

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**SUFFOLK (MAURITIUS) LIMITED, MANSFIELD (MAURITIUS) LIMITED AND SILVER
POINT MAURITIUS**

Claimants

and

PORTUGUESE REPUBLIC

Respondent

ICSID Case No. ARB/22/28

AWARD

Members of the Tribunal

Mr. Jeremy K. Sharpe, President
Prof. Dr. Stephan Schill, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

Date of dispatch to the Parties: June 12, 2026

REPRESENTATION OF THE PARTIES

*Representing Suffolk (Mauritius) Limited,
Mansfield (Mauritius) Limited, and Silver
Point Mauritius:*

Mr. Stephen Fietta KC
Ms. Laura Rees-Evans
Ms. Charlotte Westbrook
Ms. Eileen Crowley
Mr. Abdullah Tariq
Ms. Jane Byrne
Fietta LLP
1 Fitzroy Square
W1T 5HF London
United Kingdom

and

Mr. Ashique Rahman
Saadeh Rahman LLP
1 Bedford Row
WC1R 4BU London
United Kingdom

and

Mr. Joaquim Shearman de Macedo
Mr. Diogo Duarte de Campos
Mr. Tiago Duarte
PLMJ Advogados, SP, RL
Av. Fontes Pereira de Melo, 43
1050-119 Lisbon
Portugal

Representing the Portuguese Republic:

Mr. Miguel de Almada
Mr. Manuel Requicha Ferreira
Mr. Lourenço Vilhena de Freitas
Ms. Bárbara Vidal Sousa
Ms. Carolina Salazar Leite
Cuatrecasas
Avenida Fontes Pereira de Melo, 6
1050-121, Lisbon
Portugal

and

Ms. Diana Paraguacuto-Mahéo
Mr. Jago Chanter
Ms. Margaux Mery
Foley Hoag AARPI
16 avenue de Messine
75008 Paris
France

and

Mr. Peter Tzeng
Foley Hoag LLP
1717 K Street, N.W.
Washington, DC 20006
United States

and

Mr. Nicholas Renzler
Foley Hoag LLP
1301 Avenue of the Americas
New York, NY 10019
United States

and

Mr. Daniel Zaleznik
Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
United States

and

Ms. Rosa Ribeiro
Director of Legal Support and Litigation Services
Ms. Margarida Baptista
Jurist/Legal Aid at the Direction of Legal Support
and Litigation Services
Secretariat-General for the Ministry of Finance
Av. Infante D. Henrique, 1
1149-009 Lisbon
Portugal

and

Ms. Patrícia Galvão Teles
Director of the Department of Legal Affairs
Ministry of Foreign Affairs
Largo do Rílas
1399-030 Lisbon
Portugal

and

Mr. Joaquim Pedro Cardoso da Costa
Director of the State Legal Centre (CEJURE)
Presidency of the Council of Ministers
Avenida da República, 79, 1st floor
1069-218 Lisbon
Portugal

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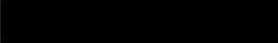
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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

2014 Banking Law	RGICSF, as amended by Decree-Law 114-A/2014, of August 1, 2014
2015 Banking Law	RGICSF, as amended by Law no. 23 A/2015, of March 26, 2015
2015 Assignment Agreements	[REDACTED]
2016 Assignment Agreements	[REDACTED]
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2022]
BES	Banco Espírito Santo, S.A.
BES Luxembourg	Banco Espírito Santo, Luxembourg Branch
Bifurcation Request	Respondent's Request for Bifurcation dated December 5, 2023
Bifurcation Response	Claimants' Response to Respondent's Request for Bifurcation dated January 23, 2024
BIT	Agreement between the Portuguese Republic and the Republic of Mauritius for the Mutual Promotion and Protection of Investments entered into force on January 3, 1999
BoP	Bank of Portugal
BRRD (Bank Recovery and Resolution Directive)	Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms

C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants' PHB	Claimants' Post Hearing Brief dated March 27, 2025
Counter-Memorial	Claimants' (Corrected) Counter-Memorial on Jurisdiction dated June 16, 2024
Deloitte Report	Deloitte, "Banco Espírito Santo, S.A., Estimation of the level of recovery of the credits of each class of creditors in a scenario of liquidation on 3 August 2014," dated July 4, 2016
Facility Agreement	
Hearing	Hearing on Jurisdiction held from January 20, 2025 to January 23, 2025
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Liquidation Committee	Liquidation committee appointed in the liquidation proceedings of BES
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated April 16, 2024
Memorial on Merits	Claimants' Memorial on Merits dated October 17, 2023
NCWO	No creditor worse off
Novo Banco	Novo Banco, S.A.
R-[#]	Respondent's Exhibit
Rejoinder	Claimants' Rejoinder on Jurisdiction dated November 12, 2024

	
Reply	Respondent's Reply on Jurisdiction dated October 1, 2024
Request for Arbitration	Claimants' Request for Arbitration dated October 13, 2022
Respondent's PHB	Respondent's Post Hearing Brief dated March 27, 2025
Retransfer Cases	The Portuguese domestic proceedings challenging the BoP's decisions that the Oak Loan had not been transferred to Novo Banco and would remain with BES
RGICSF	General Regime for Credit Institutions and Financial Companies (Decree-Law No. 298/92, 31 December 1992)
RL-[#]	Respondent's Legal Authority
Tr. Day [#] [page:line] [speaker]	Transcript of the Hearing on Jurisdiction held from January 20-23, 2025
Tribunal	Arbitral tribunal constituted on May 4, 2023
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Portuguese Republic and the Republic of Mauritius for the Mutual Promotion and Protection of Investments, which entered into force on January 3, 1999 (“**BIT**” or “**Treaty**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (“**ICSID Convention**”).
2. The claimants are Suffolk (Mauritius) Limited (“**Suffolk**”), Mansfield (Mauritius) Limited (“**Mansfield**”), and Silver Point Mauritius (“**Silver Point**”), companies incorporated under the laws of Mauritius (the “**Claimants**”).¹
3. The respondent is the Portuguese Republic (“**Portugal**” or the “**Respondent**”).
4. The Claimants and the Respondent collectively are referred to as the Parties (“**Parties**”).
5. The Parties’ representatives and their addresses are listed above on pages (i)-(ii).
6. This case concerns allegations that the Respondent, during the resolution of a major Portuguese bank, Banco Espírito Santo, S.A. (“**BES**”), deprived the Claimants of rights they claim as holders of a loan given to BES, wiping out the value of their investments. The Claimants allege breaches of the BIT with respect to expropriation, fair and equitable treatment, non-impairment, full protection and security, and most-favored-nation treatment (by virtue of which Portugal is said to be additionally obliged to provide “effective means of asserting claims and enforcing rights” with respect to the Claimants’ investments).

¹ Certificate of Incorporation of Suffolk (Mauritius) Limited, dated Dec. 28, 2007 (**C-0015**); Certificate of Incorporation of Mansfield (Mauritius) Limited, dated Jan. 11, 2008 (**C-0016**); Certificate of Incorporation of Silver Point Mauritius, dated Jan. 28, 2016 (**C-0017**).

7. The Respondent objects to the Tribunal's jurisdiction over the Claimants' claims.

II. PROCEDURAL HISTORY

8. On October 13, 2022, ICSID received a request for arbitration of that date from the Claimants against the Respondent ("**Request for Arbitration**").²
9. On November 11, 2022, the ICSID Secretary-General registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(c) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
10. By letter of the same date, ICSID requested that the Claimants make an advance payment of USD 150,000 by December 12, 2022, to defray the estimated costs of the proceeding through the first session of the Tribunal. ICSID further informed the Parties that pursuant to ICSID Administrative and Financial Regulation 15(1)(a), this advance payment shall be considered partial payment by the Claimants of the further advance payment to be requested upon constitution of the Tribunal.
11. By letter dated December 12, 2022, the Claimants proposed a method for constituting the Tribunal and invited the Respondent to respond by December 19, 2022.
12. By email of December 19, 2022, the Respondent agreed to the Claimants' proposal that the Tribunal shall be composed of three arbitrators, stating that the Parties would revert shortly on the method and deadline for appointing each arbitrator.
13. By letter dated December 22, 2022, ICSID informed the Parties that it had received the Claimants' advance payment of USD 150,000.

² The Request was accompanied by exhibits C-0001 through C-0036 and legal authorities CLA-0001 through CLA-0003.

14. By letter dated December 24, 2022, the Respondent informed ICSID that the law firm Cuatrecasas Gonçalves Pereira, Sociedade Advogados S.P., R.L would represent it in this proceeding.
15. By emails of January 17, 2023, the Parties informed ICSID that they had agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention. The Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
16. By emails of February 16 and 18, 2023, the Parties informed ICSID of their agreement on the procedure for appointing the President of the Tribunal. By that agreement, the presiding arbitrator would be selected following a “strike and rank” procedure.
17. By emails of February 20, 2023, the Parties informed ICSID of their agreement to a new method for the appointment of the Party-appointed arbitrators.
18. By letter dated February 21, 2023, the Claimants appointed as arbitrator Professor Dr. Stephan Schill, a national of Germany. Professor Schill accepted his appointment on February 28, 2023.
19. By letter dated February 27, 2023, the Respondent appointed as arbitrator Professor Brigitte Stern, a national of France. Professor Stern accepted her appointment on March 6, 2023.
20. By letter dated March 6, 2023, pursuant to the Parties’ agreed method for constituting the Tribunal, ICSID invited the Parties to communicate no later than March 13, 2023, and without copying the other Party, the name of the three candidates they wished to propose as the potential presiding arbitrator.
21. On March 13, 2023, each Party proposed its list of candidates for presiding arbitrator.
22. By letter dated March 31, 2023, in accordance with the Parties’ agreed method for appointing the presiding arbitrator, ICSID proposed a list of 24 candidates (including the 6 names put forward by the Parties) for the Parties’ consideration. On the same date, ICSID invited the Parties to submit, by April 11, 2023, their lists of candidates

- they wished to exclude from consideration and to indicate, by that same date, the procedure to be followed in case the ranking resulted in a tie.
23. By emails of April 5 and April 18, 2023, the Parties informed ICSID that they had reached agreement regarding the next steps of the procedure to appoint the presiding arbitrator. On that same date, ICSID acknowledged receipt of the Parties' correspondence and recorded the Parties' agreement.
 24. On April 21, 2023, the Parties informed ICSID of further amendments to the procedure to appoint the presiding arbitrator. On the same day, the Parties each communicated a list of candidates they wished to exclude from consideration.
 25. On April 24, 2024, in accordance with the Parties' agreed method, ICSID circulated an updated list of candidates to be considered for the selection of the presiding arbitrator and invited the Parties to submit their respective rankings by May 2, 2023.
 26. By letter dated May 2, 2023, ICSID informed the Parties that, as a result of the Parties' completed strike-and-rank forms, Mr. Jeremy K. Sharpe, a national of the United States, had been appointed as presiding arbitrator in this case, and that ICSID would formally seek his acceptance. Mr. Sharpe accepted his appointment on May 4, 2023.
 27. On May 4, 2023, in accordance with Rule 21(1) of the ICSID Rules of Procedure for Arbitration Proceedings in force as of July 1, 2022 (the "**Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
 28. By letter dated May 8, 2023, pursuant to ICSID Administrative and Financial Regulation 15(1)(b), ICSID requested that the Parties make an advance payment of USD 400,000 to the Centre by June 7, 2023. Of this amount, the Claimants were requested to make a payment of USD 50,000 to account for their initial advance

payment of USD 150,000 and the Respondent was requested to make a payment of USD 200,000.

29. By letters dated May 24, 2023, and June 13, 2023, ICSID informed the Parties that it had received their payments for the advance requested on May 8, 2023.
30. In accordance with Arbitration Rule 29(1), the Tribunal held a first session with the Parties on June 27, 2023, by teleconference.
31. Following the first session, on July 13, 2023, the Tribunal issued Procedural Order No. 1, recording the Parties' agreement on procedural matters, and Procedural Order No. 2, setting out the transparency rules governing the proceeding. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from July 1, 2022, the procedural language would be English, and the place of proceeding would be Washington, D.C., United States. Procedural Order No. 1 also sets out the agreed schedule for the jurisdictional and merits phases of the proceeding.
32. On October 17, 2023, the Claimants filed a Memorial on the Merits ("**Memorial on Merits**").³
33. On December 5, 2023, the Respondent filed a request to address the objections to jurisdiction as a preliminary question pursuant to Article 41(2) of the ICSID Convention and Arbitration Rule 44 ("**Bifurcation Request**").⁴
34. On January 23, 2024, the Claimants filed their Response on the Respondent's Request for Bifurcation ("**Bifurcation Response**").⁵

³ The Claimants' Memorial on Merits was accompanied by exhibits C-0037 through C-0169, legal authorities CL-0004 through CL-0139, and a first expert report of Mr. [REDACTED], supported by exhibits PS-1 to PS-49.

⁴ The Respondent's Bifurcation Request was accompanied by exhibits R-0001 through R-0003 and legal authorities RL-0001 through RL-0066, as well as a summary of Respondent's jurisdictional objections.

⁵ The Claimants' Bifurcation Response was accompanied by exhibits C-0170 and C-0171 and legal authorities CL-0140 through CL-0165.

35. On March 1, 2024, the Tribunal issued a Decision on the Respondent's Bifurcation Request, granting the Respondent's Request.
36. On April 16, 2024, the Respondent filed a Memorial on Jurisdiction.⁶
37. On June 11, 2024, the Claimants filed a Counter-Memorial on Jurisdiction.⁷ The Claimants filed a corrected version of their Counter-Memorial on June 26, 2024 (**"Counter-Memorial"**).
38. On June 25, July 5, and July 10, 2024, the Parties exchanged requests for the production of documents in the form of Redfern Schedules, including their objections and observations on objections (**"Requests for Document Production"**).
39. On July 23, 2024, the Parties submitted to the Tribunal their Requests for Document Production. In the cover email, the Claimants objected to the Respondent's introduction, in its objections, of new documents to the record without obtaining prior leave from the Tribunal.
40. On July 26, 2024, the Tribunal invited the Claimants to clarify by July 31, 2024, whether they claim any prejudice and what, if any, relief they seek from the Tribunal in relation to the Respondent's introduction of new documents.
41. By email of July 31, 2024, pursuant to the Tribunal's directions, the Claimants provided the requested clarifications. The Tribunal invited the Respondent to submit any observations it may have on the Claimants' correspondence by August 5, 2024.
42. By email of August 5, 2024, the Respondent provided its observations on the Claimants' objections to the introduction of new documents to the record.
43. On August 8, 2024, the Tribunal issued Procedural Order No. 4 on the Parties' Requests for Document Production. The Tribunal decided, *inter alia*, to admit to the record the

⁶ Respondent's Memorial on Jurisdiction was accompanied by exhibits R-0004 through R-0071 and legal authorities RL-0067 through RL-0140.

⁷ Counter-Memorial was accompanied by exhibits C-0172 through C-0238 and legal authorities CL-0166 through CL-0208.

- new documents submitted with the Respondent's objections and reminded the Parties to comply with the terms of Procedural Order No. 1 on the submission of documents into the record.
44. On October 1, 2024, the Respondent filed a reply on jurisdiction ("**Reply**") and legal opinions of [REDACTED]⁸
 45. On November 11, 2024, the Claimants filed a Rejoinder on Jurisdiction ("**Rejoinder**"), witness statements of [REDACTED] and [REDACTED], and legal opinions of [REDACTED] and [REDACTED].⁹
 46. By email of November 22, 2024, the Respondent requested permission to designate the law firm Foley Hoag LLP as an additional representative in the proceeding. ICSID acknowledged receipt of the Respondent's email on the same date and requested that the Respondent provide a power of attorney to that effect.
 47. By email of December 2, 2024, ICSID informed the Parties of the Tribunal's consent to the addition of Foley Hoag LLP as additional counsel for the Respondent. Additionally, Professor Schill made a disclosure in relation to the Respondent's new counsel, on which the Parties had no comment.
 48. On December 5, 2024, the Respondent provided a power of attorney granted in favor of Foley Hoag LLP to represent Portugal in the proceeding.
 49. On December 10, 2024, the Tribunal held a pre-hearing organizational meeting with the Parties by teleconference.
 50. By letter of the same date, ICSID requested that the Parties make an advance payment of USD 400,000 by January 10, 2025.

⁸ The Respondent's Reply was accompanied by exhibits R-0084 through R-0172 and legal authorities RL-0157 through RL-0252.

⁹ The Claimants' Rejoinder was accompanied by exhibits C-0239 through C-0275 and legal authorities CL-0209 through CL-0249.

51. On December 12, 2024, the Tribunal issued Procedural Order No. 5 on the organization of the hearing.
52. By letter dated December 19, 2024, the Respondent made a request for the production of documents by the Claimants (“**Respondent’s Additional Requests**”).
53. By email of December 30, 2024, the Claimants made preliminary observations on the Respondent’s Additional Requests and indicated that they could provide their observations thereon in the week commencing January 6, 2025. By email of the same date, the Tribunal invited the Claimants to respond to the Respondent’s Additional Requests by January 6, 2025.
54. By letter dated January 6, 2025, ICSID informed the Parties that it had received their payments for the advance requested on December 10, 2024.
55. By letter of the same date, the Claimants responded to the Respondent’s Additional Requests of December 19, 2024. In their letter, the Claimants sought permission to submit into the record documents responsive to three of the Respondent’s Additional Requests and objected to the Respondent’s remaining requests. The Tribunal invited the Respondent to provide any observations on the Claimants’ response by January 10, 2025.
56. By letter dated January 10, 2025, the Respondent provided its observations on the Claimants’ letter of January 6, 2025, and requested additional production of documents.
57. By email of January 13, 2025, the Tribunal invited the Claimants to provide any observations on two of the Respondent’s Additional Requests of January 10, 2025, by January 15, 2025. By letter of the same date, the Respondent requested leave to submit an additional document into the record.
58. By email of January 14, 2025, the Tribunal invited the Claimants to comment on the Respondent’s request of January 13, 2025, by January 16, 2025.

59. By letter dated January 15, 2025, the Claimants sought leave to submit an additional document into the record (“**Claimants’ Additional Request**”) and objected to one of the Respondent’s Additional Requests of January 10, 2025.
60. By email of January 16, 2025, the Claimants requested an extension to file their observations on the Respondent’s Additional Requests of January 13, 2025, until January 17, 2025.
61. By letter dated January 17, 2025, the Claimants provided their observations on the Respondent’s Additional Requests of January 13, 2025.
62. By email of January 19, 2025, given the impendence of the hearing on jurisdiction scheduled to begin on January 20, 2025, the Tribunal issued its decision on the Parties’ Additional Requests for the production of documents and indicated that reasons would follow in a procedural order to be issued in due course. The Tribunal decided as follows:

The Tribunal notes the Claimants’ voluntary production of documents and decides to:

1. Accept into the record the Claimants’ new factual exhibits C-0276-C-0281, as proposed by the Claimants and agreed by the Respondent (including the cover email forming part of C-0277); and
2. Reject as untimely all other requests for the production of documents or admission of documents into the record.

The Tribunal has further reviewed the Respondent’s letter of January 17, 2025, in which the Respondent seeks to place two additional documents on the record. The Claimants are invited to provide any comments on the Respondent’s letter, if possible, by Monday, January 20, 2025.

63. A hearing on jurisdiction was held in Paris, France from January 20-23, 2025 (“**Hearing**”). The following persons were present at the Hearing:

Tribunal:

Mr. Jeremy K. Sharpe	President
Prof. Dr. Stephan Schill	Arbitrator
Prof. Brigitte Stern	Arbitrator

ICSID Secretariat:

Ms. Ella Rosenberg	Secretary of the Tribunal
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For the Claimants:

Counsel:

Mr. Stephen Fietta KC	Fietta LLP
Ms. Charlotte Westbrook	Fietta LLP
Ms. Eileen Crowley	Fietta LLP
Mr. Abdullah Tariq	Fietta LLP
Ms. Jane Byrne	Fietta LLP
Mr. Ashique Rahman	Saadeh Rahman LLP
Mr. Joaquim Shearman de Macedo	PLMJ Advogados
Mr. Diogo Duarte de Campos	PLMJ Advogados
Mr. Tiago Duarte	PLMJ Advogados
Ms. Manuela Martins Amorim	PLMJ Advogados
Ms. Ana Coimbra Trigo	PLMJ Advogados
Ms. Carolina Apolo Roque	PLMJ Advogados

Witnesses:

	Witness
	Witness

Experts:

	
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For the Respondent:

Counsel:

Mr. Miguel de Almada	Cuatrecasas
Mr. Manuel Requicha Ferreira	Cuatrecasas
Mr. Lourenço Vilhena de Freitas	Cuatrecasas
Ms. Bárbara Vidal Sousa	Cuatrecasas
Ms. Carolina Salazar Leite	Cuatrecasas
Ms. Inês de Abreu Régio	Cuatrecasas

Mr. Paulo Simões Ramos
Ms. Blanca Solo de Zaldívar
Mr. Rúben Gameiro
Ms. Diana Paraguacuto-Mahéo
Mr. Peter Tzeng
Mr. Nicholas Renzler
Mr. Jago Chanter
Ms. Margaux Mery
Mr. Daniel Zaleznik
Mr. Luis Brugal
Ms. Mariam Ahmed
Ms. Maris Desplains
Ms. Eya Ben Yaghlane

Parties:

Ms. Margarida Baptista
Ms. Rosa Ribeiro
Ms. Patrícia Galvão Teles

Experts:

[REDACTED]
[REDACTED]

Court Reporter:

[REDACTED]

Interpreters:

[REDACTED]

Cuatrecasas
Cuatrecasas
Cuatrecasas
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag
Foley Hoag

Secretariat-General for the Ministry of Finance
Secretariat-General for the Ministry of Finance
Ministry of Foreign Affairs

[REDACTED]
[REDACTED]

Independent interpreter
Independent interpreter
Independent interpreter

64. The following persons were examined during the Hearing:

On behalf of the Claimants:

[REDACTED]
[REDACTED]
[REDACTED]

Witness
Witness

[REDACTED]
[REDACTED]

On behalf of the Respondent:

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

65. On January 20, 2025, at the Hearing, the Tribunal discussed with the Parties one of the Respondent's Additional Requests. The Claimants provided written comments on that request later that day.
66. On January 21, 2025, at the Hearing, the Tribunal informed the Parties that it agreed to admit the documents comprising the Respondent's Additional Requests, with reasons to follow in a procedural order.
67. On February 7, 2025, the Tribunal issued Procedural Order No. 6 on the Parties' Additional Requests for Production and Submission of Documents.
68. By letter dated February 12, 2025, following directions given at the close of the Hearing, the Tribunal provided instructions to the Parties regarding their post-hearing briefs, and posed several questions to the Parties to assist the Tribunal with its ruling.
69. By email of February 13, 2025, the Tribunal clarified that the Parties' post-hearing briefs were to include the answers to the Tribunal's questions.
70. By letter dated February 26, 2025, the Respondent requested an extension to file the post-hearing briefs.
71. By email of February 27, 2025, the Tribunal granted the Parties until March 27, 2025, to file their respective post-hearing briefs.
72. The Parties filed simultaneous post-hearing briefs on March 27, 2025 ("**Claimants' PHB**" and "**Respondent's PHB**," respectively).¹⁰
73. By letter dated April 1, 2025, the Claimants filed an objection to the Respondent's submission of legal authorities with its PHB. The Tribunal invited the Respondent to comment on the Claimants' letter by April 9, 2025.

¹⁰ The Respondent's PHB was accompanied by legal authorities RL-253 through RL-283.

74. By letter dated April 9, 2025, the Respondent replied to the Claimants' letter of April 1, 2025. The Respondent requested that the new legal authorities be allowed to remain on the record.
75. On April 27, 2025, the Tribunal issued Procedural Order No. 7, accepting the Claimants' objection to the submission of legal authorities with the Respondent's PHB.
76. On September 23, 2025, the Tribunal informed the Parties that due to the complexity of the issues before it, it would be unable to issue its ruling on jurisdiction by September 24, 2025, as per Rules 58(1)(b) and 44(3)(c), but would issue its ruling as soon as possible. The Tribunal further asked the Parties to submit their respective statements of costs, limited to five pages, by October 14, 2025.
77. On October 14, 2025, the Parties submitted their respective statements of costs (**"Claimants' Submission on Costs"** and **"Respondent's Submission on Costs,"** respectively).
78. By letter dated November 3, 2025, ICSID requested that each Party make an advance payment of USD 125,000 by December 3, 2025, to defray the estimated costs of the proceeding through the issuance of the Tribunal's ruling on jurisdiction.
79. By letter dated November 19, 2025, ICSID informed the Parties that it had received the Claimants' advance payment of USD 125,000.
80. By letter dated December 10, 2025, ICSID informed the Parties that it had received the Respondent's advance payment of USD 125,000.
81. On February 13, 2026, the Tribunal informed the Parties that it was finalizing its ruling on Jurisdiction and intended to issue it to the Parties in March. By email of the same date, ICSID requested that the Parties confirm their respective lists of representatives for incorporation into the Tribunal's ruling.
82. The Parties confirmed their representatives on February 17, 2026.

83. On June 12, 2026, the Tribunal declared the proceeding closed.

III. FACTUAL BACKGROUND

A. THE CLAIMANT COMPANIES

84. The Claimants are private limited liability companies constituted and organized under the laws of Mauritius.¹¹ Their principal business activities consist of owning and managing financial investments.¹²

85. Suffolk was incorporated in 2007 and has its registered office in Port Louis, Mauritius. Suffolk is a [REDACTED], a Cayman Islands investment fund, and is part of the wider Elliott International Group.¹³

86. Mansfield was incorporated in 2008 and has its registered office in Port Louis, Mauritius. Mansfield is a wholly-owned subsidiary of the [REDACTED] Liverpool Limited Partnership L.P. (“**Liverpool Partnership**”) and [REDACTED]¹⁴

87. Silver Point was incorporated in 2016 and has its registered office in Ebene, Mauritius. [REDACTED]
[REDACTED]
[REDACTED]¹⁵

¹¹ Memorial on Merits, ¶¶ 21-22, 24-25, and 27-28; Memorial on Jurisdiction, ¶¶ 75 and 78; Reply, ¶¶ 20 and 61.

¹² Memorial on Merits, ¶¶ 21-22, 25, and 28.

¹³ Memorial on Merits, ¶¶ 21 and 23; Memorial on Jurisdiction, ¶¶ 27, 73 and 78.

¹⁴ Memorial on Merits, ¶¶ 24 and 26; Memorial on Jurisdiction, ¶¶ 27, 73 and 78. The Claimants and the Respondent describe Mansfield’s date of incorporation as, respectively, Jan. 11, 2008 and Nov. 1, 2008. Compare Memorial on Merits, ¶ 24 and Memorial on Jurisdiction, ¶ 78.

