it could have done so earlier.

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46 Claimant's Response, § 89
47 Claimant's Response, § 90
48 Claimant's Response, § 92
49 Claimant's Rejoinder, § 23
50 Claimant's Rejoinder §§ 35-38. See *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, § 63 [**CL-144**]
51 Claimant's Response, §§ 98–100

57. In the alternative, if the Tribunal were to order security for costs, it should take into account Respondent's delay in filing its Application and order "*significantly less than USD 3.5 million*" because this caused both Parties to incur additional costs.[52] The Tribunal should also reduce the amount sought by Respondent because it is "*over-inflated*", unsupported and Respondent has failed to mitigate any costs incurred.

iv. The request is not "proportionate"

58. Determining whether an order for security for costs is "*proportionate*" in the circumstances of a case requires balancing "*the probability of the harm of non-recovery of the costs incurred in the arbitration against the harm of not being able to pursue the claims if the security is not provided*".[53] Claimant contends that ordering security for costs would be disproportionate in the circumstances of this Arbitration.

59. Claimant contends that Respondent is not facing any potential harm of non-recovery of its costs as established above. In contrast, an order to provide security for costs of USD 3.5 million would impose a disproportionate burden on Claimant, whatever the form of the guarantee.

60. For the above reasons, Claimant states Respondent's Application is unjustified. Respondent has had evidence since at least October 2022 showing Claimant's ownership structure and the details of the Spin Out transaction.

(2) The Tribunal has no jurisdiction over Neustar

61. Claimant argues that Respondent's request for Neustar to pay security for costs should be rejected for two main reasons.

62. First, the Tribunal no longer has jurisdiction over Neustar. Vercara has assumed all rights, obligations and liabilities of Neustar with respect to the "*applicable Transferred Assets*" which includes the MINTIC Claim and the arbitration agreement which contains

[52] Claimant's Response, § 106

[53] Claimant's Response, § 108 relying on 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**]; Claimant's Rejoinder, § 39

Neustar's consent to arbitration. Given that such consent to arbitration has been assigned to Vercara, this is "*a mere substitution of the original claimant with its assignee*", which Claimant contends occurred with Respondent's consent.[54]

63. In this regard, Claimant rejects Respondent's arguments regarding the validity and effectiveness of the assignment of claims under Delaware law and international law. To the contrary, the assignment of its claims is permitted and valid under both Delaware law and international law.

64. Claimant contends that a conveyance of a lawsuit is permitted under Delaware law "*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.*"[55] Claimant submits the legal test is met here as recorded in the Bill of Sale and the UPA.[56] Accordingly, under Delaware law Neustar Security Services (now Vercara) is "*the bona fide owner of and claimant*" of the claims in the Arbitration.

65. Claimant contends that in international law (a) there is no general prohibition on the assignment of claims, (b) a claimant can be replaced midway through proceedings, even without Respondent's consent, and (c) the specific provisions of the ICSID Convention and TPA upon which Respondent relies do not support Respondent's assertions.

66. Contrary to Respondent's submission, Claimant contends there is no general prohibition on the assignment of claims under international law. Rather, there are certain limits on the assignability of BIT claims, which are otherwise capable of assignment.

67. Further, a claimant can be replaced midway through proceedings absent a respondent's consent. This has been confirmed in various investment cases.[57] Accordingly, the

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54 Claimant's Response, §§ 183-184
55 Claimant's Rejoinder, §§ 48, 52
56 Claimant's Rejoinder, § 52
57 Claimant's Response §§ 161-165; See e.g., *Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections (20 March 2009) [**CL-165**]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005 [**RL-42**]

substitution of Vercara for Neustar as Claimant was valid, even absent Respondent's consent.

68. Finally, Claimant argues that Article 36(2) of the ICSID Convention, Article 10.16.2 and 10.18 of the TPA (referred to by Respondent) are "*mere formality requirements*" which do not relate to the Tribunal's jurisdiction. In fact, Article 36(2) concerns a matter of "*registration procedure*" not jurisdiction; it cannot prevent substitution of a claimant.

69. 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. In fact, there is no express prohibition on substitution in either the ICSID Convention or the Arbitration Rules, or in the TPA. Further, Respondent's reliance on the TPA's waiver requirement fails because: (i) Vercara assumed "*all rights, obligations and liabilities*" of Neustar with respect to these proceedings (including the right to waive), and (ii) in the alternative, to the extent that Neustar's waiver did not pass to Vercara (which is denied), this can be remedied should the Tribunal so direct.