¹⁵ Memorial on Merits, ¶¶ 27-28 and 30; Memorial on Jurisdiction, ¶¶ 27, 73 and 75.

B. THE RELEVANT LEGAL FRAMEWORK

88. Against the background of the 2008 global financial crisis, the European Union (“EU”) decided to establish tools for national authorities to use for the resolution of banks instead of normal insolvency proceedings, to help ensure the stability of the financial system. For this purpose, the EU adopted the Bank Recovery and Resolution Directive (“BRRD”), which entered into force on July 2, 2014. EU Member States were required to transpose the BRRD into domestic law by December 31, 2014.¹⁶

89. [REDACTED].

90. First, Article 34(1)(g) of the BRRD establishes the principle of “no creditor worse off” (“NCWO”) – a principle at the core of the Claimants’ claims in this proceeding. That provision states:

Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

[...]

(g) no creditor shall incur greater losses than would have been incurred if the institution or entity [...] had been wound up under normal insolvency proceedings in accordance with the safeguards in Articles 73 to 75; [...].¹⁷

91. Second, Article 73 addresses partial transfers of the rights, assets, and liabilities of an institution under resolution, providing in relevant part:

Member States shall ensure that, where one or more resolution tools have been applied and, in particular for the purposes of Article 75:

¹⁶ Request for Arbitration, ¶ 57; Memorial on Merits, ¶¶ 85-86; Memorial on Jurisdiction, ¶¶ 34-38. See Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173 (C-0087).

¹⁷ Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173, Art 34(1) (C-0087).

(a) [...] where resolution authorities transfer only parts of the rights, assets and liabilities of the institution under resolution, the shareholders and those creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in Article 82 was taken [...].¹⁸

92. Third, Article 74 sets out the requirements for an independent valuation:

1. For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to for the purpose of Article 73, Member States shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. [...]

2. The valuation in paragraph 1 shall determine:

- (a) the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if the institution under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;
- (b) the actual treatment that shareholders and creditors have received, in the resolution of the institution under resolution; and
- (c) if there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).¹⁹

93. Finally, Article 75 provides a further safeguard for shareholders and creditors:

Member States shall ensure that if the valuation carried out under Article 74 determines that any shareholder or creditor referred to in Article 73 [...] has incurred greater losses than it would have

¹⁸ Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173, Art. 73(a) (C-0087).

¹⁹ Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173, Art. 74(1)-(2) (C-0087).

incurred in a winding up under normal insolvency proceedings, it is entitled to the payment of the difference from the resolution financing arrangements.²⁰

94. In early 2012, Portugal amended its existing General Regime for Credit Institutions and Financial Companies (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*, “**RGICSF**”), establishing a legislative framework for the resolution of credit institutions. The 2012 framework did not address NCWO entitlements for creditors.²¹
95. Under Portuguese law, the Bank of Portugal (“**BoP**”) is authorized to apply resolution measures to banks and other financial institutions.²² In 2012, the RGICSF established the Resolution Fund – “a legal person governed by public law, endowed with administrative and financial autonomy and its own assets” – which may provide funding to the BoP to implement resolution measures.²³
96. On August 1, 2014, Portugal partially transposed the BRRD into Portuguese law with the adoption of Decree-Law No. 114-A/2014, again amending the RGICSF (“**2014 Banking Law**”).²⁴
97. [REDACTED]
98. [REDACTED] Article 145-B(1)(c) stated the NCWO principle, requiring efforts in the application of resolution measures to ensure that “[n]o creditor of the credit institution

²⁰ Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173, Art. 75 (**C-0087**).

²¹ Memorial on Merits, ¶ 99; Memorial on Jurisdiction, ¶ 36.

²² Memorial on Merits, ¶ 36; Memorial on Jurisdiction, ¶ 38.

²³ Legal Framework of Credit Institutions and Financial Companies (Decree-Law No. 298/92, Dec. 31, as last amended by Law No. 23-A/2015, Mar. 26, 2015) (published by Lisbon District Attorney’s Office), Art. 153-B(1) (**C-0039**); Memorial on Merits, ¶¶ 37-42.

²⁴ Request for Arbitration, ¶ 61; Memorial on Merits, ¶¶ 98-99; Memorial on Jurisdiction, ¶ 37. See Decree-Law No. 114-A/2014 of Aug. 1, 2014, *Official Gazette of Portugal* (“**2014 Banking Law**”) (**C-0094**).

may assume a greater loss than he would have assumed if the credit institution had gone into liquidation.”²⁵

99. [REDACTED] Article 145-H(4) required the BoP to commission an independent valuation of the level of recovery of credits in a liquidation scenario immediately prior to the resolution measure.²⁶
100. [REDACTED] Article 145-B(3) established creditors’ entitlement to receive, “at the end of the liquidation,” the difference between what they actually received in the resolution and what they would have received only in a hypothetical liquidation immediately prior to the resolution.²⁷
101. On March 26, 2015, Portugal transposed the BRRD in its entirety into Portuguese law by enacting Law No. 23-A/2015 and amending the RGICSF (“**2015 Banking Law**”). Together with the 2014 Banking Law, these laws are referred to as the “**Banking Law**.”²⁸
102. [REDACTED]
103. [REDACTED], Article 145-D(1) states the NCWO principle in these terms:²⁹

No shareholder or creditor of an institution subject to a resolution can, due to the application of a resolution measure, bear greater

²⁵ 2014 Banking Law, Art. 145-B(1)(c) (C-0094). See Memorial on Merits, ¶¶ 101-102; Memorial on Jurisdiction, ¶¶ 46-47.

²⁶ 2014 Banking Law, Art. 145-H(4) (C-0094).

²⁷ Memorial on Merits, ¶¶ 104-105; Memorial on Jurisdiction, ¶ 48. Art. 145-B(3) states:

If, at the end of the liquidation of the credit institution under resolution, it is found that the creditors of that institution whose credits were not transferred to another credit institution or to a bridge bank, bore greater losses than the estimated amount which, pursuant to the valuation foreseen in Article 145-F(6) and Article 145-H(4), they would have borne if the institution had entered insolvency proceedings immediately before the point in time at which the resolution measure was applied, then the creditors are entitled to receive that difference from the Resolution Fund.

²⁸ Request for Arbitration, ¶ 61; Memorial on Merits, ¶ 107; Memorial on Jurisdiction, ¶ 67 (n. 86). See Legal Framework of Credit Institutions and Financial Companies (Decree-Law No. 298/92, Dec. 31, as last amended by Law No. 23-A/2015, Mar. 26, 2015) (published by Lisbon District Attorney’s Office) (“**2015 Banking Law**”) (C-0039).

²⁹ 2015 Banking Law, Art. 145-D(1) (C-0039).

losses than those they would have incurred if the credit institution had been subject to winding up proceedings.

104. [REDACTED] Article 145-H(14) establishes the procedures for an independent assessment of potential creditor losses. [REDACTED]

For the purposes of Article 145-D(1)(c), immediately after the resolution measure has been effected, the Bank of Portugal shall appoint an independent entity at the expense of the credit institution subject to resolution to assess, within a reasonable period of time to be set by the Bank of Portugal, whether, if the resolution measure had not been applied and the credit institution under resolution had gone into liquidation at the time it was applied, the shareholders and creditors of the credit institution under resolution [...] would sustain a lower loss than the one they sustained as a result of the application of the resolution measure, determining this assessment:

- a) The losses that shareholders and creditors [...] would have borne if the credit institution under resolution had gone into liquidation;
- b) The losses that the shareholders and creditors [...] actually incurred as a result of the application of the resolution measure to the credit institution under resolution; and
- c) The difference between the losses referred to in point a) and the losses incurred referred to in the previous point.³⁰

105. [REDACTED], Article 145-H(16) establishes creditor rights of recovery:

If the assessment provided for in paragraph 14 determines that [...] creditors [...] have borne a greater loss than they would have borne if the resolution measure had not been applied and the credit institution under resolution went into liquidation at the time it was

³⁰ 2015 Banking Law, Art.145-H(14) (C-0039).

applied, they shall be entitled to receive this difference from the Resolution Fund [...].³¹

106. The Parties disagree on which version of the Banking Law applies to BES's resolution, and whether that issue is even relevant to the present proceeding.³²

C. THE OAK LOAN

107. BES was a major Portuguese bank that formed part of the larger Espírito Santo Group, one of the largest industrial and financial conglomerates in Portugal before its downfall.³³ At its peak, BES was the third largest bank in Portugal, serving a variety of retail, corporate, and institutional clients in Portugal and internationally.

108. In the first half of 2014, there were reports of financial troubles and accounting irregularities within the Espírito Santo Group, including within its parent company.³⁴ A BoP audit found that the parent company's financial situation was "extremely negative."³⁵ The BoP subsequently discovered that BES had engaged in "fraudulent funding," including *vis-à-vis* its parent company. The BoP also found numerous management and governance failures at BES under its former president, Mr. Salgado.³⁶

109. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], a loan [REDACTED] (the "Oak Loan") in the amount of

³¹ 2015 Banking Law, Art. 145-H(16) (C-0039).

³² See Memorial on Merits, ¶¶ 112-120, and Sections V.C and V.D.

³³ Request for Arbitration, ¶ 5; Memorial on Merits, ¶¶ 3 and 44-46.

³⁴ Memorial on Merits, ¶ 52.

³⁵ Memorial on Merits, ¶ 52.

³⁶ Memorial on Merits, ¶¶ 52-53.

³⁷ Counter-Memorial, ¶¶ 22-23 and 100-104; Memorial on Jurisdiction, ¶¶ 17-18.

[REDACTED] was agreed upon under the terms of a facility agreement (“Facility Agreement”).³⁸ [REDACTED]

[REDACTED].³⁹

110.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

D. THE RESOLUTION OF BES

111. At the end of July 2014, BES announced substantial losses for the first half of 2014 of approximately EUR 3.5 billion.⁴² Immediately thereafter, the Governing Council of the European Central Bank (“ECB”) suspended BES’s counterparty status, triggering an obligation by BES to repay a EUR 10 billion credit to the ECB by August 4, 2014.⁴³

³⁸ [REDACTED]
[REDACTED]

³⁹ [REDACTED]
[REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

⁴² Memorial on Merits, ¶ 54; Memorial on Jurisdiction, ¶¶ 22 and 32.

⁴³ Memorial on Merits, ¶ 54; Memorial on Jurisdiction, ¶¶ 23 and 32.

112. This decision prompted the BoP, in exercise of its powers as resolution authority, to apply resolution measures to BES on August 3, 2014 (“**August 3, 2014 Decision**”).⁴⁴
113. The resolution measures in particular established a “bridge bank,” called Novo Banco, S.A. (“**Novo Banco**”). Part of BES’s assets and liabilities were transferred to Novo Banco, while certain other assets and liabilities remained in BES.⁴⁵ The “Excluded Liabilities” remaining with BES included liabilities to shareholders holding 2% or more of BES’s share capital in the two years preceding the transfer.⁴⁶ The majority of Novo Banco’s share capital was subsequently sold to a private equity group.⁴⁷
114. On August 11, 2014, the BoP issued a decision exempting BES (as of August 3, 2014), for an initial period of one year, from making loan repayments and fulfilling certain other obligations.⁴⁸ The moratorium was later extended until July 2016. [REDACTED]
115. [REDACTED]
116. On December 22, 2014, the BoP issued a decision (“**December 22, 2014 Decision**”) providing that the Oak Loan had not been transferred to Novo Banco. The BoP explained that Oak Finance, when granting the Oak Loan, had acted on behalf of Goldman Sachs, [REDACTED]
- [REDACTED]⁵⁰ The Oak Loan thus was deemed an “Excluded

⁴⁴ Decision of the Bank of Portugal, Aug. 3, 2014 (C-0052).

⁴⁵ Request for Arbitration, ¶ 5; Memorial on Merits, ¶¶ 3, 55 and 61; Memorial on Jurisdiction, ¶¶ 25 and 41. See Decision of the Bank of Portugal, Aug. 3, 2014, ¶¶ 11-12 and Annex 2 (C-0052).

⁴⁶ Memorial on Merits, ¶ 61; Counter-Memorial, ¶ 30 (n. 43); Memorial on Jurisdiction, ¶ 42.

⁴⁷ Memorial on Merits, ¶ 56.

⁴⁸ Memorial on Jurisdiction, ¶ 43 (referencing Decision of the Bank of Portugal on the temporary exemption of Banco Espírito Santo, SA, from compliance with prudential rules and the punctual fulfilment of obligations previously contracted, Aug. 11, 2014, Points One and Two (R-0003)).

⁴⁹ Memorial on Merits, ¶ 62.

⁵⁰ Request for Arbitration, ¶ 5; Memorial on Merits, ¶¶ 4 and 63-64; Memorial on Jurisdiction, ¶ 44. See Decision of the Bank of Portugal, Dec. 22, 2014 (C-0069). [REDACTED]

Liability” and remained with BES. Following challenges to BoP’s decision by the Oak Loan noteholders, the BoP on February 11, 2015 issued a further decision (“**February 11, 2015 Decision**”) confirming that the Oak Loan had not been transferred to Novo Banco.⁵¹

117. On September 15 and December 29, 2015, the BoP issued further decisions (“**September 15, 2015 Decision**” and “**December 29, 2015 Decision**”) stating that the Oak Loan remained in BES, and even if the Oak Loan had initially been transferred to Novo Banco, it was retransferred back to BES.⁵²

E. THE DELOITTE REPORT

118. In July 2015, the BoP commissioned an independent report from Deloitte to estimate the level of recovery of each class of creditors in a scenario where BES was liquidated immediately prior to August 3, 2014.⁵³
119. Deloitte completed the report on July 4, 2016 (“**Deloitte Report**”).⁵⁴ The BoP temporarily published an executive summary of the report on its website on July 6, 2016, and published the full report on August 16, 2022.⁵⁵

See Memorial on Merits, ¶ 63

. The Respondent insists that the BoP’s position was always that the Oak Loan had never been transferred to Novo Banco, and that the December 22, 2014 Decision merely clarified this position. See Memorial on Jurisdiction, ¶ 44; Reply, ¶ 268.

⁵¹ Memorial on Merits, ¶ 64; Memorial on Jurisdiction, ¶¶ 49-50. See Decision of the Bank of Portugal, Feb. 11, 2015 (C-0070).

⁵² Memorial on Merits, ¶ 65; Counter-Memorial, ¶¶ 277 (n. 496) and 325 (n. 581); Memorial on Jurisdiction, ¶¶ 61-62; Reply, ¶ 268. See Decision of the Bank of Portugal, Sept. 15, 2015 (C-0071); Decision of the Bank of Portugal, Dec. 29, 2015 (C-0072); Decision of the Bank of Portugal, Contingencies Decision, Dec. 29, 2015 (C-0073); Decision of Bank of Portugal, Perimeter Decision, Dec. 29, 2015 (C-0074).

⁵³ Request for Arbitration, ¶ 65; Memorial on Merits, ¶¶ 15, 121 and 141; Memorial on Jurisdiction, ¶ 47.

⁵⁴ Request for Arbitration, ¶ 65; Memorial on Merits, ¶ 15; Memorial on Jurisdiction, ¶ 47; Deloitte, “Banco Espírito Santo, S.A., Estimation of the level of recovery of the credits of each class of creditors in a scenario of liquidation on 3 August 2014,” July 4, 2016 (C-0097).

⁵⁵ Request for Arbitration, ¶ 65; Memorial on Merits, ¶¶ 15 and 148-149; Bifurcation Response, ¶ 77 (n. 100); Counter-Memorial, ¶ 34; Rejoinder, ¶ 333.

120. According to the Deloitte Report, in a hypothetical liquidation of BES on the date of its resolution, secured and privileged creditors would have recovered 100% of their credits, common creditors would have recovered 31.7% of their credits, and subordinated creditors would have recovered nothing.⁵⁶

121. [REDACTED]

F. THE ASSIGNMENT OF THE OAK LOAN TO THE CLAIMANTS

122. With BES's finances deteriorating, the Claimants' affiliates saw an opportunity to acquire BES's debt instruments at a discount.⁵⁹ [REDACTED]

⁵⁶ Request for Arbitration, ¶ 69; Memorial on Merits, ¶¶ 15, 137 and 143-144 (referencing Deloitte, "Banco Espírito Santo, S.A., Estimation of the level of recovery of the credits of each class of creditors in a scenario of liquidation on 3 August 2014," July 4, 2016, p. 15 (C-0097)); Counter-Memorial, ¶ 272. Relying on the [REDACTED] Expert Report, the Claimants moreover insist that the Deloitte Report classified the Oak Loan as a common credit. See Request for Arbitration, ¶ 69; Memorial on Merits, ¶¶ 136-137 and 144 (n. 245) (referencing Expert Report of Mr. [REDACTED], dated Oct. 17, 2023, ¶¶ 4.3.22-4.3.26 ("[REDACTED] Expert Report").

⁵⁷ Memorial on Merits, ¶ 145; Bifurcation Response, ¶ 77; Counter-Memorial, ¶¶ 253 and 273; Rejoinder, ¶¶ 332-333.

⁵⁸ Reply, ¶ 446. See Deloitte, "Banco Espírito Santo, S.A., Estimation of the level of recovery of the credits of each class of creditors in a scenario of liquidation on 3 August 2014," July 4, 2016, p. 98 (C-0097).

⁵⁹ Memorial on Merits, ¶¶ 57-58.

⁶⁰ Memorial on Merits, ¶¶ 57-58; Memorial on Jurisdiction, ¶¶ 29 and 31. [REDACTED]

⁶¹ Memorial on Merits, ¶ 58; Memorial on Jurisdiction, ¶ 2.

123. [REDACTED]
[REDACTED]
[REDACTED]

124. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

125. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

126. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

127. [REDACTED]
[REDACTED]

⁶² Memorial on Merits, ¶ 59; Memorial on Jurisdiction, ¶ 25; Bifurcation Request, ¶ 4(ii). [REDACTED] (C-0063); [REDACTED] (C-0064); [REDACTED] (C-0065).

⁶³ Memorial on Merits, ¶ 59 (n. 122); Rejoinder, ¶ 216; Memorial on Jurisdiction, ¶¶ 53-54. [REDACTED] (C-0066); [REDACTED] (C-0067); [REDACTED] (C-0068).

⁶⁴ Memorial on Jurisdiction, ¶ 54 (referencing Art. 8 of the 2015 Assignment Agreements).

⁶⁵ Memorial on Merits, ¶¶ 74-75.

⁶⁶ Memorial on Merits, ¶ 76 (referencing Assignment agreement between [REDACTED], Clause 2(a) (C-0081)); Bifurcation Request, ¶ 4(iv)-(v).

[REDACTED]

128.

[REDACTED]

129.

[REDACTED]

[REDACTED]

67

[REDACTED]

68

[REDACTED]

69

[REDACTED]

G. THE DOMESTIC COURT PROCEEDINGS IN PORTUGAL AND THE UNITED KINGDOM

130. The BoP's resolution measures have generated numerous court proceedings in both Portugal and the United Kingdom.

131. *First*, in Portugal, the Claimants, their non-Mauritian affiliates, and other interested parties initiated several proceedings, [REDACTED]:

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

132. The Tribunal understands that each proceeding remains pending.⁷¹

133. *Second*, in the United Kingdom, the Claimants' non-Mauritian affiliates and Goldman Sachs (among others) brought a debt claim against Novo Banco under the Facility Agreement. [REDACTED]

134. In November 2016, however, the Court of Appeal overturned the High Court's decision, holding that UK courts were bound to recognize the December 22, 2014 Decision as effective in the United Kingdom under the BRRD.⁷³ The Court also stayed the UK proceedings pending a ruling by the Portuguese courts on the validity of the BoP's decisions. The Court of Appeal's decision was confirmed by the UK Supreme Court on appeal.⁷⁴

H. THE BES LIQUIDATION PROCEEDINGS

135. Proceedings to liquidate BES began in July 2016.⁷⁵

136. [REDACTED]

⁷¹ See Rejoinder, ¶ 81; Memorial on Jurisdiction, ¶ 71.

⁷² [REDACTED]

⁷³ Memorial on Merits, ¶ 72; Memorial on Jurisdiction, ¶¶ 63-64. [REDACTED]

⁷⁴ [REDACTED]

⁷⁵ Memorial on Merits, ¶¶ 131 and 169; Memorial on Jurisdiction, ¶ 43.

137. [REDACTED]

138. [REDACTED]

IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

139. The Claimants allege to have suffered losses as a result of the Respondent's acts and omissions in the NCWO process, in breach of Portugal's obligations under the BIT.⁷⁹ There is no dispute that the Claimants have received no NCWO payments to date.⁸⁰

⁷⁶ [REDACTED]

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

⁷⁹ Notice of Dispute under the Agreement for the Mutual Promotion and Protection of Investments between the Republic of Mauritius and the Portuguese Republic, Feb. 3, 2022 (C-0151); Request for Arbitration, ¶¶ 6-8, 53-56, 62-64, 66, 68, 70-71, 75-76, 79, 83, 87 and 96; Memorial on Merits ¶¶ 195-196. For its part, the Respondent appears to acknowledge that "the creditors that were affected by the Resolution Measure, such as the Oak Loan creditors, became entitled to NCWO protections [...]." See Memorial on Jurisdiction, ¶ 46.

⁸⁰ Request for Arbitration, ¶ 7; Memorial on Merits, ¶¶ 161-162; Counter-Memorial, ¶¶ 9, 249 and 253; Rejoinder, ¶ 290; Memorial on Jurisdiction, ¶ 238.

140. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

141. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

142. The Respondent denies the Tribunal's jurisdiction over the Claimants' claims.⁸⁴

143. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸¹ Memorial on Merits, ¶ 158.

⁸² See, e.g., Request for Arbitration, ¶¶ 53, 62 and 71; Memorial on Merits, ¶ 138; Rejoinder, ¶¶ 289 and 379.

⁸³ Memorial on Merits, ¶¶ 138-174.

⁸⁴ Memorial on Jurisdiction § III; Reply § II.

⁸⁵ Memorial on Merits, ¶ 417.

[REDACTED]

[REDACTED]

144. In the Respondent's Memorial on Jurisdiction (and Reply), the Respondent requests an award.⁸⁶

(i) in favor of the Respondent and against the Claimants, dismissing the Claimants' claims for lack of jurisdiction in their entirety and with prejudice; and

(ii) ordering that Claimants bear all the costs of this arbitration, including Portugal's costs for legal representation and assistance.

145. Finally, in the Claimants' Rejoinder, the Claimants request an award.⁸⁷

a. declaring that the Claimants' claims are within the jurisdiction of the Tribunal in their entirety;

b. declaring that the Claimants' claims are admissible in their entirety;

c. dismissing all of the Respondent's objections to jurisdiction; and

d. ordering the Respondent to pay the costs of this phase of the proceedings, including the Tribunal's fees and expenses, the Claimants' legal fees and costs, plus interest.

V. OBJECTIONS TO JURISDICTION

146. The Respondent raises five principal objections that relate either to the Tribunal's jurisdiction under the BIT and the ICSID Convention or to the admissibility of

⁸⁶ Memorial on Jurisdiction, ¶ 290; Reply, ¶ 558.

⁸⁷ Rejoinder, ¶ 402.

the Claimants' claims.⁸⁸ The Respondent asserts that the Tribunal lacks jurisdiction (A) *ratione personae*, (B) *ratione materiae*, and (C) *ratione temporis*. The Respondent further argues that the Tribunal lacks jurisdiction because the Claimants have (D) committed an abuse of process and (E) triggered the BIT's fork-in-the-road provision.

147. The Claimants reject the Respondent's objections, claiming to satisfy all jurisdictional requirements of the BIT and the ICSID Convention.

A. JURISDICTION *RATIONE PERSONAE*

148. The Respondent challenges the Tribunal's jurisdiction *ratione personae* on the ground that the Claimants are not protected investors under the BIT.

149. Article 1(3)(b) of the BIT defines "investor" to include "legal persons, including corporations, commercial companies or other companies or associations, which have a main office in the territory of either Contracting Party and are incorporated or constituted in accordance with the law of that Contracting Party."

150. The Parties agree on a number of points in this regard:⁸⁹

- to qualify as protected investors, the Claimants must be incorporated in Mauritius and have their "main office" (or "*sede*," in Portuguese) in Mauritius;
- for the Claimants to have a main office/*sede* in Mauritius, they must be "effectively managed" from Mauritius;
- determining the Claimants' place of effective management requires focusing not only on form but also on substance; and
- the test for effective management is a flexible one that accounts for the nature of the Claimants' businesses.

⁸⁸ The Respondent initially characterized its jurisdictional objections as six independent objections, but later subsumed its illegality objection under its *ratione materiae* objection. See Counter-Memorial, ¶ 4; Memorial on Jurisdiction, ¶¶ 9 and 11; Bifurcation Request, ¶¶ 6 and 116.

⁸⁹ Memorial on Merits, ¶¶ 179-181; Counter-Memorial, ¶¶ 45-46 and 51-52; Rejoinder, ¶¶ 15-16; Bifurcation Response, ¶¶ 38 and 41; Memorial on Jurisdiction, ¶¶ 86-88 and 90-91; Reply, ¶¶ 15-17; Bifurcation Request, ¶¶ 13-15.

151. The Parties, however, disagree on the application of the “effective management” test and whether it is satisfied on the facts.
152. The Respondent argues that (1) the Tribunal lacks jurisdiction *ratione personae* because the Claimants do not qualify as investors within the meaning of Article 1(3)(b) of the BIT, whereas the Claimants submit that (2) they do qualify as investors under the BIT.

(1) The Respondent’s Position

153. The Respondent contends that the Claimants have failed to satisfy their burden of establishing the requirements of Article 1(3)(b) of the BIT.⁹⁰
154. The Respondent maintains that, for the Claimants to have a main office/*sede* in Mauritius, as is required for jurisdiction *ratione personae* purposes under the BIT, (a) they must engage in independent decision-making there, but that (b) the Claimants have failed to show this.

a. The Claimants must engage in independent decision-making in Mauritius to have a main office/sede there under Article 1(3) of the BIT

155. The Respondent first observes that the requirement for a main office/*sede* in Article 1(3) of the Treaty is a mainstay of Portuguese BITs and is intended to deny BIT protections to mere “mailbox companies.”⁹¹
156. The Respondent disagrees with the Claimants on how the “effective management” test should be applied to companies such as the Claimants, whose principal activity is owning financial investments.⁹²

⁹⁰ Memorial on Jurisdiction, ¶ 89; Reply, ¶ 12.

⁹¹ Memorial on Jurisdiction, ¶ 85; Bifurcation Request, ¶ 16. See also Bifurcation Request, ¶ 17.

⁹² Reply, ¶ 17.

157. The Respondent rejects the Claimants’ attempt (see para. 202 below) to show that they are effectively managed from Mauritius through reliance on several “formal factors” extrapolated from *Tenaris v. Venezuela I* and *Orazul v. Argentina*, namely:⁹³
- registered office shown in the articles of association;
 - location of the head office shown in the commercial registry;
 - absence of offices or corporate seat outside of the claimed home state;
 - residence of managers;
 - director nationality;
 - location of record-keeping;
 - place of corporate filings, tax returns or tax residency; and
 - bank account location.
158. The Respondent maintains that investment tribunals have declined to apply a rigid set of factors when locating a company’s effective management. The purpose of this flexibility, it maintains, is not to lower the required threshold, but to ensure that the activities relevant for determining effective management are consistent with what would be expected of a company of its nature.⁹⁴
159. The Respondent criticizes the Claimants’ approach as inconsistent with the BIT. Treating legal requirements for incorporation in Mauritius as evidence of a main office/*sede* conflates the two standards and renders part of the treaty text redundant.⁹⁵ According to the Respondent, three of the factors invoked by the Claimants (existence of a registered office, preparation and filing of tax returns, and the residence of company directors and managers) are “undisputedly requirements of incorporation in Mauritius,” while preparation and storage of financial records in Mauritius is said to be effectively a requirement of incorporation.⁹⁶
160. The Respondent doubts the probative value of the factors that do not double as incorporation requirements: the absence of offices or corporate seat elsewhere, the

⁹³ Reply, ¶¶ 17-18.

⁹⁴ Reply, ¶ 19.

⁹⁵ Reply, ¶¶ 21 and 24.

⁹⁶ Memorial on Jurisdiction, ¶¶ 116-117; Reply, ¶¶ 22-24.

place of corporate filings, and bank account location. The Respondent explains that a company that has effective management elsewhere obviously cannot be effectively managed from Mauritius, and that the location of bank accounts is a plainly insufficient formality. Moreover, the Respondent denies that the Claimants' tax residency in Mauritius and status as Global Business Companies ("**GBCs**") would imply effective management in Mauritius, noting that such statuses are determined solely by reference to domestic law.⁹⁷

161. Instead of "formal factors," the Respondent argues for a "fact-based" test for effective management based on a finding of "independent decision-making" at the place where the company is said to be effectively managed.
162. The Respondent argues that, because the Claimants' primary business activity is owning their purported interests in the Oak Loan, the most appropriate indicator of effective management in Mauritius is evidence that the decision to invest in the Oak Loan was made in Mauritius. For the Respondent, the key factors in this regard are whether the board meetings for that decision took place in Mauritius, and whether the relevant directors participated in that decision in Mauritius and engaged with the "substantive issues concerned."⁹⁸
163. The Respondent argues that this test follows from the *Alverley v. Romania* tribunal's approach of treating independent decision-making as the lodestar and necessary condition for effective management.⁹⁹ This approach allows the Tribunal to determine whether the Claimants are in fact effectively managed from Mauritius as a matter of substance rather than mere form.¹⁰⁰ According to the Respondent, this test is also in line with jurisprudence and the text of the BIT.¹⁰¹ It also best gives effect to the BIT's object and purpose, as granting mailbox companies "investor" status would do nothing

⁹⁷ Reply, ¶¶ 25-27.

⁹⁸ Memorial on Jurisdiction, ¶¶ 91-93; Reply, ¶ 20.

⁹⁹ Reply, ¶ 28.

¹⁰⁰ Reply, ¶¶ 29-30.

¹⁰¹ Reply, ¶¶ 31 and 34.

to strengthen economic cooperation between the BIT parties. The Respondent sees confirmation of this in a joint interpretive statement on the Mauritius-India BIT, which clarifies that the term “investor” does not include entities without substantial business activities in their home state.¹⁰²

164. The Respondent dismisses the Claimants’ concerns about the relevance of the factors it employs to evaluate the Claimants’ effective management:¹⁰³

- the Claimants’ board meetings are relevant, as the Claimants’ board of directors (“**BoD**”) are their only management organs. Accordingly, the Claimants must demonstrate that management decisions were made at those meetings in Mauritius, which requires a showing of “engagement with the substantive issues concerned”,¹⁰⁴
- there must be evidence of substantive participation in the board meetings by the Claimants’ Mauritian directors, [REDACTED]
[REDACTED] The Claimants are thus wrong in denying the relevance of the identity and nationality of their directors in applying the effective management test;¹⁰⁵
- the Claimants’ use of a corporate services firm demonstrates that the Claimants have outsourced their substantive ties to Mauritius to a firm “that provides only the bare minimum in terms of regulatory compliance”;¹⁰⁶ and
- considering the centrality of the Oak Loan to the Claimants’ activities, decision-making regarding the Oak Loan should be given additional weight in localizing effective management.¹⁰⁷

165. The Respondent considers that these criteria should be applied to the Claimants’ decisions at the time of the purported investment or the time of the alleged BIT breach. The Respondent thus rejects the Claimants’ assertion (see para. 196 below) that tribunals have routinely recognized that a claimant must show investor status on the

¹⁰² Reply, ¶ 32.

¹⁰³ Reply, ¶ 35.

¹⁰⁴ Reply, ¶ 35(a).

¹⁰⁵ Reply, ¶ 35(b).

¹⁰⁶ Reply, ¶ 35(c).

¹⁰⁷ Reply, ¶ 35(d).

date when proceedings are commenced. Indeed, the Respondent explains that, because Article 9 of the BIT requires the dispute to “concern[] an investment of the investor,” if the claimant was not an investor at the time of the alleged BIT breach, this provision would be nonsensical and allow a claimant to change nationality tactically before filing a claim.¹⁰⁸

b. The Claimants failed to show independent decision-making in Mauritius

166. Against this background, the Respondent submits that the Claimants failed to show independent decision-making in Mauritius with respect to either (i) Suffolk and Mansfield or (ii) Silver Point.¹⁰⁹ On the contrary, key decisions were made from the offices of the Claimants’ parent entities.

(i) Suffolk and Mansfield

167. The Respondent asserts that none of the evidence presented by the Claimants shows independent decision-making regarding Suffolk and Mansfield in Mauritius.¹¹⁰ Rather, the companies’ most important decisions were undertaken by foreign directors abroad.

168. *First*, the Respondent submits that [REDACTED]

[REDACTED]

¹⁰⁸ Reply, ¶¶ 36-37.

¹⁰⁹ Memorial on Jurisdiction, ¶ 94.

¹¹⁰ Memorial on Jurisdiction, ¶ 95.

¹¹¹ Suffolk (Mauritius) Ltd., Board Meeting Minutes, Mar. 23, [REDACTED] (C-0009); Mansfield (Mauritius) Ltd., Board Meeting Minutes, Mar. 23, [REDACTED] (C-0020).

¹¹² Memorial on Jurisdiction, ¶¶ 97-98; Reply, ¶ 49.

¹¹³ Memorial on Jurisdiction, ¶¶ 99-100; Reply, ¶ 50. See also Bifurcation Request, ¶ 22.

[REDACTED]

169. *Second*, the Respondent contends that the identities of the directors allegedly present at the board meetings further suggest a lack of independent decision-making in Mauritius.¹¹⁶ [REDACTED]

[REDACTED]

Conversely, the Respondent disagrees with the Claimants (see para. 206 below) that the fact that Suffolk and Mansfield have directors residing in Mauritius would demonstrate effective management there, [REDACTED]

[REDACTED]¹¹⁸

170. *Third*, the Respondent argues that the Claimants are not aided by their relationships with Mauritian third-party vendors. To the contrary, [REDACTED]

[REDACTED]¹¹⁹

171. *Fourth*, the Respondent argues that [REDACTED]

[REDACTED]

¹¹⁴ Reply, ¶ 50.

¹¹⁵ Reply, ¶ 51. See also Bifurcation Request, ¶ 23.

¹¹⁶ Memorial on Jurisdiction, ¶ 101. See also Bifurcation Request, ¶ 21.

¹¹⁷ Memorial on Jurisdiction, ¶ 102.

¹¹⁸ Memorial on Jurisdiction, ¶ 103; Reply, ¶¶ 45-46.

¹¹⁹ Memorial on Jurisdiction, ¶¶ 104 and 119; Reply, ¶ 52. See also Bifurcation Request, ¶¶ 19-20.

[REDACTED]

172. *Fifth*, the Respondent reiterates that most of the factors the Claimants invoke to demonstrate effective management from Mauritius are merely recycled requirements for incorporation in Mauritius.¹²²
173. *Sixth*, the Respondent maintains that Suffolk's and Mansfield's maintenance of bank accounts in Mauritius is not meaningful evidence of effective management.¹²³
174. *Seventh*, the Respondent denies that Suffolk's and Mansfield's tax residency and status as GBCs is relevant evidence of effective management in Mauritius, noting that under the Mauritian Financial Services Act a resident corporation primarily conducting business outside Mauritius must be licensed as a Global Business and all GBCs must qualify as tax residents in Mauritius.¹²⁴

(ii) Silver Point

175. The Respondent equally maintains that the Claimants have failed to show that Silver Point is effectively managed from Mauritius.¹²⁵

¹²⁰ Memorial on Jurisdiction, ¶¶ 105-107.

¹²¹ Reply, ¶ 43.

¹²² Memorial on Jurisdiction, ¶ 115-116; Reply, ¶ 40.

¹²³ Memorial on Jurisdiction, ¶ 118; Reply, ¶ 43.

¹²⁴ Reply, ¶ 44.

¹²⁵ Memorial on Jurisdiction, ¶ 108; Reply, ¶ 53.

176. *First*, the Respondent in this context similarly contends that the vast majority of indicia relied upon by Silver Point are simply requirements of incorporation under Mauritian law.¹²⁶
177. *Second*, the Respondent argues that Silver Point's Mauritian bank account, tax residency, and GBC status are insufficient to show effective management in Mauritius, for the reasons provided for the other Claimants.¹²⁷
178. *Third*, the Respondent considers that Silver Point is not aided by its relationship with the corporate management firm CITCO, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].¹²⁸
179. *Fourth*, the Respondent maintains that the Claimants have failed to show that Silver Point engages in independent decision-making in Mauritius, noting in this context that Silver Point's foreign directors are employees of its parent group entities and that its Mauritian directors appear to be directors-for-hire who are not involved in substantive decision-making.¹²⁹
180. *Fifth*, the Respondent asserts that the Claimants have failed to show that Silver Point's sole substantive decision – acquiring the Oak Loan interest – was made in Mauritius. The Respondent alleges that [REDACTED]
[REDACTED]
[REDACTED], leaves no doubt that its parents made the decision for it to acquire the Oak Loan interests.¹³⁰ The Respondent further argues that the minutes

¹²⁶ Reply, ¶ 54.

¹²⁷ Reply, ¶ 55.

¹²⁸ Memorial on Jurisdiction, ¶ 113; Reply, ¶ 56.

¹²⁹ Memorial on Jurisdiction, ¶¶ 111-112; Reply, ¶¶ 57-58. See also Bifurcation Request, ¶ 21.

¹³⁰ Memorial on Jurisdiction, ¶ 110; Reply, ¶ 59.

of Silver Point's first board meeting confirm that the acquisition decision was a *fait accompli*, recording only that "the Company will hold investments" in Novo Banco.¹³¹

181. *Sixth*, the Respondent observes that Silver Point, since its incorporation, [REDACTED]

182. Accordingly, the Claimants have failed to show effective management in Mauritius.¹³³

(2) The Claimants' Position

183. The Claimants submit that the Tribunal has jurisdiction *ratione personae*, as each Claimant satisfies the requirements of the BIT and the ICSID Convention. In particular, the Claimants argue that (a) the Respondent misinterprets BIT Article 1(3)(b), which, (b) when properly applied to the facts, confirms that each Claimant has a main office/*sede* in Mauritius.¹³⁴

a. The Respondent misinterprets BIT Article 1(3)(b)

184. At the outset, the Claimants observe that the dispute between the Parties centers on the meaning of the terms "main office" or "*sede*" in Article 1(3)(b) of the BIT.¹³⁵

185. According to the Claimants, the Parties disagree on what is required for the Claimants to establish that they are "effectively managed" in Mauritius, as necessary to show each Claimant's main office/*sede* there. The Claimants argue that the Respondent misinterprets BIT Article 1(3)(b), and in particular (i) misapplies treaty-interpretation rules; (ii) misapplies the effective management test; (iii) incorrectly relies on "independent decision-making" as determinative of effective management; (iv) mischaracterizes the independent decision-making criterion; and (v) fails to

¹³¹ Reply, ¶ 59.

¹³² Reply, ¶¶ 61-62. See also Bifurcation Request, ¶ 25.

¹³³ Memorial on Jurisdiction, ¶¶ 114 and 120; Reply, ¶ 63.

¹³⁴ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 42-43; Rejoinder, ¶ 14. See also Request for Arbitration, ¶ 20.

¹³⁵ Memorial on Merits, ¶¶ 179-181; Counter-Memorial, ¶¶ 45-46 and 51-52; Rejoinder, ¶¶ 15-16; Bifurcation Response, ¶¶ 38 and 41.

understand that incorporation requirements in Mauritius may also demonstrate the Claimants' place of effective management.¹³⁶

(i) The Respondent's arguments are based on a flawed application of treaty interpretation principles

186. The Claimants argue that the Respondent fails to interpret the terms *main office/sede* by reference to their ordinary meaning, which is the starting point for analysis under Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"). The Claimants further explain that in case of any divergence in meaning between "main office" and "*sede*," the English text prevails. The ordinary meaning of "main office" suggests the place where the Claimants' business activities are carried out.¹³⁷ In the Claimants' view of this test, the Tribunal can only conclude that the sole office of each Claimant is its main office in Mauritius.
187. At the same time, the Claimants assert that the Respondent fails to explain how resorting to the BIT's object and purpose supports its interpretation of the ordinary meaning of *main office/sede*. The Claimants thus reject the argument that providing mailbox companies (which the Claimants are not) with investor status does nothing to strengthen economic cooperation between the countries. The Claimants state that Portugal and Mauritius easily could have excluded mailbox companies from investor protection in the BIT, but the treaty parties declined to do so.
188. Accordingly, the Claimants argue that applying basic principles of treaty interpretation favors their interpretation of BIT Article 1(3)(b).¹³⁸

(ii) The Claimants have appropriately applied the flexible "effective management" test

189. According to the Claimants, the Parties agree that demonstrating a company's place of "effective management" requires "something different" than merely identifying where

¹³⁶ Counter-Memorial, ¶ 44; Rejoinder, ¶¶ 17-18.

¹³⁷ Counter-Memorial, ¶¶ 47-50; Rejoinder, ¶ 33. See also Bifurcation Response, ¶ 38.

¹³⁸ Rejoinder, ¶ 36.

it is formally registered, but they disagree on what exactly is required. Citing the *Tenaris I* decision, the Claimants argue that the test for “effective management” must be flexible to account for the “precise nature of the company in question and its actual activities.”¹³⁹ The Claimants add that day-to-day management of a company with little daily operational activities will necessarily be limited. The Claimants further note that the *Tenaris I* tribunal considered several factors when applying this test (see para. 202 below). They note that the *Tenaris I* tribunal’s decision in this respect was upheld on annulment and followed in subsequent cases.¹⁴⁰

190. The Claimants reject the Respondent’s allegations (see para. 157 above) that they apply the *Tenaris I* factors too rigidly or improperly lower the bar for “effective management.” The Claimants cite the Respondent’s admission that the test should be tailored to the precise nature of the company in question and its activities. The Claimants underscore that the claimants in *Tenaris I* and *Orazul*, as here, were holding companies, making the analysis in those cases particularly apposite here.¹⁴¹ The Claimants thus deny improperly lowering the threshold for “effective management,” and claim to be applying the test appropriately in the context of the three holding-company Claimants.¹⁴²

(iii) The Respondent incorrectly relies on “independent decision-making” as determinative of “effective management”

191. The Claimants argue that the Respondent seems to have abandoned the “substantive connection” element of the test for “effective management” introduced in its Bifurcation Request, and now argues that “effective management” in a given location requires “some element of independent decision-making taking place there.”¹⁴³ According to the Claimants, the Respondent elevates this to the principal and necessary

¹³⁹ Counter-Memorial, ¶¶ 52 and 54.

¹⁴⁰ Counter-Memorial, ¶¶ 52-55; Bifurcation Response, ¶ 41.

¹⁴¹ Rejoinder, ¶¶ 19-20.

¹⁴² Rejoinder, ¶ 21.

¹⁴³ Counter-Memorial, ¶¶ 56-57; Bifurcation Response, ¶ 39.

criterion for “effective management,” contrary to the leading authorities on the issue, including *Tenaris I* and *Orazul*.¹⁴⁴

192. The Claimants consider *Averley v. Romania* as the only award cited by the Respondent that adopts independent decision-making as a factor, and even that outlier award, read in context, fails to support the Respondent’s position.¹⁴⁵ Accordingly, the Claimants submit that “independent decision-making” should not be elevated to a compulsory criterion of the “effective management” test.¹⁴⁶

(iv) Even assuming that “independent decision-making” is determinative of “effective management,” the Respondent mischaracterizes that criterion

193. In any event, the Claimants consider that the Respondent misstates the level of “independent decision-making” required for effective management. In particular, the Claimants reject the Respondent’s contention that, for entities owning financial investments, the location of the decisions to acquire those financial investments should be given particular weight in localizing effective management. The Claimants consider it irrelevant whether the decision to acquire the Oak Loan was made from Mauritius or from offices of the Claimants’ parent entities. The Claimants’ position in this regard is said to be confirmed by *Alverley*, which rejected Romania’s attempt to rely on the place of “decision-making” in the context of holding companies, and by *Tenaris I*.¹⁴⁷ Regardless, the Claimants maintain that each Claimant made the decision to acquire the Oak Loan in Mauritius (see Section V.A(2)b)).¹⁴⁸

194. Specifically, the Claimants describe as unsupported by the BIT and jurisprudence the Respondent’s statements (see para. 162 above) that the “key factors” in this context are whether the board meetings for such decisions took place in Mauritius and whether the directors involved participated there. The Claimants note that the *Alverley* tribunal

¹⁴⁴ Counter-Memorial, ¶ 57; Rejoinder, ¶¶ 25-26, 28 (n. 32).

¹⁴⁵ Counter-Memorial, ¶¶ 58-59; Rejoinder, ¶¶ 26-31.

¹⁴⁶ Rejoinder, ¶ 32.

¹⁴⁷ Counter-Memorial, ¶ 60; Rejoinder, ¶¶ 37-39.

¹⁴⁸ Rejoinder, ¶ 40.

took into account that the claimant’s board decisions were taken in Cyprus, but did not treat this as a necessary factor.¹⁴⁹

195. Similarly, the Claimants reject the relevance of the “identity of the directors allegedly present,” noting that the Respondent has failed to show why any of the factors invoked in this context are relevant to the test for “effective management.”¹⁵⁰ The Claimants note that the ultimate control of the parent company over the subsidiary will affect its decision-making, but it does not automatically follow that decisions are made outside of the investor’s home state.¹⁵¹ Indeed, the Claimants stress that such arguments have already been rejected by tribunals, including in *De Sutter v. Madagascar II*.¹⁵²
196. In any event, the Claimants see no basis to elevate decisions specifically relating to the Oak Loan to the exclusion of all other company decisions.¹⁵³ Tribunals are said to have regularly confirmed that the date at which a claimant must show that it was an “investor” (*i.e.*, had a main office/*sede*) is the date of commencement of proceedings.¹⁵⁴ The Claimants see confirmation for this in Article 25(2)(b) of the ICSID Convention, which considers the nationality of a juridical person based on the “date on which the parties consented to submit such dispute to conciliation or arbitration.”¹⁵⁵
197. In addition, the Claimants argue that the Respondent fails to identify any jurisprudential basis for the proposition (see para. 164 above) that a company would not be “effectively managed” from a state because it contracts with corporate services firms regarding office space or regulatory compliance.¹⁵⁶

¹⁴⁹ Counter-Memorial, ¶ 60; Rejoinder, ¶ 37.

¹⁵⁰ Counter-Memorial, ¶ 61.

¹⁵¹ Counter-Memorial, ¶ 61.

¹⁵² Counter-Memorial, ¶ 62; Rejoinder, ¶ 37 (n. 50).

¹⁵³ Counter-Memorial, ¶ 63; Rejoinder, ¶ 41.

¹⁵⁴ Counter-Memorial, ¶ 63; Rejoinder, ¶¶ 41-42 (citing Stephan Schill *et al.*, eds., *Schreuer’s Commentary on the ICSID Convention*, Third Edition, Cambridge University Press 2022), pp. 227 and 466 (CL-0157)).

¹⁵⁵ Rejoinder, ¶ 41.

¹⁵⁶ Counter-Memorial, ¶¶ 64-65; Rejoinder, ¶ 37; Bifurcation Response, ¶¶ 41 and 42(a).

198. Finally, the Claimants say the Respondent misstates the “independent decision-making” required of the claimants in *Alverley v. Romania*, as the tribunal there was focused on decision-making concerning regulatory and compliance issues, rather than investment decisions.¹⁵⁷ In fact, the *Alverley* tribunal is said to have recognized that investment decisions will naturally be the domain of a company’s controlling parent. The Claimants criticize the Respondent’s position as implying that no wholly-owned subsidiary with a parent in a third state could qualify as an investor under the BIT.¹⁵⁸

(v) The Respondent is wrong that requirements of incorporation cannot also demonstrate place of “effective management”

199. The Claimants argue that arbitral tribunals routinely consider incorporation requirements when determining if a company is effectively managed from a relevant jurisdiction. As such, looking to the requirements of incorporation in Mauritius to establish effective management does not constitute “double-counting.”¹⁵⁹

200. In any event, the Claimants deny that “double-counting” these requirements would violate the *effet utile* principle, depriving of meaning the main office/*sede* requirement and the incorporation requirement in BIT Article 1(3)(b). The jurisprudence accepts some overlap in these two requirements notwithstanding that requirements for effective management must be “over and above” those of incorporation.¹⁶⁰

201. Accordingly, the Claimants conclude that the relevant test for establishing the Claimants’ main office/*sede* is to determine the place of their “effective management or some sort of actual or genuine corporate activity,” which requires a flexible test that considers the specific circumstances of their business.¹⁶¹

¹⁵⁷ Counter-Memorial, ¶¶ 58-59.

¹⁵⁸ Rejoinder, ¶¶ 43-45.

¹⁵⁹ Counter-Memorial, ¶ 66; Rejoinder, ¶¶ 22-23.

¹⁶⁰ Rejoinder, ¶ 24.

¹⁶¹ Counter-Memorial, ¶ 68; Rejoinder, ¶ 46.

b. Each Claimant has a “main office” or “sede” in Mauritius

202. Against this background, the Claimants submit that there is no exhaustive list of elements indicating a company’s effective place of management. There are, however, several relevant factors that can be distilled from leading and analogous cases to be applied to companies such as the Claimants:

- registered office in the articles of association;
- location of the head office shown in commercial registry;
- absence of offices or corporate seat outside of the claimed home state;
- residence of managers;
- director nationality;
- location of record-keeping;
- place of corporate filings, tax returns or tax residency; and
- bank account location.¹⁶²

203. The Claimants argue that, viewed against these factors in their totality, each Claimant is and was at the relevant time effectively managed in Mauritius.¹⁶³

(i) Suffolk and Mansfield

204. The Claimants explain that Suffolk and Mansfield have their registered offices in Port Louis, Mauritius, and that [REDACTED]¹⁶⁴

The Claimants likewise note that Suffolk and Mansfield file annual financial statements and tax returns in Mauritius, and that they are subject to income tax in Mauritius. The Claimants add that, under Mauritian law, companies only pay income tax if they are effectively managed there, whereas Mauritius-incorporated companies that are effectively managed elsewhere are treated as non-residents for tax purposes.¹⁶⁵

205. The Claimants point out that Suffolk and Mansfield have bank accounts in Mauritius [REDACTED], and that their bank accounts in Mauritius [REDACTED]

¹⁶² Counter-Memorial, ¶ 69; Rejoinder, ¶¶ 17 and 47.

¹⁶³ Counter-Memorial, ¶ 70; Rejoinder, ¶ 48.

¹⁶⁴ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 71 and 83. See also Rejoinder, ¶ 49 (n. 71).

¹⁶⁵ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 72 and 84.

[REDACTED]
[REDACTED]¹⁶⁶ Relatedly, the Claimants contend that
[REDACTED]
[REDACTED]¹⁶⁷

206. The Claimants explain that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹

207. The Claimants reject Portugal’s criticism regarding the level of “substantive contribution” by the Mauritian directors to the management of Suffolk and Mansfield.¹⁷⁰ The Claimants deny any authority for the Respondent’s narrow focus on the meetings at which the investment decisions were taken, arguing that [REDACTED]
[REDACTED]
[REDACTED]¹⁷¹ Indeed, the Claimants contend that, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁷² The Claimants thus insist that the decision to acquire the Oak Loan was far from a “*fait accompli*.”¹⁷³

¹⁶⁶ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 73 and 85.

¹⁶⁷ Counter-Memorial, ¶¶ 74 and 86.

¹⁶⁸ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 75-76 and 87.

¹⁶⁹ Memorial on Merits, ¶ 182; Rejoinder, ¶ 58 (n. 122).

¹⁷⁰ Rejoinder, ¶ 58.

¹⁷¹ Counter-Memorial, ¶¶ 77 and 87; Rejoinder, ¶¶ 58-59; Bifurcation Response, ¶ 42(c).

¹⁷² Counter-Memorial, ¶ 77.

¹⁷³ Counter-Memorial, ¶¶ 77 and 87. See also Rejoinder, ¶ 58 (n. 121).

208. Relatedly, the Claimants see no support for the Respondent’s assertion that [REDACTED]
[REDACTED]
[REDACTED] implies that these directors failed to engage in substantive decision-making (see para. 170 above).¹⁷⁴
209. In addition, the Claimants observe that Suffolk and Mansfield keep their company records in Mauritius. Although Mauritian law requires this for companies incorporated in Mauritius, the Claimants stress that directors may keep such records outside of Mauritius.¹⁷⁵ Suffolk and Mansfield, however, have not chosen to do so.
210. The Claimants moreover contend that there are no offices other than their Mauritian offices from which Suffolk and Mansfield could be said to be effectively managed, denying that the Claimants are effectively managed from the offices of their parent companies abroad. [REDACTED]
[REDACTED]
[REDACTED]
211. Finally, the Claimants argue that Suffolk and Mansfield are GBCs under Mauritian law and fulfil the relevant Mauritian criteria in this context to be deemed “managed and controlled from Mauritius.”¹⁷⁷

(ii) Silver Point

212. The Claimants likewise submit that the evidence shows that Silver Point has its “main office” in Mauritius and is effectively managed there. Much like Suffolk and Mansfield, Silver Point:
- has its registered office in Ebene (Mauritius) and its main service suppliers are all based in Mauritius;¹⁷⁸

¹⁷⁴ Rejoinder, ¶ 59.