70. Second, even if the Tribunal had jurisdiction, Respondent has failed to establish "*exceptional circumstances*" justifying an order for security for costs. Respondent had not made any arguments specific to Neustar's circumstances to suggest that Neustar is "*either unable or unwilling to pay any costs award*". Rather, all of its allegations relate to Vercara.

71. Finally, and in the alternative, if the Tribunal finds that the substitution of Vercara as claimant in these proceedings did require Respondent's consent, "*sufficient consent*" was in fact given. In this regard, Claimant refers to Respondent's reply to Claimant's notification of Spin Out of 12 August 2022 in which Respondent expressly agreed the title of the proceeding be changed. Claimant contends that this is valid irrespective of the fact that Respondent "*reserved its rights*" and stated that this was "*for administrative purposes*"; the change of claimant was an administrative matter. For this reason, Respondent's email of 12 August 2022 constituted Respondent's consent to the change of claimant, subject only to its reservation of position as to whether the new claimant was entitled to claim.

72. Further, Respondent sought an order for security for costs against both Neustar and Vercara. According to Claimant, the "*effect*" of this is Respondent's consent to the joinder of Vercara to this Arbitration. This holds true irrespective of the fact that Respondent made this request "*pending*" the Tribunal's determination on jurisdiction. This is because the Tribunal can only make such an order against a claimant. Thus, by seeking security against Vercara, the Respondent implicitly accepts that Vercara has at least become a claimant.[58]

73. Accordingly, Claimant submits that "*to the extent*" Respondent's consent is a necessary condition to Vercara being added to these proceedings, such consent was given.

(3) The Tribunal should reject Respondent's strike out request

74. Claimant states its Response was a direct answer to the arguments in Respondent's security for costs Application. The evidence filed is also responsive to Respondent's allegations, concerns and questions regarding the identity of the "*intended claimant*" in this Arbitration[59] and Claimant's financial position.[60] Equally, Ms Rodkin's witness statement explains Claimant's corporate organization and structure at the time of the RFA, and immediately before and after the Spin Out.

75. As Claimant's Response was a direct answer to Respondent's allegation, there was no need for Claimant to seek leave from the Tribunal to file this evidence. Articles 16 and 17 of Procedural Order No 1 concern documents/evidence filed with the main submissions. In any event, as the Tribunal granted Claimant leave to reply to Respondent's Application "*in the form of a submission*"; Claimant did not need to request further leave to include evidence and legal authorities in support of that written submission.[61]

76. Further, in its Reply, Respondent does not dispute the description of the relevant corporate structures as described by Ms. Rodkin. It also does not argue that verification of the

[58] Claimant's Response, § 180. Claimant refers to Transcript, Day 2, p. 303, lines 17-19 and p. 306, lines 7-17
[59] Claimant's Rejoinder, §§ 11-13
[60] Claimant's Rejoinder, §§ 7-8
[61] Claimant's Rejoinder, §§ 5-6

evidence could only be achieved by way of cross-examination. Rather, Respondent complains about a general inability to cross-examine. Claimant contends that a party can only cross-examine a witness on matters in dispute, by not disputing the matters on which Ms Rodkin has testified, Respondent would have no entitlement to cross-examine regardless of when her statement was filed.[62]

77. Finally, Claimant contends that it would be a "*serious departure from a fundamental rule of procedure*" if Claimant is prevented from putting this evidence into the record to answer allegations made in Respondent's Application.

IV. Analysis of the Tribunal

78. The Tribunal considers and determines below two issues: (A) Respondent's security for costs application, and (B) Respondent's application to strike out the witness evidence of Ms Rodkin.

A. SECURITY FOR COSTS APPLICATION

79. There is no dispute between the Parties that the Tribunal has the authority to order security for costs if it considers it appropriate. This follows from the relevant provisions in the ICSID Convention and ICSID Rules.

> Article 47 ICSID provides:
> *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.*

> Rule 39 provides, in pertinent part, that:
> *(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

[62] Claimant's Rejoinder, § 14

80. The Parties disagree on the criteria to be applied generally and as applicable in light of the circumstances in this case.

81. In the Tribunal's view, Article 47 and Rule 39 allow provisional measures to be ordered where (i) there is a right to be preserved, and (ii) the circumstances so require. Neither provision elaborates further on what this right should be or what circumstances would warrant such measure to be ordered. Thus, this analysis is to be performed on a case-by-case basis taking account of the particular circumstances of each matter, and the arguments raised by the parties.

82. With respect to the first criterion, the Tribunal agrees with Respondent that a party's right to claim reimbursement of the costs it has incurred in the course of arbitration proceedings and to have an enforceable award on costs is a right that should be preserved. However, this right becomes enforceable once a cost determination and/or award is made by the Tribunal. Prior to that, this is a "*contingent right*" which belongs equally to both Parties.