¹⁷⁵ Memorial on Merits, ¶ 182; Counter-Memorial, ¶¶ 79 and 88.

¹⁷⁶ Counter-Memorial, ¶¶ 80 and 89. See also Bifurcation Response, ¶ 43.

¹⁷⁷ Counter-Memorial, ¶¶ 81-82 and 89.

¹⁷⁸ Counter-Memorial, ¶ 90; Rejoinder, ¶ 60; Bifurcation Response, ¶ 42(b).

- files financial statements and tax returns in Mauritius, and is subject to income tax in Mauritius;¹⁷⁹
- has its sole bank account in Mauritius, the records of which show that [REDACTED]
[REDACTED]
[REDACTED],¹⁸⁰
- has four directors, two of whom reside in Mauritius;¹⁸¹
- prepares and stores its company records in Mauritius;¹⁸²
- has no other office from where it could be said to be effectively managed; and
- is a GBC under Mauritian law, fulfilling the relevant Mauritian criteria to be considered as “managed and controlled from Mauritius.”¹⁸³

213. The Claimants argue that many of the Respondent’s arguments regarding Silver Point suffer from the same flaws as those regarding Suffolk and Mansfield, while its remaining arguments are unavailing.¹⁸⁴

214. The Claimants consider it irrelevant [REDACTED]
[REDACTED].¹⁸⁵

215. The Claimants also maintain that the argument that Silver Point does not engage in independent decision-making in Mauritius fails both on the law and facts. On the law, the Claimants argue that the test in *Alverley v. Romania* for “independent decision-making” does not require a holding company to independently make decisions on the larger corporate group’s strategic objectives; rather, it must show “*some* element of independent decision-making” in regulatory and compliance matters.¹⁸⁶ On the facts, Silver Point cites an example of independent decision-making in which its BoD

¹⁷⁹ Counter-Memorial, ¶ 91; Rejoinder, ¶ 60; Bifurcation Response, ¶ 42(b).

¹⁸⁰ Counter-Memorial, ¶ 92; Rejoinder, ¶ 60; Bifurcation Response, ¶ 42(b).

¹⁸¹ Counter-Memorial, ¶ 92; Rejoinder, ¶ 60; Bifurcation Response, ¶ 42(b).

¹⁸² Counter-Memorial, ¶ 94; Rejoinder, ¶ 60.

¹⁸³ Counter-Memorial, ¶ 95; Rejoinder, ¶ 60; Bifurcation Response, ¶ 43.

¹⁸⁴ Rejoinder, ¶¶ 61-62.

¹⁸⁵ Rejoinder, ¶ 63.

¹⁸⁶ Rejoinder, ¶¶ 64-65.

[REDACTED]
[REDACTED] 187

216. The Claimants thus insist that Silver Point’s BoD engages in independent decision-making in the company management on either test, including in the decision, taken in Mauritius, to acquire the Oak Loan.¹⁸⁸ In that regard, the Claimants explain that the minutes of Silver Point’s first board meeting show that the BoD [REDACTED]
[REDACTED]
[REDACTED]

217. Finally, the Claimants state that the Respondent offers no jurisprudential support for its suggestion [REDACTED]
[REDACTED]

[REDACTED]¹⁹⁰ On the contrary, the Claimants observe that tribunals routinely exercise jurisdiction over companies [REDACTED]
[REDACTED]

B. JURISDICTION *RATIONE MATERIAE*

218. The Respondent challenges the Tribunal’s jurisdiction *ratione materiae* on grounds that the Claimants lack a protected investment under Article 1(1) of the BIT and Article 25(1) of the ICSID Convention.

219. Article 1(1) of the BIT provides:

The term “investment” shall mean every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter including, in particular though not exclusively:

¹⁸⁷ Rejoinder, ¶ 66.

¹⁸⁸ Rejoinder, ¶ 67.

¹⁸⁹ Counter-Memorial, ¶ 93. See also Bifurcation Response, ¶ 42(b).

¹⁹⁰ Rejoinder, ¶ 68.

- (a) movable and immovable property as well as any other rights in rem, such as mortgages, usufruct, liens, pledges and similar rights;
- (b) shares, stocks, debentures, or other forms of interest in the equity of companies and/or economic interests from the respective activity;
- (c) claims to money, or to any performance having an economic value;
- (d) intellectual property rights, such as copyrights, patents, utility-models, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and goodwill; and
- (e) concessions conferred by law, under a contract or an administrative act of a competent State authority, including concessions for prospecting, research and exploitation of natural resources.

Any alteration of the form in which assets are invested shall not affect their character as investments, provided that such a change does not contradict [sic] the laws and regulations of the relevant Contracting Party.

220. Article 25(1) of the ICSID Convention provides:

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

221. The Respondent contests the Tribunal's jurisdiction *ratione materiae* (1) on account that the Claimants have not shown that their purported Oak Loan interests qualify as protected investments. For their part, (2) the Claimants insist that their Oak Loan interests constitute protected investments.

(1) The Respondent's Position

222. The Respondent disputes the Tribunal's jurisdiction *ratione materiae* on three primary grounds:¹⁹¹ (a) the Claimants' purported Oak Loan interests fail to qualify as investments under either Article 1(1) of the BIT or Article 25(1) of the ICSID Convention; (b) the Claimants acquired their purported investments in violation of Portuguese law; and (c) the Claimants in any event hold no title over interests in the Oak Loan.

a. The Claimants' purported Oak Loan interests fail to qualify as investments under Article 1(1) of the BIT or Article 25(1) of the ICSID Convention

223. The Respondent argues that the Claimants have failed to satisfy the "double-barrelled" test of demonstrating a qualifying investment under both the BIT and the ICSID Convention. The Respondent argues:

Article 25(1) of the ICSID Convention limits the Centre's jurisdiction to disputes "arising directly out of an investment." Although the Convention contains no explicit definition of "investment," it is widely recognized that the term has an objective meaning. There is "a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are necessary elements of an investment."¹⁹²

224. The Respondent further observes that Article 1(1) of the BIT defines an "investment" in relation to assets invested "in the territory" of the other Contracting Party.

225. The Respondent considers that the Claimants have failed to establish the elements of (i) contribution, (ii) risk, (iii) duration, and (iv) a territorial link with Portugal. Alternatively, (v) the Claimants have failed to show that their investments are protected even under the Claimants' flexible approach.

¹⁹¹ The Respondent initially characterized its illegality objection as an independent objection, but has since fully subsumed it under its *ratione materiae* objection. See Memorial on Jurisdiction, § 3.2.2; Bifurcation Request, ¶¶ 57-70.

¹⁹² Memorial on Jurisdiction, ¶ 123 (quoting *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012, ¶ 5.43 (RL-0012)).

- (i) The Claimants' purported acquisition of Oak Loan interests made no contribution to an economic activity

226. In the Respondent's view, the term "investment" under Article 25(1) of the ICSID Convention and Article 1(1) of the BIT requires a contribution (understood as "a contribution to an economic venture") in the territory of the host state.¹⁹³ The Respondent asserts that the Claimants have failed to show a contribution in Portugal, arguing that:

- investments consisting of financial instruments must be linked to an identified economic venture;
- acquisitions of claims against a state involve no contribution to an economic activity;
- whether the Claimants made a protected investment must be assessed by reference to the █████ Assignment Agreements, not to investments of the Claimants' predecessors-in-interest; and
- through the █████ Assignment Agreements, the Claimants purchased purported claims against Portugal, which did not contribute to economic activity.

Investments constituting financial instruments must be linked to an identified economic venture

227. The Respondent argues that investments constituting financial instruments, including debt instruments, must contribute to an economically productive activity to satisfy the "contribution" requirement.¹⁹⁴

228. In this respect, the Respondent relies on the distinction drawn in *Poštová v. Greece* between bonds used for general budgetary purposes and those used for economically productive activities.¹⁹⁵ The Respondent argues that affirming jurisdiction over bonds used for general budgetary purposes would undermine the purpose of international investment law, adding that numerous tribunals have confirmed the need for participation in an economic activity.¹⁹⁶

¹⁹³ Memorial on Jurisdiction, ¶¶ 127-128; Reply, ¶¶ 96 and 107; Bifurcation Request, ¶¶ 34-35.

¹⁹⁴ Memorial on Jurisdiction, ¶¶ 128-133; Reply, ¶ 108; Bifurcation Request, ¶ 36.

¹⁹⁵ Reply, ¶¶ 97-99.

¹⁹⁶ Reply, ¶¶ 100-106.

229. The Respondent considers inapposite the Claimants’ reliance (see para. 349 below) on *Deutsche Bank v. Sri Lanka* for the proposition that “a contribution can take any form.”¹⁹⁷ The Respondent notes that this case was accompanied by a strong dissenting opinion and criticism, including in particular due to its application of the contribution requirement. Adopting the *Deutsche Bank* tribunal’s approach, the Respondent argues, would erode the distinction between a protected “investment” and a mere “commercial transaction” not deemed an investment.¹⁹⁸ The Respondent finds equally unpersuasive the Claimants’ invocation of *del Valle Ruiz v. Spain* to argue that the contribution requirement merely requires a “commitment of resources,” noting that the issue in that case was whether this criterion required the claimants’ active contribution.¹⁹⁹
230. With this in mind, the Respondent asserts that many tribunals have confirmed that merely holding a type of asset identified as an example of an “investment” in a BIT does not demonstrate an investment in the ordinary meaning of the term. Rather, the action of investing is also required. Accordingly, the Respondent considers it “uncontroversial” that a mere purchase of an asset does not satisfy the contribution requirement.²⁰⁰

Acquisitions of claims against a state involve no contribution to an economic activity

231. Relatedly, relying on *Nations Energy v. Panama* and *Phoenix Action v. Czech Republic*, the Respondent contends that acquiring claims against a state does not contribute to an economic venture and thus does not qualify as an investment.²⁰¹
232. The Respondent alleges that the Claimants do not directly challenge its position, but merely point to the “highly controversial” decision in *Gramercy v. Peru*, which concerned whether the purchase of defaulted public debt constituted an investment (see para. 350 below). The Respondent notes that, in finding that the element of

¹⁹⁷ Reply, ¶ 110.

¹⁹⁸ Reply, ¶¶ 109-114.

¹⁹⁹ Reply, ¶¶ 115-116.

²⁰⁰ Reply, ¶ 119.

²⁰¹ Memorial on Jurisdiction, ¶¶ 134-135; Reply, ¶ 120.

contribution was not satisfied, the dissenting opinion in that case explained that Gramercy was buying a claim against the Peruvian government through “a speculative purchase of uncertain investments.”²⁰² The Respondent moreover argues that the majority’s decision in *Gramercy v. Peru* is not instructive, as the facts differ from the present dispute.²⁰³

233. With this in mind, the Respondent concludes that purchases of claims against a state do not qualify as “investments.”²⁰⁴

Whether the Claimants made a protected investment must be assessed by reference to the █████ Assignment Agreements

234. The Respondent further rejects the Claimants’ position (see para. 323 below) to the effect that the existence of the Claimants’ purported investment should be assessed by reference to the Oak Loan.²⁰⁵ Rather, the Respondent submits that the Claimants must show that the 2016 Assignment Agreements themselves contributed to economic activity. The Respondent in particular denies that the authorities invoked by the Claimants (including *SCB v. Tanzania*) support their position in this regard. The facts here are said to be closer to *Phoenix Action v. Czech Republic* than to *SCB v. Tanzania*, as the Claimants are part of “vulture funds” whose conduct is that of “a speculative debt hunter” and who admit to seeking BIT protection through the █████ Assignment Agreements.²⁰⁶ Indeed, the Respondent asserts that, at the time of the investment, the Claimants had no expectation of an economic return through repayment of the loan. The only prospect of return was through NCWO payments or successful litigation against the state.²⁰⁷

²⁰² Reply, ¶¶ 95 and 121-125.

²⁰³ Reply, ¶ 126.

²⁰⁴ Reply, ¶ 127.

²⁰⁵ Memorial on Jurisdiction, ¶¶ 145-146; Reply, ¶¶ 129-130 and 143.

²⁰⁶ Reply, ¶¶ 132-137.

²⁰⁷ Reply, ¶¶ 137-138.

235. For the Respondent, there is an inherent presumption in the case law that the purchase of rights associated with a prior investment is distinct from that investment, with tribunals looking to the former to determine the existence of a contribution.²⁰⁸ This is said to be confirmed by *Alps Finance v. Slovakia*, where the tribunal rejected the contention that the claimant’s acquisition of receivables through assignment was an investment, finding that the assignment contract amounted to a “mere purchase-sale contract.”²⁰⁹
236. With this in mind, the Respondent asserts that the Claimants fail to explain how the █████ Assignment Agreements contributed to economic activity, adding that the █████ Assignment Agreements are each “a mere purchase-sale contract” through which the Claimants’ affiliates purportedly sold them discounted receivables.²¹⁰ Indeed, while the Respondent acknowledges that █████ project that the Oak Loan originally financed would qualify as economic activity, it observes that the █████ Assignment Agreements had nothing to do with that project and that the Claimants admit no involvement in granting the Oak Loan.²¹¹

The Claimants purchased purported claims, which did not contribute to economic activity

237. Against this background, the Respondent submits that the Claimants, through the █████ Assignment Agreements, purchased purported claims against Portugal, which did not contribute to economic activity.²¹²
238. More specifically, the Respondent explains that the Claimants had no expectation of a return from the original Oak Loan, but merely sought to acquire (through the

²⁰⁸ Reply, ¶¶ 139 and 143.

²⁰⁹ Reply, ¶¶ 140-142.

²¹⁰ Memorial on Jurisdiction, ¶¶ 143-144; Reply, ¶¶ 141 and 146.

²¹¹ Memorial on Jurisdiction, ¶ 146.

²¹² Memorial on Jurisdiction, ¶ 147; Reply, ¶ 144.

████ Assignment Agreements) an NCWO claim in relation to it and the possibility of launching litigation against Portugal.²¹³

239. The Respondent thus rejects the Claimants' contention (see paras. 323-324 below) that they invested in the Oak Loan. [REDACTED]

240. The Respondent contends that the Claimants were aware of these facts, and of the Parties' dispute, when they acquired their purported interest (see Sections V.D and V.E). [REDACTED]

[REDACTED] The Respondent considers it undisputed that the Claimants understand their Oak Loan interests to consist of their purported rights to NCWO payments and associated claims, as they “make no reference [...] to other means by which they might profit from their purported investment.”²¹⁶ The Respondent thus considers it unsurprising that [REDACTED], as the Claimants’ corporate group is notorious for purchasing distressed debt and litigating aggressively.²¹⁷ Indeed, the Respondent observes that the Claimants

²¹³ Reply, ¶ 145.

²¹⁴ Memorial on Jurisdiction, ¶¶ 147 and 149; Reply, ¶ 147.

²¹⁵ Memorial on Jurisdiction, ¶ 151; Reply, ¶ 148.

²¹⁶ Memorial on Jurisdiction, ¶¶ 150-151.

²¹⁷ Memorial on Jurisdiction, ¶ 149; Reply, ¶ 149.

acknowledge that only the Resolution Fund would benefit from a potential repayment of the Oak Loan due to its privileged position in the real-world litigation.²¹⁸

241. Accordingly, because the Claimants knowingly allocated their resources – if resources were at all allocated²¹⁹ – into a loan unrecoverable outside of the NCWO process, the Claimants did not contribute to any economic activity in Portugal. Instead, the Claimants conducted “a one-off transaction between non-Portuguese entities without any intent to engage in an economic activity in Portugal.”²²⁰ [REDACTED]

- (ii) The Claimants cannot demonstrate that they assumed investment risk in acquiring their purported Oak Loan interests

242. The Respondent submits that the Claimants have failed to show that they assumed investment risk in making their purported investments, as required for protection under Article 25 of the ICSID Convention and Article 1(1) of the BIT.²²²

243. The Respondent explains that “investment risk,” as distinct from ordinary commercial and sovereign risk, is the risk that a given economic activity will not be financially successful for reasons inherent in that economic activity.²²³ The Respondent rejects the Claimants’ contention that “the very fact that there is a dispute indicates risk.”²²⁴ The Respondent also considers inapposite in this context the Claimants’ invocation of *Manchester Securities v. Poland*, since the investments in that case (non-performing

²¹⁸ Memorial on Jurisdiction, ¶ 148.

²¹⁹ [REDACTED]

[REDACTED] See Reply, ¶ 151 (n. 275). See also Bifurcation Request, ¶¶ 37-41 and 46.

²²⁰ Memorial on Jurisdiction, ¶ 153; Reply, ¶ 151; Bifurcation Request, ¶ 39.

²²¹ Reply, ¶¶ 152-161.

²²² Memorial on Jurisdiction, ¶¶ 168-169 and 175; Reply, ¶ 172; Bifurcation Request, ¶ 48.

²²³ Memorial on Jurisdiction, ¶¶ 170-171; Reply, ¶¶ 172-175 and 182-183; Bifurcation Request, ¶¶ 49-50.

²²⁴ Reply, ¶¶ 174-175.

loans secured by mortgages) are typically made with the expectation that the investor can recover the amount owed by restructuring the loan.²²⁵

244. In contrast, the Respondent contends, when acquiring their purported Oak Loan interests, the Claimants knew that BES was under resolution and that their only feasible return was by pursuing claims against Portugal. This is not an investment risk, but a sovereign risk of receiving less than expected in the resolution process.²²⁶

245. The Respondent moreover insists that any purported risk associated with the Oak Loan itself was not an investment risk. The Respondent argues that a return on investment is certain in a loan, such as the Oak Loan, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(iii) The Claimants cannot demonstrate an investment of the requisite duration

246. The Respondent further insists, relying on *Doutremepuich v. Mauritius*, that an investment is protected only if it is of a certain duration, said to be at least two years.²²⁸ Short-duration purchase-sale agreements, by contrast, are not protected. According to the Respondent, the cases invoked by the Claimants challenging the two-year threshold still refer to timeframes of months or years and would not accept one-off transactions as meeting the duration requirement.²²⁹

247. The Respondent rejects the Claimants' attempt to satisfy the temporal requirement by relying on the characteristics of the Oak Loan itself. Citing *Alps Finance v. Slovakia*, the Respondent argues that the Claimants must satisfy the temporal requirement by

²²⁵ Reply, ¶¶ 176-180.

²²⁶ Memorial on Jurisdiction, ¶¶ 172-173; Reply, ¶ 180; Bifurcation Request, ¶¶ 51-53.

²²⁷ Memorial on Jurisdiction, ¶ 174; Reply, ¶¶ 181 and 184.

²²⁸ Memorial on Jurisdiction, ¶ 176; Reply, ¶ 185.

²²⁹ Reply, ¶ 187.

reference to the 2016 Assignment Agreements.²³⁰ These contracts are said to have no ongoing duration and are equivalent to one-off transactions.

248. The Respondent further considers that the duration requirement would not be met even by the Oak Loan itself. [REDACTED]

(iv) The Claimants cannot establish that their purported acquisition of Oak Loan interests made a contribution in the territory of Portugal

249. The Respondent also submits that, regardless of whether the Claimants have contributed to an economic activity, this purported contribution does not have the requisite ties to Portuguese territory.²³²

250. The Respondent thus explains that the BIT requires a territorial nexus between an investment and Portuguese territory. Article 1(1) of the BIT defines “investment” as assets invested “in the territory” of the host state, and Article 9 of the BIT establishes a tribunal’s jurisdiction over disputes regarding investments made “in the territory” of the host state. The same inference follows from the BIT’s object and purpose, as the treaty’s preamble mentions creating favorable conditions for “investments made by investors of one Contracting Party *in the territory* of the other Contracting Party,” as well as from numerous references to territoriality in the treaty text.²³³

251. The Respondent contends that several investment tribunals have recognized the importance of this territorial nexus.²³⁴ The *SGS v. Philippines* tribunal, for example, interpreted similar treaty text to exclude investments made outside of the host state’s territory, regardless of any benefits received by that state. The Singapore Court of Appeal similarly affirmed a judgment setting aside the *Swissbourgh v. Lesotho* award

²³⁰ Memorial on Jurisdiction, ¶¶ 177-178; Reply, ¶¶ 188-189.

²³¹ Reply, ¶¶ 190-192.

²³² Memorial on Jurisdiction, ¶ 141. See also Bifurcation Request, ¶ 47.

²³³ Memorial on Jurisdiction, ¶¶ 136-137.

²³⁴ Memorial on Jurisdiction, ¶¶ 138-140.

because of the absence of a territorial nexus between the alleged investment and the host state.

252. In the Respondent's view, the Claimants cannot establish the requisite territorial link.²³⁵

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Respondent moreover rejects the Claimants' suggestion that the Oak Loan may have had other purposes apart from financing the [REDACTED] project, [REDACTED]

[REDACTED] The Respondent contends that the Claimants, in their Counter-Memorial, shifted position to try to show the territorial link by relying on BES's own operations [REDACTED]

[REDACTED].²³⁹

253. Among other things, the Respondent rejects the Claimants' position (see para. 357 below) to the effect that the Oak Loan was located in Portuguese territory [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is said to confirm that the Claimants' investment is not the Oak Loan itself, but rather the acquisition of claims.²⁴⁰

²³⁵ Memorial on Jurisdiction, ¶ 158; Reply, ¶¶ 164-167.

²³⁶ Memorial on Jurisdiction, ¶ 159.

²³⁷ Memorial on Jurisdiction, ¶ 160. See also Reply, ¶ 162; Bifurcation Request, ¶¶ 44-45.

²³⁸ Memorial on Jurisdiction, ¶ 161.

²³⁹ Reply, ¶ 162.

²⁴⁰ Reply, ¶¶ 165-166.

254. In any event, the Respondent sees no link to Portugal even under the Claimants' preferred test. [REDACTED]

(v) The Claimants have no investments even if the Tribunal were to apply their preferred flexible approach to jurisdiction *ratione materiae*

255. The Respondent denies the existence of an investment even under the Claimants' flexible approach to Article 25 of the ICSID Convention, by which the *Salini* criteria are deemed indicative rather than mandatory.²⁴²

256. The Respondent reiterates that the decisions the Claimants rely on for this position are controversial and have been accused of bypassing the distinction between an "investment" and a "commercial transaction."²⁴³ For the Respondent, a more appropriate approach to the "flexible" test is embodied in *Phoenix Action*, where the tribunal held that it should not only consider the *Salini* criteria, but also whether assets (i) were invested in accordance with host state laws and (ii) are *bona fide*.²⁴⁴ Applying the flexible approach would thus not aid the Claimants, as [REDACTED]

[REDACTED]²⁴⁵
Moreover, Portugal considers that, as is illustrated by assessing the Claimants' alleged investment through the lens of good faith in the manner of the *Phoenix Action* tribunal, a consideration of broader circumstances militates against protecting their alleged investment.²⁴⁶

257. In the Respondent's view, the *bona fide* criterion therefore further confirms that there is no jurisdiction *ratione materiae* under a flexible approach, considering that:²⁴⁷

²⁴¹ Reply, ¶¶ 167-170.

²⁴² Reply, ¶¶ 194-195.

²⁴³ Reply, ¶¶ 196-199.

²⁴⁴ Reply, ¶¶ 200-202.

²⁴⁵ Reply, ¶ 203.

²⁴⁶ Reply, ¶¶ 204-208.

²⁴⁷ Reply, ¶ 205.

- as to the timing of the investment, the Claimants entered into the purported investment when the alleged violations and damages had already occurred or were foreseeable (see Sections V.C and V.D);
- as to the timing of Claimants' claims, the Claimants' claims are based on events that predate their purported investment (see Section V.C);
- as to the substance of the investment, the [REDACTED] Assignment Agreements concern operations amounting to a mere redistribution of interest within the Claimants' company groups;
- regarding the nature of the operation, the Claimants admit that the [REDACTED] Assignment Agreements were concluded not with a view of engaging in economic activity, but because "Elliott and Silver Point wanted to avail themselves of Mauritius' bilateral investment treaty with Portugal"; and
- [REDACTED]

258. Accordingly, the Respondent insists that the present case concerns [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸

b. The Claimants acquired their purported investments in violation of Portuguese law

259. The Respondent contends that the Claimants have no protected investment because they acquired their purported investments in violation of Portuguese law.²⁴⁹

260. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁴⁸ Reply, ¶¶ 210-211.

²⁴⁹ Memorial on Jurisdiction, ¶ 180; Reply, ¶ 212.

²⁵⁰ Reply, ¶¶ 213-214 and 234.

261. This being so, the Respondent points out that the Claimants' position in these proceedings is nonetheless undisputedly premised on the Oak Loan remaining in BES, and thus also on the Claimants' contemporaneous conduct in concluding the Assignment Agreements being contrary to the BoP's decisions. The Respondent contends that the Claimants' and their affiliates' chain of conduct was capable of frustrating the purposes of the BoP's decisions and the resolution process.²⁵¹
262. Thus, the Respondent explains that this conduct had the purpose of seeking payment of the full Oak Loan interest from Novo Banco, in contravention of the BoP decisions and the 2014 Banking Law. This in turn undermined the purpose of the bridge bank's establishment and the preservation of the perimeter of assets assigned to it, with potentially catastrophic consequences for the resolution process.²⁵²
263. In the Respondent's view, in arguing that they acquired their purported Oak Loan interests in accordance with Portuguese regulations, the Claimants moreover attempt to establish an unjustifiably high threshold for illegality, whereas "non-triviality" has been confirmed in ICSID practice as a sufficient standard for the loss of BIT protection.²⁵³
264. Against this background, the Respondent at the outset (i) denies that it would be estopped from raising the illegality objection. The Respondent then argues (ii) that the BIT does not protect investments in the event of non-trivial violations of Portuguese law, (iii) that the Claimants' purported investments flagrantly violated Portuguese law and BoP decisions, and (iv) that such violations were non-trivial and indeed serious. Finally, the Respondent (v) concludes that the Assignment Agreements' violation of Portuguese law attracts significant sanctions and renders them illegal and ineffective.

²⁵¹ Reply, ¶¶ 215-216.

²⁵² Reply, ¶¶ 217-219.

²⁵³ Reply, ¶ 220.

(i) The Respondent is not estopped from raising the Claimants' illegality

265. The Respondent denies that it is estopped from raising the illegality objection, arguing that the Claimants misrepresent both the doctrine of estoppel and the relevant underlying facts.²⁵⁴
266. *First*, the Respondent argues that estoppel requires several cumulative conditions. Estoppel imposes consequences under international law only regarding conduct that is clear, unambiguous, voluntary, unconditional, and authorized by the state. The conduct moreover should not arise as part of argumentation or negotiation, while the other party must detrimentally rely on the conduct in good faith.²⁵⁵ Relatedly, the Respondent contends that, in the jurisprudence invoked by the Claimants, no tribunal has concluded that silence alone constitutes a sufficient representation to establish estoppel, but instead tribunals have based their conclusions on the host state's positive acts of acceptance. Conversely, the Claimants have made no effort to establish reliance, detriment to themselves, or advantage to Portugal.²⁵⁶ Indeed, the Respondent maintains not only that no such clear, unconditional, voluntary, and unambiguous representation was given by Portugal regarding the legality of the [REDACTED] Assignment Agreements, but argues moreover that the Respondent has consistently objected to their validity.²⁵⁷
267. *Second*, and relatedly, the Respondent rejects the Claimants' position (see para. 387 below) that Portugal raised illegality allegations for the first time in this arbitration.²⁵⁸ The Respondent asserts that the BoP has made specific allegations of illegality in various domestic proceedings prior to this arbitration.²⁵⁹ The Respondent further notes that ICSID tribunals have, in assessing estoppel claims, considered arguments raised

²⁵⁴ Reply, ¶¶ 316-317.

²⁵⁵ Reply, ¶¶ 318-319 and 337.

²⁵⁶ Reply, ¶¶ 320-321 and 337.

²⁵⁷ Reply, ¶ 322.

²⁵⁸ Reply, ¶ 323.

²⁵⁹ Reply, ¶ 324.

outside of the dispute.²⁶⁰ [REDACTED]

268. [REDACTED]

[REDACTED]

269. Accordingly, the Respondent concludes that it is not estopped from arguing the illegality of the Assignment Agreements.²⁶⁷

²⁶⁰ Reply, ¶ 324.

²⁶¹ Memorial on Jurisdiction, ¶ 201; Reply, ¶¶ 325-326 and 337. See also Bifurcation Request, ¶ 69.

²⁶² Reply, ¶ 327.

²⁶³ Reply, ¶¶ 328-329.

²⁶⁴ Reply, ¶¶ 330-331.

²⁶⁵ Reply, ¶ 332.

²⁶⁶ Reply, ¶¶ 333-334.

²⁶⁷ Reply, ¶¶ 335-337.

(ii) The BIT offers no protection in case of non-trivial violations of Portuguese law

270. The Respondent observes that the BIT requires investments to be made in accordance with the host state's laws and "regulations." The Respondent thus argues that investors must observe any directives or standards issued by empowered governmental authorities (including administrative acts), as is further confirmed by the BIT's Portuguese version ("*de acordo com as leis e regulamentos*").²⁶⁸
271. The Respondent contends that ICSID tribunals have confirmed that such treaty terminology excludes from protection investments made through "non-trivial" violations of the host state's law.²⁶⁹ In contrast, the Respondent rejects the Claimants' contention that protection would only be excluded for serious breaches of local law, which finds no support in the treaty text or the VCLT's general rules of interpretation. More specifically, the Respondent considers that the BIT contains no language that would limit the application of the legality clause in such a manner, and the same conclusion is said to follow from its object and purpose and *travaux préparatoires*.²⁷⁰
272. The Respondent further explains that tribunals assess whether a violation is sufficiently severe by reference to the materiality of the violation, and that they have deprived purported investments of protection where non-trivial violations jeopardized relevant public policy goals.²⁷¹ The Respondent adds that, while gravity of the relevant law is central, tribunals also consider the intention underlying investor conduct. This is said to require a balancing exercise, assessing whether the loss of treaty protection is proportional to a claimant's non-compliance.²⁷²

²⁶⁸ Memorial on Jurisdiction, ¶ 182.

²⁶⁹ Reply, ¶ 183.

²⁷⁰ Reply, ¶¶ 222-226.

²⁷¹ Reply, ¶¶ 228-229.

²⁷² Memorial on Jurisdiction, ¶¶ 184-185; Reply, ¶¶ 228-232.

273. With this in mind, the Respondent contends that the Claimants are not entitled to BIT protections, as their violations of Portuguese law were not trivial, but serious and flagrant.²⁷³

(iii) The Claimants' purported investments violated Portuguese law

274. Citing decisions of Portugal's Supreme Court, the Respondent contends that BoP decisions, being administrative acts enacted by duly-authorized government authority, constitute regulations. The Respondent adds that, under Portuguese law, administrative acts are binding, imperative, and self-executing legal instruments that express decisions of public authority and affect the legal situations of individuals or entities.²⁷⁴

275. The Respondent explains that the BoP enacted various decisions under the 2014 Banking Law to ensure the orderly resolution of BES. These decisions confirmed that the Oak Loan was held by BES and had the effect of exempting BES from making payments under existing arrangements. According to the Respondent, these decisions were issued in the public interest to ensure the orderly resolution of BES and safeguard the stability of the Portuguese financial system by pursuing the goals established by the 2014 Banking Law for resolution measures.²⁷⁵

276. The Respondent asserts that the Claimants disregarded these BoP decisions and violated Portuguese law by:

■ [REDACTED]
■ [REDACTED]

²⁷³ Memorial on Jurisdiction, ¶ 186; Reply, ¶ 233.

²⁷⁴ Memorial on Jurisdiction, ¶ 188.

²⁷⁵ Memorial on Jurisdiction, ¶¶ 189-191.

²⁷⁶ Memorial on Jurisdiction, ¶¶ 187, 192 and 197; Reply, ¶ 235; Bifurcation Request, ¶¶ 66-67. See also Bifurcation Request, ¶ 68.

[REDACTED]

277. The Respondent submits that the Claimants expressly contravened BoP decisions by designating Novo Banco, rather than BES, as the borrower under the Facility Agreement when concluding the Assignment Agreements.²⁷⁷

278. In this context, the Respondent *first* explains that BoP decisions were clear and determinative that BES remained the borrower under the Facility Agreement.²⁷⁸

279. *Second*, the Respondent asserts that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

280. *Third*, the Respondent rejects the Claimants' contention that the transfer of the Oak Loan and the identity of the borrower "is a live issue before the Portuguese Courts."²⁸¹ At the outset, the Respondent observes that the Claimants' claims in this proceeding are premised on the Oak Loan being within BES. They thus cannot excuse their illegal conduct on the (false) basis that it remains unclear whether the Oak Loan is within BES.²⁸² Moreover, the Respondent denies that the BoP has in the Portuguese court proceedings stated that the Oak Loan was transferred to Novo Banco and then

²⁷⁷ Reply, ¶¶ 255-256.

²⁷⁸ Memorial on Jurisdiction, ¶ 189(b); Reply, ¶¶ 257-261.

²⁷⁹ Memorial on Jurisdiction, ¶¶ 195-196; Reply, ¶¶ 262-264.

²⁸⁰ Reply, ¶ 265.

²⁸¹ Reply, ¶ 266.

²⁸² Reply, ¶ 267.

back to BES.²⁸³ In addition, considering the nature of the BoP’s decisions, the Respondent argues that these decisions are binding and self-executing without the need for further development through other judicial or administrative decisions. They are thus binding on their addressees until they are set aside or revoked by a court or the BoP itself, regardless of whether the Claimants have challenged them.²⁸⁴ The Respondent adds that the Claimants are not aided by the fact that the Assignment Agreements are governed by English law (see paras. 380 and 383 below), as the UK Supreme Court has held that the BoP’s December 22, 2014 Decision “is to be recognised as affecting rights under an English law contract.”²⁸⁵

281. The Respondent thus concludes that the Oak Loan has at all times remained within BES and that [REDACTED]

- [REDACTED]
282. [REDACTED]
[REDACTED]

283. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

284. [REDACTED]
[REDACTED]

²⁸³ Reply, ¶ 268.

²⁸⁴ Reply, ¶¶ 269-273.

²⁸⁵ Reply, ¶¶ 274-275.

²⁸⁶ Reply, ¶ 276.

²⁸⁷ Memorial on Jurisdiction, ¶ 189(a); Reply, ¶¶ 278 and 283. See also Bifurcation Request, ¶¶ 63-64.

285.

286.

287.

²⁸⁸ Reply, ¶¶ 279-282 and 286.

²⁸⁹ Reply, ¶¶ 284-285.

²⁹⁰ Reply, ¶ 287.

²⁹¹ Reply, ¶¶ 288-289.

²⁹² Reply, ¶¶ 290-291.

²⁹³ Memorial on Jurisdiction, ¶¶ 193-194 (referencing Memorial on Merits, ¶ 59 (n. 122)); Reply, ¶¶ 292-293.

288.

[REDACTED]

(iv) The Claimants' violations of Portuguese law were non-trivial and serious

289. The Respondent argues that the laws and regulations breached by the Claimants are of great systemic importance, such that their contravention was a serious violation of Portuguese law.²⁹⁵

290. The Respondent explains that the resolution regime was established to safeguard systemic stability in the banking sector. In domestic law, it pursues such essential interests as:²⁹⁶

- ensuring continuity in providing essential financial services;
- protecting against systemic risks;
- safeguarding public finance interest; and
- safeguarding depositor trust.

291. The Respondent further observes that, in EU law, the BRRD acknowledges that the failure of a cross-border institution will likely affect the stability of financial markets in different Member States, and it establishes a resolution regime that gives authorities credible tools to intervene in a failing institution and ensure continuity of critical functions. These resolution measures include *inter alia* the transfer of assets and

²⁹⁴ Reply, ¶¶ 294-296.

²⁹⁵ Memorial on Jurisdiction, ¶¶ 198, 202 and 206; Reply, ¶ 236.

²⁹⁶ Memorial on Jurisdiction, ¶ 204; Reply, ¶¶ 237-238. See also Memorial on Jurisdiction, ¶¶ 198-200.

liabilities to a bridge bank and the suspension of certain contractual obligations. According to the Respondent, Portugal's banking law provides the same.²⁹⁷

292. The Respondent considers that, in this instance, the resolution of BES was urgent and necessary for the public interest because:²⁹⁸

- BES's size, qualification as a significant credit institution for European regulatory supervision purposes, and importance for Portugal's financial system meant that its failure entailed unequivocal systemic risk; and
- there was a serious and grave risk that BES would default in the short term on its obligations and thus on the requirements for continuing its activity, which would lead to its liquidation.

293. Accordingly, the Respondent argues that the creation of Novo Banco and its insulation from BES's exposure risks was necessary to ensure the continuity of BES's critical functions.²⁹⁹ Indeed, the Respondent maintains that all of the BoP's decisions were issued so as to ensure an orderly resolution of BES by (i) creating Novo Banco and imposing an appropriate division of assets between the bridge bank and BES, and (ii) suspending BES's obligations to preserve the perimeter of its assets and liabilities in preparation for a proper liquidation process. These decisions sought to safeguard the stability of Portugal's financial system by pursuing the goals established for resolution measures in Article 145-A of the 2014 Banking Law.³⁰⁰

294. The Respondent considers these goals to reflect important interests and that actions contrary to them are a serious matter. The Tribunal thus has no reason to depart from ICSID jurisprudence recognizing the need to protect the public interest underlying the stability of financial systems.³⁰¹ This equally means that the Claimants are wrong to

²⁹⁷ Reply, ¶¶ 239-241.

²⁹⁸ Reply, ¶ 242.

²⁹⁹ Reply, ¶ 243.

³⁰⁰ Reply, ¶¶ 244-245.

³⁰¹ Reply, ¶ 246.

characterize such violations as “trivial,” particularly because the examples of “trivial” illegality in the cases cited raise no issues of comparable systemic importance.³⁰²

295. [REDACTED]

296. [REDACTED]

297. [REDACTED]

(v) The Assignment Agreements’ violation of Portuguese law attracts significant sanctions and renders them illegal and ineffective

298. [REDACTED]

³⁰² Reply, ¶¶ 247-249.

³⁰³ Reply, ¶¶ 250-251.

³⁰⁴ Memorial on Jurisdiction, ¶ 203; Reply, ¶ 252.

³⁰⁵ Memorial on Jurisdiction, ¶ 203; Reply, ¶¶ 253-254.

³⁰⁶ Memorial on Jurisdiction, ¶¶ 204-205.

[REDACTED]

299. The Respondent explains that the Portuguese legal order requires all entities to respect the public administration's acts and that the BoP's decisions form part of the constitutionally protected legality principle.³⁰⁸ This rule-of-law principle is not limited to legislation *stricto sensu*, it argues, but integrates a broad range of legal sources, including administrative acts. Accordingly, the Respondent argues that breaches of administrative acts are invalid and ineffective.³⁰⁹

300. The Respondent moreover contends that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

301. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

302. [REDACTED]

[REDACTED]

the Respondent concludes that these violations, [REDACTED]

[REDACTED]

³⁰⁷ Reply, ¶ 297.

³⁰⁸ Reply, ¶ 298.

³⁰⁹ Reply, ¶ 298.

³¹⁰ Reply, ¶¶ 306-309.

³¹¹ Reply, ¶¶ 310-312.

c. The Claimants hold no title over interests in the Oak Loan

303. The Respondent also contests the Tribunal’s jurisdiction *ratione materiae* on account that the Claimants do not own the assets they claim are protected by the BIT.³¹³

304. In particular, the Respondent contends that (i) the Claimants bear the burden of proving title to their alleged investments under the relevant municipal law, but failed to show that they acquired title under (ii) Portuguese law, (iii) English law, or (iv) the Assignment Agreements.

(i) The BIT only protects assets over which the Claimants can establish title under host state law

305. The Respondent argues that the Claimants have failed to carry their admitted burden to show title to their alleged investments. The Respondent further argues that the BIT only protects assets over which a claimant has title, as made clear by the Treaty’s use of the possessive terms “of” investors, “made by an investor,” and investors and “their” investments.³¹⁴ The same follows both from the definition of the English word “asset” and general international law.³¹⁵

306. Moreover, the Respondent relies *inter alia* on *Bozo v. Panama* and *Vestey v. Venezuela* to argue that the question whether a claimant holds title over assets constituting a purported investment should be determined in accordance with the law of the host state.³¹⁶ Title to the Claimants’ purported investments in Portugal thus necessarily is a

³¹² Reply, ¶¶ 313-316.

³¹³ Memorial on Jurisdiction, ¶ 207; Reply, ¶ 339. See also Reply, ¶ 380 (n. 606).

³¹⁴ Memorial on Jurisdiction, ¶¶ 208-210 (referencing BIT Articles 2(1), 3(1), 3(2), 4(1), 6(1), 9(1), 10 and 11); Reply, ¶ 339.

³¹⁵ Memorial on Jurisdiction, ¶¶ 211-213.

³¹⁶ Memorial on Jurisdiction, ¶ 214; Reply, ¶ 342.

question of Portuguese law, irrespective of the law governing the Facility Agreement or Assignment Agreements.³¹⁷

(ii) The Claimants have not established title under Portuguese law

307. With this in mind, the Respondent submits that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

308. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

309. The Respondent argues that the 2016 Assignment Agreements violate the BoP's decisions and Portuguese law for the same reasons. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

310. [REDACTED]
[REDACTED]

³¹⁷ Memorial on Jurisdiction, ¶ 215; Reply, ¶ 342.

³¹⁸ Memorial on Jurisdiction, ¶¶ 217-219; Reply, ¶¶ 343-346.

³¹⁹ Memorial on Jurisdiction, ¶ 220.

³²⁰ Memorial on Jurisdiction, ¶ 225; Reply, ¶¶ 347-349.

³²¹ Memorial on Jurisdiction, ¶¶ 221 and 225-226; Reply, ¶¶ 350-353.

[REDACTED]

311. [REDACTED]

312. [REDACTED]

[REDACTED]

313. [REDACTED]

314. [REDACTED]

322 [REDACTED]

323 [REDACTED]

324 [REDACTED]

325 [REDACTED]

[REDACTED]

315. [REDACTED]

316. [REDACTED]

³²⁶ Memorial on Jurisdiction, ¶ 222; Reply, ¶ 364. See also Bifurcation Request, ¶¶ 59-60.

³²⁷ Reply, ¶¶ 364-365.

³²⁸ Reply, ¶¶ 366-367.

³²⁹ Reply, ¶ 368. See also Memorial on Jurisdiction, ¶ 223; Bifurcation Request, ¶¶ 62-65.

³³⁰ Reply, ¶ 369.

³³¹ Reply, ¶¶ 370-373. [REDACTED]

³³² Reply, ¶ 374.

³³³ Reply, ¶¶ 374-376 (emphasis in the Reply).

[REDACTED]

317. [REDACTED]

318. Accordingly, the Respondent concludes that the Claimants cannot establish title to the NCWO rights.³³⁷

(2) The Claimants' Position

319. The Claimants reject the grounds on which the Respondent disputes the Tribunal's jurisdiction *ratione materiae*, arguing that the Claimants: (a) hold investments within the meaning of the BIT and the ICSID Convention; (b) acquired their investments in accordance with Portuguese laws and regulations; and (c) validly received title to their Oak Loan interests through the [REDACTED] Assignment Agreements.³³⁸

320. According to the Claimants, the latter two objections – concerning the legality of the acquisition and validity of the title – suffer from the same fundamental flaw – [REDACTED]

[REDACTED] Although the Claimants

³³⁴ Reply, ¶ 377.

³³⁵ Reply, ¶ 378.

³³⁶ Memorial on Jurisdiction, ¶ 224; Reply, ¶ 379. See also Bifurcation Request, ¶ 66.

³³⁷ Reply, ¶ 380.

³³⁸ Rejoinder, ¶¶ 70-71.

consider it unnecessary to discuss those objections in detail, they demonstrate their invalidity for completeness' sake.³³⁹

a. The Claimants hold investments within the meaning of the BIT and the ICSID Convention

321. The Claimants submit that (i) their investments are their interests in the Oak Loan. Those interests constitute investments under (ii) the terms of the BIT, and (iii) the “objective” meaning of the term “investment” under Article 25(1) of the ICSID Convention, to the extent (*quod non*) the Tribunal applies the “double-barrelled” test for investment.

(i) The Claimants’ investments are their Oak Loan interests

322. The Claimants explain that their Oak Loan interests represent their investments,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Through the [REDACTED] Assignment Agreements, the Claimants acquired the Oak Loan interests with the accompanying bundle of rights, rather than just the rights to NCWO payments

323. At the outset, the Claimants submit that their investments, acquired through the [REDACTED] Assignment Agreements, are their interests in the Oak Loan as originally arranged and the complete bundle of rights afforded under the Facility Agreement.³⁴⁰

324. More specifically, the Claimants explain that in 2014 Elliott and Silver Point acquired notes from the original noteholders under the Facility Agreement, becoming noteholders themselves. [REDACTED]

³³⁹ Rejoinder, ¶ 71.

³⁴⁰ Counter-Memorial, ¶ 120; Rejoinder, ¶¶ 73 and 78.

[REDACTED]

325.

[REDACTED]

326.

[REDACTED]

327.

[REDACTED]

³⁴¹ Request for Arbitration, ¶ 44; Counter-Memorial, ¶ 120; Rejoinder, ¶ 79.

³⁴² Request for Arbitration, ¶ 44; Counter-Memorial, ¶ 120; Rejoinder, ¶ 80.

³⁴³ Case numbers [REDACTED]

³⁴⁴ Rejoinder, ¶¶ 81-82.

[REDACTED]

328. In the Claimants' view, this defeats the Respondent's assertion (see para. 238 above) that no repayment could have been expected except through the NCWO process when the Claimants acquired their Oak Loan interests.³⁴⁷ [REDACTED]

[REDACTED]

The Claimants' acquisition of Oak Loan interests does not change the nature of the underlying investments

329. The Claimants equally submit that their acquisition of the Oak Loan interests did not change the underlying nature of their investments.³⁵¹

330. The Claimants contend that the Respondent cannot unilaterally change the investment nature of the Oak Loan through a bank resolution. [REDACTED]

[REDACTED]

³⁴⁵ Request for Arbitration, ¶ 45; Counter-Memorial, ¶ 120; Rejoinder, ¶¶ 76-77 and 83-84.

³⁴⁶ Rejoinder, ¶ 85.

³⁴⁷ Rejoinder, ¶ 86.

³⁴⁸ Rejoinder, ¶¶ 87-88.

³⁴⁹ Rejoinder, ¶ 88.

³⁵⁰ Rejoinder, ¶ 89.

³⁵¹ Counter-Memorial, ¶ 124; Rejoinder, ¶ 90.

³⁵² Counter-Memorial, ¶ 121; Rejoinder, ¶ 97.

331. Indeed, the Claimants assert that investment jurisprudence and academic commentary confirm that the acquisition of a pre-existing investment does not deprive it of its “investment” character. The Claimants argue that the Respondent omits relevant additional analysis on this point in *Schreuer’s Commentary on the ICSID Convention*, which explains that controversies over whether the successor had an investment arose “in cases involving acquisitions of existing investments without the injection of funds into the host State, either because the transactions took place completely outside the host State, because the purchase price was nominal, or because the transaction consisted of a donation.”³⁵³
332. With this in mind, the Claimants maintain that here the purchase price for the assignments was neither nominal nor a donation, [REDACTED]. As for the injection of funds into the host state, the Claimants argue that the *Commentary* notes that investment acquisitions implemented entirely outside of the host state that did not involve any capital flows into the host state have been recognized as investments.³⁵⁴ Accordingly, the Claimants argue that the “investment” to be considered for *ratione materiae* purposes is the underlying investment rather than the transaction through which it was acquired.³⁵⁵
333. The Claimants similarly consider inapposite the Respondent’s reliance in this context (see para. 235 above) on *Alps Finance v. Slovakia*, as that tribunal held that, when a claim arises from a contract, the underlying contract should itself qualify as an investment.³⁵⁶ The Claimants find this to be the case here, as their claims concern NCWO rights, which in turn arise out of the Facility Agreement, rather than the Assignment Agreements.³⁵⁷

³⁵³ Counter-Memorial, ¶¶ 122-123; Rejoinder, ¶ 91.

³⁵⁴ Rejoinder, ¶¶ 92-93; Bifurcation Response, ¶ 53. See also Bifurcation Response, ¶¶ 48-49.

³⁵⁵ Rejoinder, ¶ 94.

³⁵⁶ Rejoinder, ¶ 95.

³⁵⁷ Rejoinder, ¶¶ 95-96.

- (ii) The term “investment” in the ICSID Convention should be interpreted by reference to the BIT definition of “investment,” which the Claimants’ investments satisfy

334. The Claimants argue that the Respondent’s preferred “double-barrelled” test is inappropriate because it inserts into the ICSID Convention preconditions for the existence of an investment that otherwise do not exist. Instead, the Claimants assert that the correct approach is to interpret the term “investment” in Article 25(1) of the ICSID Convention by reference to the BIT definition of “investment.”³⁵⁸ With this in mind, the Claimants argue:

- *first*, that the ICSID Convention and the BIT do not require the application of the “double-barrelled” test; and
- *second*, that Portugal and Mauritius agreed on a specific BIT definition of “investment” that covers the Claimants’ investments.³⁵⁹

The ICSID Convention and the BIT do not require the application of the “double-barrelled” test

335. *First*, the Claimants submit that, if an asset satisfies the BIT definition of “investment,” there is a “strong presumption” that it also satisfies the jurisdictional requirements of the ICSID Convention, negating any need for additional inquiry.³⁶⁰

336. According to the Claimants, this approach has persuasively found favor in jurisprudence. Thus, tribunals have explained that it is not up to the arbitrators to impose additional requirements beyond those contained in the BIT and in Article 25(1) of the ICSID Convention.³⁶¹ The Claimants likewise maintain that their approach is grounded in the drafting history of the ICSID Convention, as well as in the very purpose of the international investment regime and the ICSID Convention.³⁶²

³⁵⁸ Request for Arbitration, ¶ 50; Counter-Memorial, ¶¶ 149-150; Rejoinder, ¶¶ 98-99.

³⁵⁹ Rejoinder, ¶ 99.

³⁶⁰ Memorial on Merits, ¶¶ 199 and 201; Counter-Memorial, ¶ 151; Rejoinder, ¶ 100.

³⁶¹ Counter-Memorial, ¶¶ 151-154; Rejoinder, ¶¶ 103-105.

³⁶² Request for Arbitration, ¶ 49; Counter-Memorial, ¶¶ 155-156; Rejoinder, ¶¶ 100-102.

337. At the same time, the Claimants reject the Respondent’s “mischaracterization” of their position to the effect that its test would “sidestep” and render “otiose” the jurisdictional requirements of Article 25 of the ICSID Convention.³⁶³ The Claimants assert that their test does not altogether exclude Article 25. Rather, a tribunal must have “very strong reasons” to disregard the mutually agreed definition of investment in a BIT.³⁶⁴
338. Finally, the Claimants deny that the Respondent’s position is supported by *Schreuer’s Commentary on the ICSID Convention*, as the quoted text merely indicates that the “objective test,” if followed, operates to limit “the types of disputes the parties can agree to submit to the Centre.”³⁶⁵ According to the Claimants, such objective meaning, even if adopted by most tribunals, in practice amounts to little more than a guardrail defining the “outer limit” of what may be considered a protected investment.³⁶⁶ The Claimants’ investments here, by contrast, are “plainly incomparable” to single commercial transactions that would clearly fall outside the outer limit.³⁶⁷ The Claimants thus see little difference between their position and the *Commentary*.³⁶⁸

Portugal and Mauritius agreed on a specific BIT definition of “investment” that covers the Claimants’ investments

339. *Second*, the Claimants argue that Mauritius and Portugal agreed to a specific definition of investment in BIT Article 1(1), which explicitly protects the Claimants’ investment. They could have agreed to exclude debt instruments from BIT protection, or Portugal could have excluded disputes arising from such investments through an ICSID Convention Article 25(4) notification, but did not.³⁶⁹

³⁶³ Rejoinder, ¶ 106.

³⁶⁴ Rejoinder, ¶¶ 106-108.

³⁶⁵ Rejoinder, ¶ 110.

³⁶⁶ Rejoinder, ¶ 110.

³⁶⁷ Rejoinder, ¶ 110.

³⁶⁸ Rejoinder, ¶¶ 110-111.

³⁶⁹ Counter-Memorial, ¶¶ 125 and 157; Rejoinder, ¶ 112.

340. The Claimants elaborate that their Oak Loan interests qualify as “every kind of asset” under the broad definition found in the *chapeau* of Article 1(1), [REDACTED]

The Claimants add that their Oak Loan interests granted them valuable rights, such as the right to NCWO payments, which equally fall within the specifically enumerated illustrative category of protected investments in Article 1(1) – namely, “claims to money, or to any performance having an economic value.”³⁷⁰

341. The Claimants also state that their investments satisfy the BIT’s “territoriality” requirement. The Claimants explain that, for financial investments like the Oak Loan, the jurisprudence has repeatedly held that the BIT’s territoriality condition does not require a physical transfer of funds into the host state.³⁷¹ The more relevant inquiry is whether the host state was the “ultimate beneficiary.”³⁷²

342. Moreover, the Claimants consider that the cases invoked by the Respondent (see para. 251 above) for the argument that the BIT requires a “territorial nexus” with Portugal in fact support the Claimants’ position that such a nexus is present here. The Claimants explain that the tribunal in *SGS v. Philippines* found the territorial requirement satisfied after considering the investment “as a whole.”³⁷³ Similarly, the Claimants maintain that the Singapore Court of Appeal’s decision in *Swissbourgh v. Lesotho* was premised on the fact that the host state can only control acts occurring within its jurisdiction. [REDACTED]

³⁷⁰ Request for Arbitration, ¶ 47; Memorial on Merits, ¶¶ 184-186; Counter-Memorial, ¶¶ 127-129; Rejoinder, ¶ 113. See also Bifurcation Response, ¶ 51.