83. In the present case, Respondent has failed to prove that its right to claim the costs it has incurred in this Arbitration would be lost and/or jeopardized in some manner, absent the Tribunal granting its Application for security for costs. In fact, Respondent made this Application at the end of the procedural timetable, after the filing of all submissions and evidence, and after the hearing on the merits, when it had already incurred the majority of its costs.

84. With respect to the second criterion, the Parties are largely agreed a security for costs application should be granted where it is established that (a) there are "*exceptional circumstances*" warranting such order, (b) it is necessary and proportionate to make such order, and (c) the application is "timely" and "urgent".[63] However, the Parties disagree as to whether equal weight should be given to each criterion or whether there is an overarching exceptional circumstances requirement as argued by Respondent. As the

[63] The Parties disagree over this last criterion: Respondent argues that the Application must be "timely", not urgent; Claimant argues that it must be both "timely" and "urgent".

party which made this Application Respondent bears the burden of proving each of these elements which are analyzed individually below.

(1) Exceptional circumstances

85. The Tribunal accepts that security for costs orders may be granted where "*exceptional circumstances*" exist warranting such order. As submitted by the Parties, different tribunals have looked at different factors when determining what constitutes "*exceptional circumstances*". These factors largely include claimant's ability to pay any potential adverse awards/orders on costs, claimant's unwillingness to comply with cost orders or otherwise, claimant's inability and/or failure to pay counsel, or to fund its claim, resort to third-party funding where such funding arrangement does not cover potential adverse cost awards, where there are unusual transactions moving assets across different jurisdictions in order to avoid liability among others. All of these are relevant factors.

86. However, in this case, the Tribunal is not persuaded by Respondent's arguments that Claimant's actions and omissions with respect to its claim in this Arbitration warrant the Tribunal to order security for costs. This is for the following reasons.

87. First, Claimant has provided sufficient evidence showing that it has the financial means to pay any potential adverse costs awards against it.[64]

88. Second, Respondent has failed to prove that Claimant is or would be unwilling to comply with any adverse costs award. Claimant has complied with all orders and directions issued by the Tribunal in this Arbitration until now, even if no order or award on costs has been made so far. There is no evidence to suggest that Claimant will fail or refuse to comply with adverse award on costs, should the Tribunal issue one.

[64] 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), **[C-150]** [CONFIDENTIAL]. [redacted]

89. Third, Claimant's change of name and corporate structure, including the assignment of the claim (with respect to which the Tribunal makes no determination at this stage), may constitute "*exceptional circumstances*". However, this per se is insufficient to warrant a security for cost order. This is because there is nothing exceptional or unusual in the Spin Out which could raise potential concerns regarding Claimant's payment ability. Further, Claimant did provide evidence of the name change and of the restructuring, even if it could have been provided sooner. However, even if Claimant had refused to provide such information or clarification, this alone would not have warranted a security for costs order because there is nothing in Claimant's conduct or attitude which may be interpreted as an intention to hide a dire financial situation. In any event, the relevant information relating to Claimant's financial status was provided with its Response of 10 May 2023.

90. Further, the Tribunal notes that there is an inherent risk in every Arbitration that an unsuccessful claimant may refuse or be unable to pay adverse costs award, if ordered to do so. However, unless there is clear evidence that this would be the case, a security for costs order would not be justified.

91. Accordingly, the Tribunal is not persuaded that there are "*exceptional circumstances*" in this Arbitration requiring the Tribunal to order security for costs.

(2) Necessary and Proportionate

92. The Tribunal is not persuaded by Respondent's argument that ordering security for costs in this Arbitration is necessary because of "*Claimant's unclear dealings*" with respect to its claim in this Arbitration or alleged unwillingness to disclose any financial information.

93. Respondent has not discharged its burden of proving that there were any "*unclear dealings*" with respect to Claimant's change of name or internal corporate restructuring, or that such have affected in any way Claimant's claim in this Arbitration. There is also no evidence of Claimant's "unwillingness" to disclose financial information. To the contrary, Claimant provided evidence relating to the said transfer of assets and ownership of Neustar Security Services, as well as of its financial standing as of 31 December 2022. Even if such evidence and documentation could have been submitted earlier, or Claimant

could have been more transparent regarding the Spin Out, this in itself does not make it *necessary* for security for costs to be ordered.

94. Further, the Tribunal is not persuaded that Respondent's request for USD 3.5 million security for costs is reasonable in the circumstances of this case. Also, just because the security for costs could be posted as a bank guarantee does not mean that it does not impose unnecessary burden on Claimant to post such guarantee. This is even more true in circumstances where such order is not warranted in the first place.