³⁷¹ Counter-Memorial, ¶¶ 133-139.

³⁷² Counter-Memorial, ¶ 133.

³⁷³ Counter-Memorial, ¶ 140.

³⁷⁴ Counter-Memorial, ¶ 141.

- (iii) In any event, the Claimants' Oak Loan interests are protected "investments" under Article 25(1) of the ICSID Convention

343. The Claimants submit that they have a protected investment under Article 25 of the ICSID Convention even if the "double-barrelled" test were applied. This is because:

- *first*, the *Salini* criteria identified by the Respondent are merely indicative, rather than mandatory prerequisites; and
- *second*, the Claimants' investments in any event meet even a strict application of the *Salini* criteria.³⁷⁵

344. *First*, the Claimants deny the Respondent's assertion (see para. 256 above) to the effect that the *Salini* criteria are applied rigidly by an "overwhelming majority" of tribunals, arguing instead that even the *Salini v. Morocco* tribunal opined that these elements "should be assessed globally."³⁷⁶ The Claimants further observe that tribunals in some of the decisions invoked by the Respondent are "markedly more guarded in their application of the *Salini* criteria,"³⁷⁷ while there is a wealth of jurisprudence rejecting an overly strict application of the criteria.³⁷⁸ In addition, the Claimants insist that their approach is more consistent with basic principles of treaty interpretation reflected in Article 31(1) of the VCLT.³⁷⁹

345. *Second*, the Claimants submit that their investments in any event satisfy the *Salini* criteria, namely: contribution (irrespective of whether it must be specifically linked to Portugal), duration, and risk.

³⁷⁵ Request for Arbitration, ¶ 51; Memorial on Merits, ¶¶ 200-202; Counter-Memorial, ¶¶ 158-159; Rejoinder, ¶ 116; Bifurcation Response, ¶ 46.

³⁷⁶ Rejoinder, ¶¶ 119-120.

³⁷⁷ Rejoinder, ¶¶ 121-122.

³⁷⁸ Counter-Memorial, ¶¶ 160-163; Rejoinder, ¶ 120.

³⁷⁹ Rejoinder, ¶¶ 127-129.

Contribution

346. First, the Claimants assert that the Respondent misstates the test for contribution by insisting that this must entail “a contribution to an economic venture in Portugal.”³⁸⁰
347. The Claimants note that the findings from *Poštová v. Greece* on the *Salini* criteria were effectively *obiter*, and explain that the tribunal’s approach was overly restrictive in not recognizing as a “contribution” funds invested in bonds used by Greece for its budgetary needs.³⁸¹ The Claimants consider this to be an outlier that overlooks the very real economic value created for states when using bond proceeds for “general funding purposes.”³⁸² The Claimants deem the Respondent’s reliance on *Alps Finance v. Slovakia* similarly misplaced. They argue that the *Alps Finance* tribunal held that, in the case of a claim arising out of a contract, the contract itself should qualify as an investment, which is said to be the case here with the Oak Loan.³⁸³ Moreover, the Claimants reject as “seriously exaggerated” the Respondent’s concern (see para. 228 above) to the effect that extending ICSID jurisdiction over debt instruments would undermine the purpose of international investment law by protecting “speculative” transactions.³⁸⁴ In any case, the Claimants observe that states are free to exclude certain categories of investment from protection through explicit treaty terms.³⁸⁵
348. To similar effect, the Claimants deem inapt the Respondent’s reliance on a series of other awards, arguing that those cases concerned loans made by claimants as part of a wider framework of connected investments.³⁸⁶ The tribunals in those cases did not consider whether a corporate loan like the Oak Loan was in itself a protected investment.

³⁸⁰ Counter-Memorial, ¶ 166; Rejoinder, ¶ 136; Bifurcation Response, ¶ 50.

³⁸¹ Counter-Memorial, ¶¶ 164 and 168; Rejoinder, ¶ 137.

³⁸² Counter-Memorial, ¶¶ 168-170; Rejoinder, ¶¶ 137-138; Bifurcation Response, ¶ 47.

³⁸³ Counter-Memorial, ¶ 171.

³⁸⁴ Rejoinder, ¶ 140.

³⁸⁵ Rejoinder, ¶ 141.

³⁸⁶ Rejoinder, ¶¶ 142-144.

349. The Claimants similarly reject the Respondent’s reliance on *Quiborax v. Bolivia*, arguing that the tribunal in that case held that a contribution to an operation made to develop an economic activity in the host state is “not an element of the objective definition of investment.”³⁸⁷ Moreover, the one claimant to which this pertained had received a single share to comply with local legal formalities, [REDACTED]⁸ With this in mind, the Claimants submit that investment tribunals actually favor a flexible approach to “contribution,” citing *Deutsche Bank v. Sri Lanka* and *del Valle v. Spain*.³⁸⁹
350. The Claimants dispute the Respondent’s claim (see para. 233 above) that the mere purchase of a claim against a state does not qualify as a contribution to economic activity. The Parties’ real dispute is said to concern whether the Claimants purchased interests in the Oak Loan (and the accompanying bundle of rights) or interests in claims against Portugal.³⁹⁰ The Claimants point to *Gramercy v. Peru*, where the tribunal rejected an argument similar to the Respondent’s, and thus dismiss the Respondent’s attempts to distinguish the decision.³⁹¹ Regardless, the Claimants argue that, as in *Gramercy*, the BIT’s reference to “claims to money” explicitly protects investments such as the Claimants’.³⁹²
351. The Claimants also reject the Respondent’s reliance on *Phoenix Action v. Czech Republic*, *Nations Energy v. Panama*, and *Antaris v. Czech Republic*.³⁹³ The Claimants consider *Phoenix v. Czech Republic* clearly distinguishable. That decision pertained to abuse of process rather than jurisdiction *ratione materiae* and reflected several complicating factors not present here.³⁹⁴ The Claimants similarly consider *Nations*

³⁸⁷ Rejoinder, ¶ 151.

³⁸⁸ Rejoinder, ¶ 152.

³⁸⁹ Counter-Memorial, ¶¶ 172-173; Rejoinder, ¶¶ 145-149.

³⁹⁰ Rejoinder, ¶ 153.

³⁹¹ Rejoinder, ¶ 162.

³⁹² Counter-Memorial, ¶ 174; Rejoinder, ¶¶ 162-164.

³⁹³ Rejoinder, ¶ 154.

³⁹⁴ Rejoinder, ¶¶ 156-160.

Energy v. Panama unhelpful to the Respondent’s position. Just as that tribunal found that the claimants had invested in shares (and not the tax credits connected with them), so too the Claimants here purchased interests in the Oak Loan with the expectation of returns (rather than the right to NCWO payments connected to those interests). Meanwhile, the Claimants find the Respondent’s reliance on *Antaris v. Czech Republic* “wholly inappropriate,” as the tribunal’s finding pertaining to a “speculative investment” was made in the context of legitimate expectations, not jurisdiction *ratione materiae*.³⁹⁵

352. Accordingly, the Claimants consider it clear that the “contribution” element requires merely the “commitment of resources.”³⁹⁶ It does not require contribution to “an economic activity” in the host state, which is said to be particularly inappropriate in the context of financial investments.

Territorial link

353. Even if the Claimants were required to show a contribution to an “economic activity” in Portugal, the Claimants maintain that they have done so.³⁹⁷

354. The Claimants consider that the Respondent is trying to disconnect the Oak Loan from its wider funding structure. The Claimants see a clear territorial nexus between the Oak Loan and Portugal, [REDACTED]

355. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁹⁵ Rejoinder, ¶¶ 155 and 161.

³⁹⁶ Rejoinder, ¶ 165. See also Bifurcation Response, ¶ 47.

³⁹⁷ Counter-Memorial, ¶ 175; Bifurcation Response, ¶ 54.

³⁹⁸ Counter-Memorial, ¶¶ 99, 105, and 142; Rejoinder, ¶¶ 166-167; Bifurcation Response, ¶ 54.

356.

357.

358.

³⁹⁹ Counter-Memorial, ¶¶ 100-101; Rejoinder, ¶¶ 170-171.

⁴⁰⁰ Counter-Memorial, ¶¶ 22 and 102.

⁴⁰¹ Counter-Memorial, ¶ 102; Rejoinder, ¶¶ 171-172.

⁴⁰² Counter-Memorial, ¶ 104.

⁴⁰³ Counter-Memorial, ¶ 103; Rejoinder ¶ 174.

⁴⁰⁴ Counter-Memorial, ¶¶ 103-104; Rejoinder, ¶ 173.

⁴⁰⁵ Counter-Memorial, ¶ 144.

⁴⁰⁶ Counter-Memorial, ¶¶ 18, 106-107, and 144-145; Bifurcation Response, ¶ 54.

⁴⁰⁷ Counter-Memorial, ¶¶ 17, 108-109, and 143; Rejoinder, ¶ 173; Bifurcation Response, ¶ 54.

[REDACTED]

359. The Claimants further observe that the BoP, [REDACTED], asserted regulatory authority over the Oak Loan. The BoP, the Claimants argue, applied resolution measures to BES and “made decisions regarding the treatment of the Oak Loan.”⁴¹⁰

360. [REDACTED]

361. [REDACTED]

⁴⁰⁸ Counter Memorial, ¶ 144.

⁴⁰⁹ Rejoinder, ¶ 173.

⁴¹⁰ Counter-Memorial, ¶ 145; Bifurcation Response, ¶ 54.

⁴¹¹ Rejoinder, ¶ 168.

⁴¹² Rejoinder, ¶ 168.

⁴¹³ Rejoinder, ¶ 169.

⁴¹⁴ Counter-Memorial, ¶ 176; Rejoinder, ¶ 180.

⁴¹⁵ Counter-Memorial, ¶¶ 110-111, 146, and 176; Rejoinder, ¶¶ 180-181.

[REDACTED]

362. [REDACTED]

363. Accordingly, the Claimants conclude that the Oak Loan contributed substantial funds to economic activity in Portugal and that their Oak Loan interests were therefore an asset invested “in the territory” of Portugal.⁴²²

⁴¹⁶ Rejoinder, ¶¶ 170 and 179-180.

⁴¹⁷ Counter-Memorial, ¶¶ 115-116; Rejoinder, ¶¶ 167 and 175-177.

⁴¹⁸ Rejoinder, ¶ 174.

⁴¹⁹ Rejoinder, ¶ 174.

⁴²⁰ Rejoinder, ¶ 178.

⁴²¹ Counter-Memorial, ¶¶ 112 and 147; Rejoinder, ¶ 182; Bifurcation Response, ¶ 54.

⁴²² Memorial on Merits, ¶ 202; Counter-Memorial, ¶¶ 113-114, 148, and 176; Rejoinder, ¶ 183.

Risk

364. The Claimants maintain that the Respondent overstates the test for the “risk” requirement, adding that the mere existence of the dispute is an indication of risk.⁴²³ The Claimants reject in this respect the Respondent’s reliance (see para. 243 above) on “investment risk” described in *Poštová v. Greece*, preferring instead the position in *Manchester v. Poland*, pursuant to which the “nature of risk will depend on the type of investment.”⁴²⁴ Other tribunals are said to have considered sufficient the risk that investors would lose all or part of their contribution.⁴²⁵
365. Even if such “investment risk” were required, the Claimants submit that this requirement would be met, as the Oak Loan was an investment in the banking operations of BES, which was in serious financial difficulty at the time, so that the proceeds were dependent on the success or failure of the economic venture.⁴²⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Duration

366. Finally, the Claimants contest the Respondent’s assertion that the “duration” criterion for an investment requires a set number of years (see para. 246 above), noting that the Respondent itself “does not seriously dispute” that there is no rigid threshold.⁴²⁸ The Claimants argue that this was recognized by the *Doutremepuich v. Mauritius*

⁴²³ Counter-Memorial, ¶ 177.

⁴²⁴ Counter-Memorial, ¶ 178.

⁴²⁵ Rejoinder, ¶ 184.

⁴²⁶ Counter-Memorial, ¶¶ 180-181; Rejoinder, ¶ 185.

⁴²⁷ Rejoinder, ¶ 186.

⁴²⁸ Rejoinder, ¶ 187.

tribunal cited by the Respondent, adding that several tribunals have found that the duration criterion should be applied flexibly and “assessed in all the circumstances.”⁴²⁹

367. With this in mind, the Claimants note that the Oak Loan’s four-year term satisfied the requisite duration. The Claimants reject the Respondent’s argument that the Claimants’ investments are actually the [REDACTED] Assignment Agreements, which are mere “one-off transactions” that do not meet the duration requirement for investment.⁴³⁰

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

368. Accordingly, the Claimants submit that the *Salini* criteria are in any event met.⁴³²

b. The Claimants acquired their investments in accordance with Portuguese laws and regulations

369. The Claimants urge the Tribunal to dismiss the Respondent’s illegality objection, arguing that they acquired their Oak Loan interests in accordance with Portuguese laws and regulations. [REDACTED]

[REDACTED]

[REDACTED]

370. At the outset, the Claimants argue that BIT Article 1(1) only excludes investments involving serious or severe breaches of local law reflecting “a correspondingly

⁴²⁹ Counter-Memorial, ¶¶ 182-185; Rejoinder, ¶ 187.

⁴³⁰ Counter-Memorial, ¶ 186; Rejoinder, ¶ 188.

⁴³¹ Rejoinder, ¶ 189.

⁴³² Rejoinder, ¶ 190.

⁴³³ Rejoinder, ¶ 191.

significant” host state interest.⁴³⁴ This is said to be confirmed by recent jurisprudence, including *Álvarez y Marín v. Panama*.⁴³⁵

371. The Claimants argue that (i) the Claimants acquired their investments without any violation of Portuguese law, and (ii) the Respondent is in any event estopped or otherwise precluded from raising its illegality objection in this proceeding.⁴³⁶

(i) The Claimants acquired their investments without violating Portuguese law

372. The Claimants dismiss Portugal’s illegality allegations [REDACTED]

373. Indeed, the Claimants argue that none of the BoP’s decisions prohibited the assignment of loans arising out of agreements entered into by BES or Novo Banco. Specifically, the Claimants did not violate Portuguese law or defy BoP decisions [REDACTED]

374. [REDACTED]

⁴³⁴ Counter-Memorial, ¶ 190; Rejoinder, ¶ 196.

⁴³⁵ Counter-Memorial, ¶¶ 190-193; Rejoinder, ¶¶ 197-198.

⁴³⁶ Counter-Memorial, ¶ 188; Rejoinder, ¶ 192.

⁴³⁷ Rejoinder, ¶ 202.

⁴³⁸ Counter-Memorial, ¶¶ 195-198; Rejoinder, ¶¶ 203-204.

_____ This is confirmed by Article 145-J(2) of the 2014 Banking Law, which provided that waiver of timely performance of previously contracted obligations does “not prevent the preservation of all rights of creditors against co-obligors or guarantors.”⁴³⁹

375. The Claimants further argue that they and their affiliates legitimately held the view that Novo Banco was the borrower under the Facility Agreement, and thus was the entity in default. The Claimants note that, unlike BES, Novo Banco was not subject to the BoP moratorium.⁴⁴⁰

[illegible]

377. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴³⁹ Counter-Memorial, ¶ 199; Rejoinder, ¶¶ 213-214; Bifurcation Response, ¶ 63.

⁴⁴⁰ Rejoinder, ¶ 215.

⁴⁴¹ Counter-Memorial, ¶¶ 200-201; Rejoinder, ¶¶ 212 and 216; Bifurcation Response, ¶ 62.

⁴⁴² Rejoinder, ¶ 218.

378.

379.

380.

⁴⁴³ See ¶ 110, *supra*.

⁴⁴⁴ Rejoinder, ¶¶ 202-203. See also Bifurcation Response, ¶ 66.

⁴⁴⁵ Counter-Memorial, ¶¶ 204-205; Rejoinder, ¶¶ 219-221.

⁴⁴⁶ Counter-Memorial, ¶ 204; Rejoinder, ¶ 221.

⁴⁴⁷ Rejoinder, ¶ 222.

⁴⁴⁸ Counter-Memorial, ¶ 205.

⁴⁴⁹ Rejoinder, ¶ 224.

[REDACTED]

The Claimants did not violate Portuguese law or defy BoP decisions by identifying Novo Banco as the borrower under the Oak Loan

381. *Second*, the Claimants deny that the Assignment Agreements would have violated Portuguese law or BoP decisions by designating Novo Banco as the borrower under the Facility Agreement, noting that the issue of whether the Oak Loan was validly transferred back to BES is a live one before Portuguese courts.⁴⁵¹

382. [REDACTED]

383. [REDACTED]

⁴⁵⁰ Counter-Memorial, ¶ 206; Rejoinder, ¶ 225. See also Bifurcation Response, ¶ 64.

⁴⁵¹ Counter-Memorial, ¶ 207; Rejoinder, ¶ 205.

⁴⁵² Rejoinder, ¶ 206.

⁴⁵³ Rejoinder, ¶ 208.

[REDACTED]

384. [REDACTED]

385. Accordingly, the Claimants conclude that they acquired their Oak Loan interests without any violations of Portuguese law.⁴⁵⁶

(ii) The Respondent is in any event estopped or otherwise precluded from raising its illegality objection

386. The Claimants contend that the Respondent is in any event estopped from invoking illegality because of the BoP's prior conduct. Indeed, the Respondent is said not to contest that, where a host state overlooks an investor's failure to comply with local law for a period of time, it may be estopped from contesting jurisdiction on illegality grounds.⁴⁵⁷

387. [REDACTED]

⁴⁵⁴ Rejoinder, ¶¶ 209-210.

⁴⁵⁵ Counter-Memorial, ¶ 208.

⁴⁵⁶ Counter-Memorial, ¶ 209. See also Bifurcation Response, ¶ 65.

⁴⁵⁷ Counter-Memorial, ¶¶ 210-212; Rejoinder, ¶ 226; Bifurcation Response, ¶¶ 59 and 67.

⁴⁵⁸ Counter-Memorial, ¶ 213; Rejoinder, ¶¶ 226-227.

⁴⁵⁹ Counter-Memorial, ¶ 215; Rejoinder, ¶ 228.

[REDACTED]
[REDACTED] In the Claimants' view, the Respondent instead resorts to a legal argument that estoppel cannot be invoked based on state silence. The authorities it relies on for this purpose, however, are misplaced.⁴⁶¹

388. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

389. Moreover, the Claimants consider that, even if the Respondent were not formally estopped from invoking illegality, the Tribunal should nonetheless dismiss its objection based on the Respondent's prior conduct. The Claimants argue that tribunals are reluctant to uphold illegality objections where respondent states have sat on their rights.⁴⁶⁴

c. The Claimants validly acquired title over the Oak Loan interests

390. Finally, the Claimants consider the Respondent's "new *ratione materiae* objection" – pertaining to the Claimants' alleged lack of title to the Oak Loan interests – untimely under Arbitration Rule 44(1)(b). The Claimants also consider the argument meritless,

⁴⁶⁰ Counter-Memorial, ¶¶ 214-215; Rejoinder, ¶¶ 228-229 (n. 482); Bifurcation Response, ¶ 67.

⁴⁶¹ Rejoinder, ¶¶ 229-233.

⁴⁶² Counter-Memorial, ¶ 216; Rejoinder, ¶ 234.

⁴⁶³ Counter-Memorial, ¶ 215; Rejoinder, ¶ 235.

⁴⁶⁴ Counter-Memorial, ¶ 217; Rejoinder, ¶¶ 236-237.

The assignments contravened neither [REDACTED] BoP decisions; [REDACTED]
[REDACTED]
[REDACTED]

394. The Claimants first contend that the [REDACTED] Assignment Agreements were fully consistent with Portuguese law, contravening neither the 2014 Banking Law nor any BoP decision, [REDACTED]

395. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The Claimants further argue that the Respondent misrepresents Portuguese law when claiming (see para. 308 above) that any acts contravening BoP measures are illegal.⁴⁷¹

396. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴⁶⁹ Counter-Memorial, ¶ 225; Rejoinder, ¶ 242.

⁴⁷⁰ Counter-Memorial, ¶ 225.

⁴⁷¹ Counter-Memorial, ¶ 226.

⁴⁷² Counter-Memorial, ¶ 228.

[REDACTED]

397. [REDACTED]
[REDACTED]
[REDACTED]

398. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

399. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴⁷³ Rejoinder, ¶ 245.

⁴⁷⁴ Counter-Memorial, ¶ 230; Rejoinder, ¶ 246.

⁴⁷⁵ Rejoinder, ¶¶ 247-248.

⁴⁷⁶ Rejoinder, ¶ 249.

⁴⁷⁷ Counter-Memorial, ¶ 230; Rejoinder, ¶¶ 250-251.

⁴⁷⁸ Rejoinder, ¶ 252.

400.

[REDACTED]

[REDACTED]

401.

[REDACTED]

⁴⁷⁹ Rejoinder, ¶¶ 253-254.

⁴⁸⁰ Rejoinder, ¶¶ 255-256.

⁴⁸¹ Rejoinder, ¶ 257.

⁴⁸² Rejoinder, ¶ 258.

⁴⁸³ Counter-Memorial, ¶ 231; Rejoinder, ¶ 261.

⁴⁸⁴ Rejoinder, ¶ 262.

⁴⁸⁵ Counter-Memorial, ¶ 232; Rejoinder, ¶ 263.

(ii) The Respondent is estopped or otherwise precluded from invoking the invalidity of the Claimants' title to their Oak Loan interests

402. Regardless, the Claimants submit that, for reasons similar to those invoked in the context of the illegality objection (see paras. 386-389 above), the Respondent is estopped or otherwise precluded from challenging the Claimants' title to their Oak Loan interests.⁴⁸⁶

403. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸

404. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹

⁴⁸⁶ Counter-Memorial, ¶ 233; Rejoinder, ¶¶ 264-265.

⁴⁸⁷ Counter-Memorial, ¶ 233.

⁴⁸⁸ Counter-Memorial, ¶ 234; Rejoinder, ¶¶ 266 and 269.

⁴⁸⁹ Rejoinder, ¶ 267.

⁴⁹⁰ Rejoinder, ¶ 268.

⁴⁹¹ Rejoinder, ¶¶ 269-270.

405. The Claimants thus conclude that they validly acquired title over their Oak Loan interests.

C. JURISDICTION *RATIONE TEMPORIS*

406. The Respondent contests the Tribunal's jurisdiction *ratione temporis* on account that (1) the Claimants' claims are based on events that occurred before the Claimants made their putative investments. The Claimants, by contrast, argue that (2) the Tribunal has temporal jurisdiction, as the Claimants raise no BIT dispute regarding Portugal's conduct prior to the making of their investments.
407. The Parties broadly agree that an investment-treaty tribunal lacks jurisdiction *ratione temporis* over claims that are based on events that occurred prior to the date of the alleged investment.⁴⁹² The Parties disagree, however, on the precise articulation of the relevant test and whether its requirements have been satisfied.

(1) The Respondent's Position

408. The Respondent submits that (a) the Tribunal lacks jurisdiction *ratione temporis* over claims based on events that occurred before the Claimants made their alleged investments, and (b) the Claimants' claims are based on such events. In addition, the Respondent considers that, (c) even if the Tribunal were to apply the so-called dispute-based test, it would find that the dispute arose before the Claimants made their alleged investments.

a. The Tribunal lacks jurisdiction ratione temporis over claims based on events that occurred before the Claimants made their alleged investments

409. The Respondent asserts that the Claimants accept that an investment-treaty tribunal lacks jurisdiction *ratione temporis* over claims based on events that occurred prior to the date of the alleged investment. The Parties disagree, however, on the applicable test for making that determination.

⁴⁹² Counter-Memorial, ¶¶ 237-238; Rejoinder, ¶¶ 279-280; Memorial on Jurisdiction, ¶ 228; Reply, ¶¶ 8, 384, and 386.

410. According to the Respondent:

The applicable test, as supported by extensive jurisprudence and sound policy considerations, is whether the claimant's claims are based on events that occurred before the making of the alleged investment [...].⁴⁹³

411. The Respondent refers to this as an “events-based test.”⁴⁹⁴

412. This contrasts with the Claimants’ alleged “dispute-based test” for determining whether the Tribunal has jurisdiction *ratione temporis*, which looks to “whether the dispute arose before the Claimants acquired their investment.”⁴⁹⁵

413. The Respondent explains that the events-based and dispute-based tests have some overlap but are different. Satisfaction of the dispute-based test might necessarily imply the satisfaction of the events-based test, but the reverse does not necessarily hold.⁴⁹⁶

414. The Respondent rejects the Claimants’ efforts to distinguish the relevant case law (see paras. 434-435 below). Although the facts of those cases naturally differed from the facts here, those tribunals are said to have endorsed an events-based test for jurisdiction *ratione temporis*.⁴⁹⁷

415. The Respondent adds that many other tribunals have adopted the same approach, some of which (like *Mondev v. United States* and *Carrizosa v. Colombia*) featured facts analogous to the present case.⁴⁹⁸ The Respondent acknowledges that some cases “appear to stand for the dispute-based test,” and some tribunals have examined when the dispute arose in assessing jurisdiction *ratione temporis*.⁴⁹⁹ The Respondent

⁴⁹³ Reply, ¶ 382.

⁴⁹⁴ Reply, ¶ 382.

⁴⁹⁵ Memorial on Jurisdiction, ¶¶ 228-232; Reply, ¶¶ 382, 384-386, and 389-390. But see Bifurcation Request, ¶¶ 71-74.

⁴⁹⁶ Reply, ¶ 387.

⁴⁹⁷ Reply, ¶ 389.

⁴⁹⁸ Reply, ¶¶ 390-392.

⁴⁹⁹ Reply, ¶ 393.

contends, however, that the fact that the dispute arose prior to the critical date necessarily implies that the events on which the claims are based must have arisen prior to the critical date.⁵⁰⁰

416. For the Respondent, this makes sense as a matter of policy. Because BITs only protect “investments,” if an investment did not exist at the time the relevant event took place, that event could not form the basis of a BIT claim.⁵⁰¹ Focusing on when a dispute has arisen, the Respondent argues, would allow a claimant to manipulate a tribunal’s jurisdiction. A claimant could intentionally refrain from raising its complaint until after it has acquired its investment, or simply allege in the arbitration that it is not contesting events occurring prior to the date on which it acquired its investment.⁵⁰²
417. The Respondent denies that the relevant test is whether the facts and considerations that gave rise to the dispute between the Claimants’ affiliates and Portugal prior to the Claimants’ acquisition of their investments “continued to be central” to the dispute under the BIT.⁵⁰³ The Respondent insists that the Claimants extrapolated this test from tribunals’ discussions of abuse of process, making it inapposite to issues of jurisdiction *ratione temporis*.⁵⁰⁴
418. Accordingly, the Respondent argues that the Tribunal should apply the events-based test, by which the Tribunal, rather than the Claimants, must objectively determine the events upon which the dispute is based and reject jurisdiction *ratione temporis* if the events post-dating the critical date are merely the consequences of events predating it.⁵⁰⁵

⁵⁰⁰ Reply, ¶ 393.

⁵⁰¹ Reply, ¶ 394.

⁵⁰² Reply, ¶¶ 394-395.

⁵⁰³ Reply, ¶¶ 388 and 396.

⁵⁰⁴ Memorial on Jurisdiction, ¶ 233; Reply, ¶¶ 388 and 396-397.

⁵⁰⁵ Memorial on Jurisdiction, ¶ 234; Reply, ¶ 398.

b. The Claimants' claims are based on events that occurred before the Claimants made their alleged investments

419. In the Respondent's view, the Claimants' claims are based on events predating their investments.

420. At the outset, the Respondent notes [REDACTED] that the Tribunal lacks temporal jurisdiction over claims predating this period.⁵⁰⁶

421. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

422. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵⁰⁶ Memorial on Jurisdiction, ¶ 235.

⁵⁰⁷ Memorial on Jurisdiction, ¶¶ 236 and 249; Reply, ¶ 399.

⁵⁰⁸ Memorial on Jurisdiction, ¶¶ 236 and 249; Reply, ¶ 399. See also Bifurcation Request, ¶¶ 76-79; Tr. Day 1, 28:1-5 (Respondent's counsel).

⁵⁰⁹ Memorial on Jurisdiction, ¶¶ 238-239; Reply, ¶ 402.

[REDACTED]

423.

[REDACTED]

424.

[REDACTED]

⁵¹⁰ Memorial on Jurisdiction, ¶¶ 237-240 and 249; Reply, ¶¶ 400-402.

⁵¹¹ Memorial on Jurisdiction, ¶¶ 242-243 and 249; Reply, ¶¶ 403-405.

⁵¹² Reply, ¶¶ 406-407.

⁵¹³ Memorial on Jurisdiction, ¶ 241; Reply, ¶ 408.

⁵¹⁴ Reply, ¶ 409.

⁵¹⁵ Reply, ¶ 410.

[REDACTED]

425. [REDACTED]

426. [REDACTED]

c. In any event, the dispute arose before the Claimants made their alleged investments

427. Regardless of which test is applied, the Respondent maintains that the Claimants artificially mischaracterize the dispute, and it urges the Tribunal to objectively determine the “real cause” of the dispute.⁵¹⁹

428. [REDACTED]

⁵¹⁶ Reply, ¶ 411.

⁵¹⁷ Reply, ¶¶ 412-413.

⁵¹⁸ Memorial on Jurisdiction, ¶ 249; Reply, ¶ 414. See also Bifurcation Request, ¶ 82.

⁵¹⁹ Reply, ¶¶ 415-417.

⁵²⁰ But see Memorial on Jurisdiction, ¶ 244.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

429. [REDACTED]

430. The Respondent thus submits that the Tribunal lacks jurisdiction even under the dispute-based test.

(2) The Claimants' Position

431. According to the Claimants, the key issue is whether they acquired their investments after the Parties' dispute arose. The Claimants consider it uncontested that no dispute of any kind regarding the NCWO process or the timing of NCWO payments existed at the time the Claimants acquired their investments.⁵²⁶

⁵²¹ Memorial on Jurisdiction, ¶ 244; Bifurcation Request, ¶¶ 80-81.

⁵²² Memorial on Jurisdiction, ¶ 245.

⁵²³ Memorial on Jurisdiction, ¶¶ 246-247.

⁵²⁴ Memorial on Jurisdiction, ¶¶ 246 and 248.

⁵²⁵ Reply, ¶ 419.

⁵²⁶ Rejoinder, ¶ 274.

432. For the Claimants, the Parties differ on how the notion of “dispute” applies to the present facts. The Respondent’s arguments are said to distract from the fact that the Claimants raise no BIT dispute regarding the Respondent’s pre-investment conduct.⁵²⁷ The Claimants add that the Respondent has changed its position from its Bifurcation Request to favor an “events-based” test, introducing a dichotomy with a “dispute-based” test, and in the process misconstruing both the Claimants’ position and international jurisprudence.⁵²⁸ According to the Claimants, however, the Respondent cannot make out its *ratione temporis* objection by merely identifying pre-investment events of tangential relevance to the dispute.⁵²⁹
433. With this in mind, the Claimants submit that the Tribunal should assess its jurisdiction *ratione temporis* by determining whether (a) the facts and considerations that gave rise to any earlier dispute between the Claimants’ affiliates and the Respondent continued to be central to the dispute post-dating the Claimants’ investments, and (b) the facts that are central to the Parties’ BIT dispute indeed arose after the Claimants made their investments.⁵³⁰

a. The relevant test is whether facts and considerations that gave rise to any earlier dispute between the Claimants’ affiliates and Portugal continued to be central to the dispute that postdates the Claimants’ investments

434. The Claimants maintain that, irrespective of whether the focus is on the “real causes” of the dispute or on its “subject matter,” the Tribunal must determine whether the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.⁵³¹
435. The Claimants further contend that a state’s obligations to investors only arises after the date of the investment by a qualified investor and that a claimant bringing a BIT claim must have owned or controlled the investment when that obligation was allegedly

⁵²⁷ Rejoinder, ¶ 275.

⁵²⁸ Rejoinder, ¶ 276.

⁵²⁹ Rejoinder, ¶ 277.

⁵³⁰ Rejoinder, ¶ 278.

⁵³¹ Counter-Memorial, ¶¶ 241-247; Rejoinder, ¶ 281; Bifurcation Response, ¶ 70.

breached.⁵³² According to the Claimants, recent jurisprudence confirms that there is no retroactive application of a BIT in circumstances where a claimant refers to facts predating a BIT's entry into force but only claims for measures that occurred after its entry into force.⁵³³ The same position is said to be confirmed by the jurisprudence relied upon by the Respondent.⁵³⁴

436.

[REDACTED]

[REDACTED]

b. Facts central to the Parties' BIT dispute arose after the Claimants made their investments

437.

[REDACTED]

438.

[REDACTED]

⁵³² Rejoinder, ¶ 282.

⁵³³ Rejoinder, ¶ 283.

⁵³⁴ Rejoinder, ¶¶ 284-285.

⁵³⁵ Rejoinder, ¶ 289. See also Counter-Memorial, ¶ 240.

⁵³⁶ Counter-Memorial, ¶ 248; Rejoinder, ¶ 291.

⁵³⁷ Memorial on Merits, ¶ 197; Rejoinder, ¶ 290; Bifurcation Response, ¶¶ 71-72.

- [REDACTED]
439. Specifically, [REDACTED] the Claimants do not challenge (i) the Respondent's decision to place BES in resolution, [REDACTED] and (iii) whether the Respondent's decision to place the Oak Loan in BES was correct.⁵⁴¹
440. The Claimants contend that the Respondent remained able to fulfill its BIT obligations to the Claimants under both international and Portuguese [REDACTED], finding it unsurprising that no proceedings regarding the NCWO process (including under domestic law) were initiated until 2019.⁵⁴²

D. ABUSE OF PROCESS

441. The Respondent contends that (1) the Tribunal lacks jurisdiction because the Claimants committed an abuse of process by acquiring their alleged investments at a time when the dispute between the Parties already existed or was at least foreseeable. The Claimants, by contrast, (2) deny this allegation.

⁵³⁸ Rejoinder, ¶ 295.

⁵³⁹ Counter-Memorial, ¶ 249; Rejoinder, ¶¶ 296-297. See also Bifurcation Response, ¶ 73.

⁵⁴⁰ Counter-Memorial, ¶ 253; Rejoinder, ¶ 302.

⁵⁴¹ Memorial on Merits, ¶ 196; Counter-Memorial, ¶ 252; Bifurcation Response, ¶¶ 71-72. See also Bifurcation Response, ¶ 73.

⁵⁴² Rejoinder, ¶ 301.

442. While the Parties agree that it is permissible to restructure investments in order to obtain investment protection for “unforeseeable” disputes, they disagree on the relevant legal standard for determining foreseeability and on its application here.⁵⁴³

(1) The Respondent’s Position

443. The Respondent maintains that (a) the legal test is whether, at the time the investment is restructured, there is a reasonable prospect that a measure giving rise to a treaty claim will materialize, but (b) regardless of the applicable test, the dispute over the promptness of NCWO payments was at least foreseeable when the Claimants restructured their alleged investments.

a. Applicable legal test

444. According to the Respondent, this issue boils down to (i) how foreseeable the dispute must be, and (ii) which elements of the dispute must be foreseeable.⁵⁴⁴

445. *First*, regarding how foreseeable the dispute must be, the Respondent urges a “reasonable prospect” test, as generally endorsed in the jurisprudence.⁵⁴⁵ By contrast, the few cases invoked by the Claimants that apply a “high [degree of] probability” test remain in “the clear minority.”⁵⁴⁶ Further, these cases endorsed this stricter test when compared to the much lower standards of merely a “possible controversy” or “general future controversy” that had been relevant in those specific cases.⁵⁴⁷

446. *Second*, regarding the elements of the dispute that must be foreseeable, the Respondent accepts that not “every contour of the dispute” must be foreseeable, but disagrees that the “specific measures that give rise to the dispute” must have been foreseeable.⁵⁴⁸

⁵⁴³ Counter-Memorial, ¶ 258; Memorial on Jurisdiction, ¶¶ 252-253; Reply, ¶ 431.

⁵⁴⁴ Memorial on Jurisdiction, ¶¶ 252-253; Reply, ¶ 431. See also Bifurcation Request, ¶¶ 86-90.

⁵⁴⁵ Memorial on Jurisdiction, ¶ 254; Reply, ¶¶ 432-433.

⁵⁴⁶ Reply, ¶ 434.

⁵⁴⁷ Reply, ¶¶ 434-435.

⁵⁴⁸ Memorial on Jurisdiction, ¶ 255; Reply, ¶¶ 437-438 and 441.

Instead, what needs to be foreseeable is that a “measure” that may give rise to a treaty claim could materialize.⁵⁴⁹

447. Accordingly, the Respondent submits that an abuse of process occurs if an investment is restructured when there is a reasonable prospect that a measure giving rise to a treaty claim will materialize.⁵⁵⁰

b. The dispute was at least foreseeable when the Claimants acquired their alleged investments

448. Irrespective of the test applied, the Respondent maintains that the dispute over the promptness of NCWO payments was at a minimum foreseeable when the Claimants restructured their alleged investments.⁵⁵¹

449. At the outset, the Respondent stresses that the Claimants expressly admit to restructuring their non-Mauritian affiliates’ investments when acquiring their Oak Loan interests because they “wanted to avail themselves of Mauritius’s bilateral investment treaty with Portugal.”⁵⁵²

450. The Respondent rejects the Claimants’ argument that the specific BIT dispute was not foreseeable at the time. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁴⁹ Reply, ¶¶ 439-440.

⁵⁵⁰ Memorial on Jurisdiction, ¶ 256; Reply, ¶ 442.

⁵⁵¹ Memorial on Jurisdiction, ¶ 259; Reply, ¶¶ 443-444.

⁵⁵² Memorial on Jurisdiction, ¶ 257; Reply, ¶¶ 425, 427, and 453. See also Bifurcation Request, ¶ 91.

⁵⁵³ Memorial on Jurisdiction, ¶¶ 260 and 263; Reply, ¶¶ 444-445 and 449-450.

451. [REDACTED]
[REDACTED]
[REDACTED] It is according to the Respondent equally no coincidence that the Claimants restructured their investment after extensive litigation in domestic courts so as to gain BIT protection.⁵⁵⁵
452. The Respondent rejects the Claimants’ reliance on the 2016 Deloitte Report for the proposition that the Claimants could not have known that the NCWO process would “continue indefinitely.”⁵⁵⁶ There is, the Respondent argues, no documentary support for the Claimants’ assertion. Further, the Claimants could not have reasonably expected the liquidation to be “largely completed” by August 2016, nor for it to have been “almost entirely completed” by August 2019, as it had only begun in July 2016.⁵⁵⁷
453. The Respondent concludes that the Claimants restructured their alleged investments in order to create BIT jurisdiction that would otherwise not exist at a time when there was a “reasonable prospect” that a dispute would arise, which constitutes an abuse of process.⁵⁵⁸

(2) The Claimants’ Position

454. The Claimants (a) first submit that the Respondent misrepresents the relevant test for abuse of process, (b) before arguing that the present BIT dispute was not foreseeable when the Claimants acquired their investments.

a. Applicable legal test

455. At the outset, the Claimants contend that what is contested is when a dispute is deemed “foreseeable.”⁵⁵⁹ The Claimants in this context maintain that the Respondent does not

⁵⁵⁴ Memorial on Jurisdiction, ¶ 261; Reply, ¶¶ 451-452.

⁵⁵⁵ Memorial on Jurisdiction, ¶ 262.

⁵⁵⁶ Memorial on Jurisdiction, ¶ 264; Reply, ¶ 446.

⁵⁵⁷ Reply, ¶¶ 447-448.

⁵⁵⁸ Memorial on Jurisdiction, ¶ 265; Reply, ¶¶ 453-454. See also Bifurcation Request, ¶¶ 92-96.

⁵⁵⁹ Counter-Memorial, ¶ 258.

disagree with the five factors put forward by the Claimants, but merely with the contours of some of those factors.⁵⁶⁰

456. *First*, the Claimants maintain that the Respondent does not dispute that the threshold for an abuse of process is “high” and requires “exceptional circumstances.”⁵⁶¹
457. *Second*, the Claimants consider it trite that restructuring an investment to gain access to treaty protection is not “*per se* illegitimate.”⁵⁶² The Claimants allege that the Respondent deliberately misrepresents their statements on this point (see para. 449 above). The Claimants deny claiming that they restructured their investment to gain treaty protection for a pre-existing or foreseeable dispute; they sought protection for future and unforeseeable state misconduct.⁵⁶³
458. *Third*, the Claimants contend that the Parties agree that a dispute must have been foreseeable at the time of restructuring.⁵⁶⁴
459. *Fourth*, regarding the degree of foreseeability required for an abusive restructuring, the Claimants submit that a specific dispute must be foreseeable with a high degree of probability.⁵⁶⁵ The Claimants reject the Respondent’s contention (see para. 445 above) that there needs to be a “reasonable prospect that a measure which might give rise to a treaty claim will materialize.”⁵⁶⁶
460. *Fifth*, the Claimants argue that what must be foreseeable is the specific BIT dispute.⁵⁶⁷ While the Claimants agree with the Respondent that not “every contour” of the dispute must be foreseeable, they insist that the specific measures giving rise to the dispute

⁵⁶⁰ Counter-Memorial, ¶ 259; Rejoinder, ¶ 308; Bifurcation Response, ¶ 75.

⁵⁶¹ Counter-Memorial, ¶ 260; Rejoinder, ¶ 309.

⁵⁶² Counter-Memorial, ¶ 261; Rejoinder, ¶ 310.

⁵⁶³ Rejoinder, ¶¶ 311-312.

⁵⁶⁴ Counter-Memorial, ¶ 262; Rejoinder, ¶ 313.

⁵⁶⁵ Counter-Memorial, ¶¶ 263-264 and 266; Rejoinder, ¶¶ 314-315 and 317.

⁵⁶⁶ Counter-Memorial, ¶¶ 263 and 265; Rejoinder, ¶¶ 316-318.

⁵⁶⁷ Counter-Memorial, ¶ 267; Rejoinder, ¶¶ 319-322.

must be foreseeable.⁵⁶⁸ Indeed, the Claimants explain that the decisions relied upon by the Respondent in this context allowed for the possibility that investors may restructure their investments to protect against hypothetical future adverse state action.⁵⁶⁹

461. In the Claimants' view, this is exactly the situation here. The domestic proceedings related to the Oak Loan initiated by the Claimants' non-Mauritian affiliates prior to the restructuring had nothing to do with the Claimants' NCWO rights. [REDACTED]

[REDACTED] Accordingly, what must have been foreseeable at the time of the restructuring was whether the Respondent would delay and fail to pay the Claimants' NCWO entitlements.⁵⁷¹

b. The present dispute was not foreseeable when the Claimants acquired their investments

462. With this in mind, the Claimants contend that the Respondent has failed to show that the specific BIT dispute over NCWO payments was foreseeable with a high degree of probability when the Claimants acquired their investments. The Respondent's objections here are based on a series of controversies rooted in domestic law, which concern neither the Claimants nor the specific dispute at issue in this arbitration.⁵⁷²

463. *First*, the Claimants argue that this case differs fundamentally from instances where claimants abusively initiated arbitration shortly after restructuring, as the Respondent's breach here occurred years after the Claimants acquired their Oak Loan interests.⁵⁷³

⁵⁶⁸ Counter-Memorial, ¶¶ 267-269 (referencing Memorial on Jurisdiction, ¶ 255); Rejoinder, ¶¶ 319 and 323.

⁵⁶⁹ Rejoinder, ¶¶ 323-324 and 326-327.

⁵⁷⁰ Rejoinder, ¶ 325.

⁵⁷¹ Rejoinder, ¶ 328.

⁵⁷² Counter-Memorial, ¶ 270; Bifurcation Response, ¶ 76.

⁵⁷³ Counter-Memorial, ¶ 271. See also Bifurcation Response, ¶ 78.

464. [REDACTED]
[REDACTED]
[REDACTED]

465. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

466. The Claimants further consider that the Respondent makes several misrepresentations in arguing that the specific dispute brought by the Claimants was foreseeable at the time of the restructuring. Thus, the Claimants reiterate (see Section V.C.2) that the Respondent has failed to substantiate its assertion that there was a dispute between the Parties regarding “prompt NCWO payments” before [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

467. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The Claimants equally

⁵⁷⁴ Counter-Memorial, ¶ 272; Rejoinder, ¶ 330.

⁵⁷⁵ Counter-Memorial, ¶ 273; Rejoinder, ¶¶ 330 and 333; Bifurcation Response, ¶ 77.

⁵⁷⁶ Counter-Memorial, ¶¶ 274-275.

⁵⁷⁷ Counter-Memorial, ¶ 276; Rejoinder, ¶ 330.

⁵⁷⁸ Counter-Memorial, ¶ 277.

deny that the 2014 BES Management Report goes to the issue of whether the specific BIT dispute between the Parties was foreseeable when the Claimants acquired their investments.⁵⁷⁹

468. The Claimants see confirmation of their position in the testimony of [REDACTED] and [REDACTED].⁵⁸⁰ [REDACTED] testified that, before Silver Point Mauritius acquired its investment, he did “not anticipate that Silver Point would enter into a dispute with Portugal [REDACTED].”⁵⁸¹ [REDACTED] similarly testified, “[REDACTED], NCWO payments were not at the forefront of my mind.”⁵⁸²
469. The Claimants further deny that the liquidation process for other banks can be a basis for an objective assessment of how long the BES liquidation was anticipated to take. Rather, the only objective evidence of how long the liquidation should have taken is contained in the Deloitte Report.⁵⁸³
470. The Claimants conclude that their BIT dispute was not foreseeable when they acquired their investments, and thus there is no evidence of abuse of process.⁵⁸⁴

E. FORK-IN-THE-ROAD

471. Article 9 of the BIT states in relevant part:

(1) Any dispute which may arise between one Contracting Party and an investor of the other Contracting Party concerning an investment if [sic] that investor in the territory of the former Contracting Party shall be settled amicably through negotiations between the parties to the dispute.

⁵⁷⁹ Counter-Memorial, ¶ 278.

⁵⁸⁰ Rejoinder, ¶ 331.

⁵⁸¹ [REDACTED] Witness Statement, ¶ 31.

⁵⁸² [REDACTED] Witness Statement, ¶ 14.

⁵⁸³ Rejoinder, ¶ 333.

⁵⁸⁴ Counter-Memorial, ¶ 279; Rejoinder, ¶ 334.

(2) If such dispute cannot be settled within a period of six (6) months from the date of request for settlement, either party may submit the dispute:

(a) to the competent [sic] court of the Contracting Party for decision; or

(b) for conciliation or arbitration, to the International Center [sic] for the Settlement of Investments [sic] Disputes (ICSID), established under the Convention on the Settlement of Investments [sic] Disputes between States and Nationals of other States, opened for signature in Washington D.C., on March 18, 1965.

472. The Respondent argues that the Claimants have brought claims with the same fundamental basis to the courts of Portugal and to this ICSID Tribunal. The Respondent thus argues that (1) the Tribunal lacks jurisdiction because the Claimants have triggered the fork-in-the-road provision contained in Article 9(2) of the BIT, which (2) the Claimants deny.

(1) The Respondent's Position

473. According to the Respondent, it is undisputed that Article 9(2) of the BIT is a “classic fork-in-the-road” provision.⁵⁸⁵

474. With this in mind, the Respondent argues that (a) the Tribunal lacks jurisdiction over BIT claims that share the same “fundamental basis” with claims brought before domestic courts, and (b) the Claimants’ claims in the present proceeding have the same fundamental basis as the claims brought by the Claimants and their affiliates before Portuguese courts. Alternatively, (c) the Respondent argues that the Claimants’ preferred “triple identity” test – which requires an identity of parties, cause of action, and relief sought – would in any event be met.

⁵⁸⁵ Memorial on Jurisdiction, ¶¶ 268-269; Bifurcation Request, ¶¶ 97-98.

a. The “fundamental basis” test, rather than the “triple identity” test, applies

475. The Respondent submits that, in determining whether a fork-in-the-road provision has been triggered, recent investment tribunals have eschewed the stricter “triple identity” test in favor of the more flexible “fundamental basis” test introduced in *Pantechniki v. Albania*.⁵⁸⁶ Under the latter test, the clause is triggered when claims in domestic courts and arbitration have the same fundamental basis.
476. The Respondent considers that the Claimants fail to justify the need for the Tribunal to apply the triple identity test with anything but the fact that it was applied by previous tribunals; in turn, the Respondent sees three compelling reasons not to apply this test: (i) it is not required by the BIT; (ii) it would render the BIT’s fork-in-the-road clause without *effet utile*; and (iii) it is not the modern approach to the fork-in-the-road clause.⁵⁸⁷
477. The Respondent rejects the Claimants’ contention (see para. 500 below) that interpreting Article 9 of the BIT in accordance with Article 31 of the VCLT requires a strict identity of parties. In particular, the Respondent disputes that the reference in Article 9 to “such disputes” of the “investor” necessarily requires the same parties in both the domestic and arbitration proceedings.⁵⁸⁸ The Respondent considers that the Claimants’ overly restrictive test would strip the fork-in-the-road provision of its practical significance, which is precisely the concern that motivated recent investment tribunals to adopt the fundamental basis test.⁵⁸⁹
478. The Respondent considers its position unrefuted by case law invoked by the Claimants. Those cases are said to be distinguishable from the present case and thus not determinative of the applicable test.⁵⁹⁰ The Respondent equally considers that the Claimants unsuccessfully attempt to rebut the case law invoked by the Respondent,

⁵⁸⁶ Memorial on Jurisdiction, ¶ 270; Reply, ¶¶ 465-466; Bifurcation Request, ¶¶ 99-100.

⁵⁸⁷ Memorial on Jurisdiction, ¶ 273; Reply, ¶¶ 460 and 467.

⁵⁸⁸ Reply, ¶¶ 469-473.

⁵⁸⁹ Reply, ¶¶ 461-464, 474, and 495.

⁵⁹⁰ Reply, ¶¶ 475-483.

noting that the *Hydro v. Albania*, *H&H v. Egypt*, *Supervision v. Costa Rica*, and *Crystallex v. Venezuela* tribunals had not applied elements of the triple identity test when dismissing the fork-in-the-road objection, but were instead clear in their application of the fundamental basis test.⁵⁹¹ The Respondent moreover denies that cases dealing with the “fundamental basis” test when differentiating contractual and treaty claims are irrelevant for present purposes, explaining that “this test originated precisely from such cases and was subsequently applied in the context of fork-in-the-road provisions.”⁵⁹² Accordingly, the Respondent concludes that the jurisprudence does not support the application of the triple identity test.⁵⁹³

479. As to when the fundamental basis test should be considered met, the Respondent submits that this requires “a holistic analysis” of the different claims, assessing whether the disputes “share the fundamental cause of the claim and seek for the same effects.”⁵⁹⁴ The Respondent conversely considers inapposite the Claimants’ attempt to narrow the criteria underlying the fundamental basis test to the assessment of whether “the same dispute has been submitted to both national and international fora” and whether “the claimed entitlements have the same normative source.”⁵⁹⁵

b. The Portuguese court claims have the same fundamental basis as the BIT claims

480. The claims presented before the domestic courts and the Tribunal are said to share the same fundamental basis because they (i) share the same fundamental cause and (ii) seek the same effects. The Respondent further argues that (iii) Portuguese courts may apply BIT protection standards in the ongoing domestic disputes.

⁵⁹¹ Reply, ¶¶ 484-491.

⁵⁹² Reply, ¶¶ 492-493.

⁵⁹³ Reply, ¶ 494.

⁵⁹⁴ Memorial on Jurisdiction, ¶ 271; Reply, ¶¶ 496 and 500. But see Bifurcation Request, ¶ 100.

⁵⁹⁵ Reply, ¶¶ 497-500.

(i) The disputes share the same fundamental cause

481. The Respondent first argues that the BIT claims and the domestic claims share the same “fundamental cause of claim” – [REDACTED]

[REDACTED]
[REDACTED]

482. Indeed, according to the Respondent, the Claimants and their non-Mauritian affiliates in the Portuguese proceedings seek a ruling [REDACTED]
[REDACTED] to establish that the Oak Loan is in Novo Banco and to receive full payment under it. [REDACTED]

[REDACTED]
[REDACTED]

483. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

484. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

⁵⁹⁶ Memorial on Jurisdiction, ¶¶ 274-275, 277, 279, and 285-286; Reply, ¶¶ 502 and 511-512.

⁵⁹⁷ Memorial on Jurisdiction, ¶ 275; Reply, ¶¶ 503-505.

⁵⁹⁸ Memorial on Jurisdiction, ¶ 276.

⁵⁹⁹ Reply, ¶ 506.