(3) "Timely" and "Urgent" Application

95. The Tribunal notes the Parties' disagreement over whether a security for costs application must meet the requirements of "timeliness" and "urgency", or of "timeliness". The Tribunal does not express opinion on this question because, in any event, Respondent's Application fails to meet either requirement. This is for the following reasons.

96. First, by letter dated 29 July 2022, Claimant informed Respondent of the very first change of its name, i.e., to Neustar Security Services. This was acknowledged by Respondent in an email dated 12 August 2022 to ICSID in which Respondent agreed to the change of the case name "*for administrative purposes and in order to avoid any confusion*". Respondent also reserved "*all of its rights in relation to the corporate changes*" referred to in Claimant's letter of 29 July 2022. Since then, apart from requesting further information and objecting to the intended change of claimant, Respondent made no further requests or applications in this regard.[65]

97. Further, Respondent expressed no concerns regarding Claimant's ability or willingness to pay any potential adverse cost award, at any point since 29 July 2022. If Respondent had any doubts regarding Claimant's ability or willingness to pay or considered this to be an urgent matter, it could have filed an application for security for costs after any of the name changes introduced by Claimant, or during the Hearing. Instead, Respondent waited for almost all procedural steps of the timetable to be completed (except for the post-hearing briefs and the award) to file this Application. In the Tribunal's view, this

[65] See Respondent's Application of 5 September 2022 and Respondent's Rejoinder of 4 November 2022

Application is neither timely nor urgent. It was only on the second day of the Hearing that counsel for Respondent indicated that Respondent intended to file an application for security for costs.[66]

98. In any event, even if Respondent's Application was "timely" and "urgent" this alone does not suffice for the Tribunal to order security for costs given that Respondent has failed to establish the requirements of exceptional circumstances, necessity and proportionality.

99. For the above reasons, the Tribunal rejects Respondent's Application for Security for Costs.

B. APPLICATION TO STRIKE OUT EVIDENCE

100. The Tribunal is not persuaded to strike from the record the witness statement of Ms Megan Rodkin.[67] This is for the following reasons.

101. First, the evidence in this witness statement relates exclusively to the corporate structure of Claimant. This is an issue which has been subject to disagreement between the Parties since 29 July 2022 when Claimant introduced the first change of name, as well as one of the grounds of Respondent's jurisdictional challenges. No other matter is discussed, nor are new arguments or evidence presented. Thus, the information provided is relevant and material to the outcome of this Application, as well as the issues in dispute in this Arbitration.

102. Second, Claimant produced this witness statement with its Response to the arguments and questions raised in Respondent's Application. This Response was filed in accordance with the Tribunal's directions of 31 March 2023, granting leave to Claimant to respond to Respondent's Application. This leave also includes Claimant's right to file legal authorities and evidence in support of its submission which are exclusively relevant to the matters raised in Respondent's Application. Thus, there was no breach of Sections 16.3 and 17.2 of Procedural Order No 1. In any event, most of the exhibits filed by Claimant

[66] Transcript, Day 2, p 303, lines 12-21; p 304, line 22-23; pp 403-404, lines 25- 1
[67] Respondent's Reply, § 5

were already part of the record,[68] and others were specifically requested by the Respondent, most recently during the Hearing. Claimant also stated during the Hearing that it was ready to provide evidence of its financial information as requested by the Respondent.

103. Further, Respondent had the opportunity to comment on Claimant's evidence and file evidence in rebuttal with its Reply. Rather it chose to seek a strike out. The Tribunal does not consider that allowing Ms Rodkin's witness statements to the record creates a procedural imbalance or unfairness between the Parties. To the contrary, each party was presented with the opportunity to present its case and file supporting evidence, and to comment on the evidence presented by the other party.

104. For the above reasons, Respondent's request to strike out Ms Rodkin's witness statement from the record is rejected. It will remain part of the evidence considered by the Tribunal in this Arbitration.

105. As Respondent has expressly stated that "*for the sake of the efficient administration of the proceedings, Respondent does not object to the inclusion on the record of the new exhibits,*[69] the Tribunal makes no order in respect of the Additional Evidence filed by Claimant with its Reply. That evidence remains part of the evidentiary record.

V. Decision

106. Accordingly, the Tribunal has decided and hereby rejects Respondent's Application for Security for Costs and the strike out Application in respect of the evidence of Ms Rodkin.

Date: 27 September 2023

Yves Derains | Julian D M Lew KC | Kaj Hober

[68] For instance, Exhibits C-146 and C-147 were filed with the Claimant's letter to the Tribunal dated 15 September 2022

[69] § 13 Respondent's Reply