⁶⁰⁰ Reply, ¶¶ 506-508.

[REDACTED]

[REDACTED] 1

[REDACTED]

[REDACTED]

[REDACTED]

485. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

486. On this basis, Portugal concludes that these proceedings share the same fundamental cause as the Claimants’ BIT claims, providing the following overview (internal references omitted):⁶⁰⁴

[REDACTED]		[REDACTED]	
[REDACTED]		[REDACTED]	[REDACTED]
[REDACTED]		[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]		[REDACTED]	
[REDACTED]		[REDACTED]	

⁶⁰¹ Memorial on Jurisdiction, ¶ 278; Reply, ¶ 509. See also Bifurcation Request, ¶¶ 103-104.

⁶⁰² Memorial on Jurisdiction, ¶ 278; Reply, ¶¶ 510-511. See also Bifurcation Request, ¶ 105.

⁶⁰³ Memorial on Jurisdiction, ¶¶ 280-285; Reply, ¶¶ 512-514. See also Bifurcation Request, ¶ 106.

⁶⁰⁴ Reply, ¶¶ 515-516 and 530.

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		[REDACTED]
		[REDACTED]
[REDACTED]		
[REDACTED]		
[REDACTED]		
[REDACTED]		
[REDACTED]		
[REDACTED]		
[REDACTED]		

(ii) The proceedings seek the same effects

487. Likewise, the Respondent insists that the domestic and BIT proceedings seek the same effects.

488. The Respondent explains that, substantively, the effect sought in Cases [REDACTED] is to obtain court decisions determining that the Oak Loan was transferred to Novo Banco and thus permit the recovery of the full amount under the loan. Moreover, in Case [REDACTED], the Claimants expressly seek damages corresponding to the full amount of the unpaid loan.⁶⁰⁵ Simultaneously, the Claimants are said in this arbitration to seek compensation corresponding to 31.7% of the alleged value of their Oak Loan interests.⁶⁰⁶ The Respondent accordingly surmises that there is a risk of double recovery and contradictory outcome if both sets of proceedings are allowed to continue, adding that the Claimants fail to substantiate what “legal instruments” would protect against the risk of double recovery.⁶⁰⁷

489. The Respondent thus submits that this arbitration and the domestic proceedings seek the same effects, providing the following overview (internal references omitted):⁶⁰⁸

⁶⁰⁵ Reply, ¶ 519.

⁶⁰⁶ Reply, ¶¶ 520-522.

⁶⁰⁷ Memorial on Jurisdiction, ¶¶ 285 and 288; Reply, ¶¶ 523-528.

⁶⁰⁸ Reply, ¶¶ 529-530.

EFFECTS SOUGHT	
ICSID	NATIONAL DISPUTES
Compensation amounting to 31.7% of the Claimants' purported investments in the Oak Loan, plus interest	Declaration that the Oak Loan was transferred to and maintained in Novo Banco and consequent payment by Novo Banco of 100% of their purported investments in the Oak Loan, plus interests [REDACTED] [REDACTED] Or Compensation amounting to 100% of their purported investments in the Oak Loan, plus interests [REDACTED]

(iii) Portuguese courts may apply BIT standards of protection

490. While the Respondent maintains that the Claimants' lack of invocation of BIT infringements in the domestic proceedings is insufficient to defeat this objection, it submits that Portuguese courts may consider the conformity of the Respondent's and the BoP's conduct in light of the BIT's standards of protection.⁶⁰⁹

491. The Respondent explains that the Portuguese Constitution follows the monist conception of the relationship between domestic and international law, providing in Article 8 for full automatic reception in the domestic system of general international law and treaties that bind Portugal internationally.⁶¹⁰ Thus, not only do BITs automatically enter into force in the Portuguese legal system and take precedence over ordinary law⁶¹¹ but Portuguese courts are entitled to assess the conformity of administrative acts and laws with the BIT, even if not invoked by the Claimants. The same is said to follow from the *jura novit curia* principle.⁶¹²

⁶⁰⁹ Reply, ¶¶ 531-533.

⁶¹⁰ Reply, ¶ 534.

⁶¹¹ Reply, ¶¶ 535-536.

⁶¹² Reply, ¶¶ 537-538.

492. The Respondent thus submits that the Tribunal lacks jurisdiction because the BIT's fork-in-the-road provision has been triggered.⁶¹³

c. In any event, the "triple identity" test is met

493. The Respondent submits that, even if the Tribunal were to apply the triple identity test, its requirements would be met.

494. *First*, regarding the identity of the Parties, the Respondent observes that the reason all Claimants are not formally parties to some of the domestic proceedings is that these proceedings predate the [REDACTED] Assignment Agreements. [REDACTED]
[REDACTED]
[REDACTED], the Respondent maintains that the Claimants and their non-Mauritian affiliates are in substantive terms the same party to the domestic disputes.⁶¹⁴ Indeed, the Respondent notes that the Claimants have in the domestic proceedings [REDACTED] already recognized that they are parties to several of the cases [REDACTED]
[REDACTED], whereas their affiliates have equally presented themselves as replacing the Claimants in those cases after the assignment pending the Claimants' formal intervention.⁶¹⁵ The Respondent states that party identity is in any event met in the remaining cases where the Claimants are formally parties to the disputes.⁶¹⁶

495. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

⁶¹³ Memorial on Jurisdiction, ¶¶ 287-289; Reply, ¶ 539.

⁶¹⁴ Reply, ¶¶ 541-544.

⁶¹⁵ Reply, ¶¶ 545-546.

⁶¹⁶ Reply, ¶¶ 547-548.

[REDACTED]

496. *Third*, regarding the relief sought, the Respondent reiterates that the Claimants are seeking compensation under the Oak Loan, *i.e.*, compensation for the full amount of their purported Oak Loan interests in the domestic proceedings, whereas before this Tribunal they claim 31.7% of the value of their alleged Oak Loan interests.⁶¹⁸

497. Thus, even if the triple identity test were to apply, the Respondent concludes that it would be met.⁶¹⁹

(2) The Claimants' Position

498. For their part, the Claimants contend that the BIT's fork-in-the-road provision does not deprive the Tribunal of jurisdiction. According to the Claimants, (a) this provision is only triggered if the "triple identity" test is met, (b) which is not the case. In any event, the Claimants submit that (c) even the requirements of the "fundamental basis" test advocated by Portugal are not met in this instance.⁶²⁰

a. The BIT's fork-in-the-road provision is only triggered if the "triple identity" test is met

499. At the outset, the Claimants argue that the "triple identity" test is the correct standard for the BIT's fork-in-the-road provision,⁶²¹ whereas the Respondent's ill-founded reliance on the "fundamental basis" test results from its failure to engage with the ordinary meaning of the relevant BIT language and from its misreading of the relevant jurisprudence.⁶²²

⁶¹⁷ Reply, ¶¶ 549-553.

⁶¹⁸ Reply, ¶¶ 554-555.

⁶¹⁹ Reply, ¶¶ 556-557.

⁶²⁰ Counter-Memorial, ¶ 280; Rejoinder, ¶¶ 335-336.

⁶²¹ Counter-Memorial, ¶ 281; Rejoinder, ¶ 352; Bifurcation Response, ¶ 80.

⁶²² Counter-Memorial, ¶ 283; Rejoinder, ¶ 337.

500. Turning to the interpretation of BIT Article 9 under VCLT Article 31, the Claimants observe that it is “self-evident” that this provision requires at least identity of the parties. This follows from the fact that the term “[s]uch dispute” in Article 9(2) refers to a “dispute” in Article 9(1) “which may arise between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor,” as defined in BIT Article 1(3). Similarly, the reference to “either party” in Article 9(2) is said to refer to the “investor” from Article 9(1), which implies that the ordinary meaning of this clause requires that the “investor” be the same party in the international arbitration and any proceedings in the “competent court of the Contracting party.”⁶²³
501. The Claimants moreover contend that the ordinary meaning of Articles 9(1) and (2) clearly precludes an investor from bringing a dispute to international arbitration only if what has been brought in domestic proceedings is a dispute “concerning an investment of that investor.”⁶²⁴ The Claimants further observe that, in denying the applicability of the “triple identity” test, the Respondent argues (see para. 477 above) that Article 9 “does not include any indication as to the test to be applied,” thus effectively admitting that there is equally no textual basis to apply the “fundamental basis” test. While the Respondent thus tried to ground the “fundamental basis” test in policy and jurisprudential arguments, the Claimants contend that the jurisprudence undercuts the Respondent’s position.⁶²⁵
502. The Claimants likewise argue that the Respondent’s assertion (see paras. 475 and 477 above) that recent tribunals have predominantly applied the “fundamental basis” test is not supported by the other cases it cites. The Claimants in this context rely on *Schreuer’s Commentary on the ICSID Convention* to argue that, even if the “fundamental basis” test may have found favor with some tribunals, the “triple identity” test continues to be preferred.⁶²⁶ The Claimants similarly explain that many of the older cases cited by Portugal upon closer scrutiny fail to support its position, while

⁶²³ Counter-Memorial, ¶¶ 284-286; Rejoinder, ¶¶ 350 and 352.

⁶²⁴ Rejoinder, ¶ 351.

⁶²⁵ Counter-Memorial, ¶ 287-295; Rejoinder, ¶¶ 342 and 349.

⁶²⁶ Counter-Memorial, ¶¶ 296-297; Rejoinder, ¶¶ 344-345.

others (*Vivendi v. Argentina* and *Crystallex v. Venezuela*) have nothing to do with a fork-in-the-road provision.⁶²⁷ Moreover, the Claimants do not consider that the *H&H v. Egypt* award assists the Respondent, noting that in this case it was undisputed that the parties in both the domestic proceedings and international arbitration were identical, while *Pantechniki v. Albania* has little persuasive value as the parties to that case had agreed that the relevant test was the fundamental basis of a claim.⁶²⁸

503. The Claimants further reject the Respondent’s contention that applying the “triple identity” test would deprive the fork-in-the-road provision of its *effet utile*, as the purpose of such clauses is to preclude an investor from bringing the same case before multiple fora; the most effective way of fulfilling this purpose is to apply a more precise test that allows for sufficient scrutiny as to whether the same parties, cause of action, and relief are involved.⁶²⁹

504. The Claimants in addition consider that the Respondent overemphasizes the role of fork-in-the-road provisions in guarding against the duplication of proceedings and conflicting decisions, as such risks do not arise when the proceedings relate to different causes of action and relief.⁶³⁰ Similarly, the Claimants deny any risk of double recovery.⁶³¹

b. The “triple identity” test is clearly not met

505. In the Claimants’ view, none of the elements of the “triple identity” test are met, as there is no identity of (i) parties, (ii) cause of action, or (iii) relief sought.⁶³²

⁶²⁷ Counter-Memorial, ¶¶ 298-303.

⁶²⁸ Counter-Memorial, ¶¶ 305-306; Rejoinder, ¶¶ 346-348.

⁶²⁹ Counter-Memorial, ¶¶ 307-308; Rejoinder, ¶¶ 339-341, 343, and 348.

⁶³⁰ Counter-Memorial, ¶ 309.

⁶³¹ Counter-Memorial, ¶ 310.

⁶³² Counter-Memorial, ¶ 311; Rejoinder, ¶ 353; Bifurcation Response, ¶ 81.

(i) There is no identity of parties

506. First, the Claimants provide the following tabular overview of the parties to the domestic proceedings on which the Respondent relies in this context.⁶³³

Claimants in the arbitration				
Suffolk (Mauritius) Limited	No	No	No	Yes
Mansfield (Mauritius) Limited	No	No	No	Yes
Silver Point Mauritius	No	No	Yes	Yes

507. With this in mind, the Claimants explain that Cases ██████████
██████████ “were brought by entities other than the Claimants,” whereas Case ██████████ does not involve Claimants Suffolk and Mansfield. As the reference in Article 9 to “investor” can only mean the Claimants, domestic litigation by other entities is irrelevant; the Claimants thus submit that these cases “fall at the first hurdle,” leaving only Case ██████████.⁶³⁴

508. The Claimants on this point consider the Respondent’s attempt to pierce the corporate veil by assimilating the Claimants and their affiliates to be “flawed,” and its reliance on *Addiko v. Montenegro* and *Supervision v. Costa Rica* in this respect inapposite. Indeed, the Claimants contend that the Respondent has failed to show that the fact patterns that led to those decisions apply here, adding that these decisions are in any event contradicted by other investment tribunals.⁶³⁵ Accordingly, the Claimants

⁶³³ Rejoinder, ¶ 354.

⁶³⁴ Counter-Memorial, ¶ 312; Rejoinder, ¶ 355.

⁶³⁵ Rejoinder, ¶¶ 356-357.

consider that there is no basis in either the BIT or domestic procedural law to assimilate them to their non-Mauritian affiliates. Cases [REDACTED] and [REDACTED] thus give rise to no “identity of the parties” regarding any of the Claimants, while Case [REDACTED] gives rise to no “identity” regarding Suffolk and Mansfield.⁶³⁶

(ii) There is no identity of cause of action

509. *Second*, the Claimants argue that the causes of action in the proceedings invoked by the Respondent are plainly different compared to this arbitration: whereas the Claimants’ claims in this arbitration are based on Portugal’s violations of substantive BIT protections [REDACTED], the domestic court claims are grounded in Portuguese and European law.⁶³⁷

510. More specifically, the Claimants explain that jurisprudence on the “triple identity” test is clear in that the “cause of action” requires a comparison of the legal basis of action, legal standards, and applicable law at issue in the relevant fora.⁶³⁸ For the Claimants, it is not only clear that there is no identity on these elements between the arbitration and the domestic proceedings⁶³⁹ but that, even in domestic law, the proceedings relied upon by Portugal for its fork-in-the-road objection and the domestic NCWO proceedings have to proceed on two distinct legal tracks.⁶⁴⁰

511. This is why, the Claimants argue, the Respondent is forced to make a strained argument regarding the potential relevance of the BIT in the pending Portuguese proceedings, which mischaracterizes the relevant issues in this arbitration and the domestic proceedings and overstates the BIT’s potential role in the domestic proceedings.⁶⁴¹

⁶³⁶ Rejoinder, ¶ 358.

⁶³⁷ Counter-Memorial, ¶¶ 313-314; Rejoinder, ¶¶ 359 and 366.

⁶³⁸ Rejoinder, ¶ 360.

⁶³⁹ Rejoinder, ¶ 361.

⁶⁴⁰ Rejoinder, ¶¶ 362-364.

⁶⁴¹ Rejoinder, ¶ 365.

(iii) There is no identity of relief sought

512. *Third*, the Claimants allege that the Respondent’s contention that there is “overlap” between the domestic proceedings and this arbitration regarding the relief sought is an admission that there is no “*identity*” between them.⁶⁴²

513. *Arguendo*, the Claimants submit that a simple summary of the reliefs sought in this arbitration and in the domestic cases invoked by Portugal confirms the lack of “identity” between them:⁶⁴³

█ [REDACTED]

█ [REDACTED]

514. The Claimants contend that these are clearly issues of domestic public or constitutional law, adding that investment tribunals are not empowered to annul acts adopted by domestic authorities or to refer the issues to Portugal’s Constitutional Court.⁶⁴⁴ Moreover, the Claimants argue that any compensation potentially awarded by Portuguese courts would be based on a legal determination under domestic law that the Oak Loan should have been transferred to Novo Banco, whereas the claims in the arbitration are based on the assumption that the Oak Loan remains in BES. Thus, the Claimants under such assumptions seek full reparation under customary international law standards [REDACTED], based on an NCWO entitlement of no less than 31.7% of the value of the credits.⁶⁴⁵

⁶⁴² Rejoinder, ¶¶ 367-368 (emphasis in Rejoinder).

⁶⁴³ Counter-Memorial, ¶ 315; Rejoinder, ¶ 369.

⁶⁴⁴ Counter-Memorial, ¶ 316.

⁶⁴⁵ Rejoinder, ¶ 370.

515. Accordingly, the Claimants conclude that the “triple identity” test is not met.⁶⁴⁶

c. Even if the “fundamental basis” test were adopted, it would not be met

516. *Arguendo*, the Claimants submit that the “fundamental basis” test would also not be satisfied.⁶⁴⁷ The Claimants argue that (i) the Respondent’s articulation of the “fundamental basis” test sets a lower standard than the decisions it relies on, but that (ii) the Portuguese proceedings do not satisfy the “fundamental basis” test even under the Respondent’s articulation. Finally, the Claimants submit that (iii) the Respondent’s claim that the Portuguese courts may apply BIT standards of protection in the domestic proceedings is a non-starter.

(i) The Respondent’s articulation of the “fundamental basis” test sets a lower standard than that applied by the decisions it relies on

517. The Claimants argue that the Respondent’s articulation of the “fundamental basis” test minimizes the requirements of this already less stringent test. The Claimants contend that the key to assessing the “fundamental basis” of a claim is “to assess whether the same dispute has been submitted to both national and international fora” and “whether the claimed entitlements have the same normative source.”⁶⁴⁸ The Claimants argue that the Respondent cannot meet this bar, as the domestic proceedings are not related to the same normative source as the arbitration: [REDACTED].⁶⁴⁹

518. This is why the Respondent is said to try to articulate (see para. 479 above) a vaguer, more easily satisfied test, which looks at whether the proceedings share “the *fundamental cause of the claim*” and seek the “*same effects*.”⁶⁵⁰ The Claimants allege that this test would defeat the BIT’s object and purpose, as almost *any* domestic

⁶⁴⁶ Counter-Memorial, ¶ 317; Rejoinder, ¶ 371.

⁶⁴⁷ Counter-Memorial, ¶ 318; Rejoinder, ¶¶ 372-373; Bifurcation Response, ¶ 82.

⁶⁴⁸ Rejoinder, ¶ 374.

⁶⁴⁹ Counter-Memorial, ¶ 321; Rejoinder, ¶ 374.

⁶⁵⁰ Rejoinder, ¶ 375 (emphasis in Rejoinder).

proceeding brought by a party related to an investor arising out of a single factual event could satisfy it.⁶⁵¹

- (ii) The Portuguese proceedings do not satisfy the “fundamental basis” test even as articulated by the Respondent

519. Regardless, the Claimants contend that the “fundamental basis” test would not be met even under the Respondent’s articulation.⁶⁵² [REDACTED]

[REDACTED]

[REDACTED] The Claimants consider it equally clear that none of the domestic proceedings invoked by the Respondent concern BIT breaches or Portugal’s conduct in relation to the NCWO process.⁶⁵³

520. To this end, the Claimants produce a table setting out a proceeding-by-proceeding analysis of the “fundamental cause of the claim” and “effect” sought (internal references omitted), which is said to show that none of the domestic cases share the same fundamental basis with this arbitration:⁶⁵⁴

[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

⁶⁵¹ Rejoinder, ¶ 376.

⁶⁵² Counter-Memorial, ¶ 322; Rejoinder, ¶ 377.

⁶⁵³ Counter-Memorial, ¶¶ 323-324; Bifurcation Response, ¶ 82.

⁶⁵⁴ Counter-Memorial, ¶ 325.

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]

521. *First*, the Claimants thus consider it clear that the domestic and international disputes do not share the same fundamental cause.⁶⁵⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁵⁵ Counter-Memorial, ¶ 326; Rejoinder, ¶ 378.

[REDACTED]

522. According to the Claimants, the Respondent avoids engaging with this substantive case-by-case analysis of the cause of the domestic proceedings, and fails to explain how the domestic proceedings share the same “fundamental cause” as the arbitration.⁶⁵⁷ The Respondent instead mischaracterizes the “fundamental cause” of the domestic proceedings, which concern the illegality of the BoP’s retransfer decisions as a matter of domestic administrative and constitutional law and their inconsistency with the BRRD, rather than the applicable Banking Law.⁶⁵⁸

523. *Second*, the Claimants also deny that the domestic proceedings seek to have the same effect as this arbitration.⁶⁵⁹ More specifically, the Claimants explain that the Respondent itself confirms (see para. 488 above) that a successful outcome in the Retransfer Cases would be that the Oak Loan is in Novo Banco, in which case no right to NCWO payments would arise and the Claimants would be entitled to their credits in full. Meanwhile, in this arbitration, the Claimants seek damages regarding the value of their NCWO entitlements, which is significantly less than the full value of their Oak Loan entitlements.⁶⁶⁰ [REDACTED]

[REDACTED]

⁶⁵⁶ Rejoinder, ¶¶ 379-381.

⁶⁵⁷ Rejoinder, ¶ 382.

⁶⁵⁸ Rejoinder, ¶¶ 383-384.

⁶⁵⁹ Counter-Memorial, ¶ 326; Rejoinder, ¶ 385.

⁶⁶⁰ Counter-Memorial, ¶ 326; Rejoinder, ¶ 386.

- [REDACTED]
- [REDACTED]
524. According to the Claimants, the Respondent thus has no choice but to recognize that the “effect” sought in this arbitration is different from these domestic proceedings, and it cannot argue that a mere “overlap” in this respect is sufficient, nor does such overlap exist.⁶⁶² Indeed, in the domestic cases the outcome would be that the Oak Loan is repaid in full or that the applicants receive damages for losses resulting from the incomplete transposition of the BRRD, whereas in this arbitration any compensation will arise from the Claimants’ NCWO rights as BES’s creditors.⁶⁶³
525. With this in mind, the Claimants reject the Respondent’s cautioning (see para. 488 above) against double compensation or contradictory outcomes stemming from the parallel proceedings.⁶⁶⁴
- (iii) The Respondent’s claim that the Portuguese courts may apply BIT standards of protection in the domestic proceedings is a non-starter
526. Finally, the Claimants dismiss as a “non-starter” the Respondent’s argument (see paras. 490-492 above) that Portuguese courts may consider whether the BoP’s/Respondent’s conduct conforms with the BIT.⁶⁶⁵
527. *First*, the Claimants note that this argument can only potentially have relevance for the proceedings in which one or more Claimants are actually a party, thus leaving only Cases [REDACTED] and [REDACTED]. The Claimants further explain that Article 95(3) of the Portuguese Procedural Code in the Administrative Courts only

⁶⁶¹ Rejoinder, ¶ 387.

⁶⁶² Rejoinder, ¶¶ 388-390.

⁶⁶³ Rejoinder, ¶¶ 391-394.

⁶⁶⁴ Rejoinder, ¶ 395.

⁶⁶⁵ Rejoinder, ¶ 396.

- applies to actions challenging administrative acts, not to liability proceedings such as Case [REDACTED], leaving only Case [REDACTED] as potentially relevant.⁶⁶⁶
528. *Second*, nothing in Article 95(3) of the Portuguese Procedural Code in the Administrative Courts allows Portuguese courts to add *ex officio* a new request to domestic proceedings.⁶⁶⁷
529. *Third*, in the Claimants' view, the Portuguese administrative court in Case [REDACTED] may theoretically refer to the BIT only for a different purpose – namely, assessing the BoP's decisions retransferring the Oak Loan from Novo Banco to BES for consistency with Portugal's BIT obligations.⁶⁶⁸
530. *Fourth*, the Claimants insist that the chances for a Portuguese court to *sua sponte* rely on the BIT in Case [REDACTED] are slim.⁶⁶⁹
531. Accordingly, the Claimants conclude that the domestic proceedings bear no relation to the measures or law relevant in this arbitration, and that the fork-in-the-road objection thus must be rejected.⁶⁷⁰

F. CONFLICT BETWEEN THE PORTUGUESE PROCEEDINGS AND THIS ARBITRATION

532. In addition to the Respondent's five preliminary objections, discussed above, the Parties' arguments and evidence raise further concerns regarding a conflict between the domestic proceedings in Portugal and this arbitration. These issues go beyond the Respondent's fork-in-the-road objection, which concerns the allegation that the Claimants have impermissibly brought claims with the same "fundamental basis" to the courts of Portugal and to this ICSID Tribunal (see Section V.E).

⁶⁶⁶ Rejoinder, ¶ 397.

⁶⁶⁷ Rejoinder, ¶ 398.

⁶⁶⁸ Rejoinder, ¶ 399.

⁶⁶⁹ Rejoinder, ¶ 400.

⁶⁷⁰ Counter-Memorial, ¶¶ 327-328; Rejoinder, ¶ 401.

533. At the Hearing on Jurisdiction, the Tribunal questioned the Parties on the possible conflict between the domestic proceedings in Portugal and this arbitration. During the Claimants' opening presentation, the President of the Tribunal asked:

[Y]ou mentioned the ongoing court proceedings in Portugal. And in the Claimants' view, are those at all relevant for the Tribunal now in our analysis, and is there any risk of a conflict between what this Tribunal is required to do and what those courts might do in terms of the interpretation or application of certain legal questions, like whether the Oak Loan is in BES or in Novo Banco? As I said, you don't have to address it now, but if you could just deal at some point with this issue of the relevance of the court proceedings that are ongoing and the impact it might have on the Tribunal's obligation to decide the jurisdictional issues before us.⁶⁷¹

534. The Tribunal later issued written directions to the Parties to address these issues in their PHBs. Specifically, the Tribunal, *inter alia*, asked:

1. If the so-called "Retransfer cases" in Portuguese courts result in a holding that the Oak Loan was incorrectly placed in BES by the Bank of Portugal and instead is properly with Novo Banco so that Novo Banco and not BES is the debtor, what impact would such a determination have on the Claimants' participation in the NCWO process as NCWO rightsholders?
2. Is there a risk that a decision of this Tribunal could conflict with the decision in Portuguese judicial and administrative proceedings?
3. If there is such a risk of conflict, how should this Tribunal consider and address it:
 - a. Would it be dealt with at the level of admissibility, potentially resulting in a stay of this proceeding pending the outcome of a decision in the Portuguese judicial and administrative proceedings?
 - b. Would it be dealt with at the level of jurisdiction, potentially resulting in a finding of no jurisdiction of the Tribunal?
 - c. Would it be dealt with at the level of merits, potentially resulting in the Tribunal deferring any decision on a

⁶⁷¹ Tr. Day 1, 203:15-204:7 (emphasis added).

possible conflict until a possible merits phase of this arbitration proceeding?

- d. Would it be dealt with at the level of quantum, with the possibility of this Tribunal or Portuguese judicial or administrative courts preventing possible double recovery in the international and domestic legal proceedings?⁶⁷²

535. The Tribunal thus turns to the broader implications of the ongoing proceedings in domestic courts in Portugal brought by the Claimants and their affiliates.

(1) The Parties' Positions on the Risk of Conflict

536. The Respondent indicated four potential risks of a conflict between this arbitration and the judicial proceedings in Portugal.

537. *First*, there is a risk of conflict between a decision of this Tribunal and decisions in the Retransfer Cases in Portugal.⁶⁷³ If the domestic courts find that “the Oak Loan should have been allocated to Novo Banco [...] Claimants would only have rights against Novo Banco and no entitlement to NCWO rights and hence no more basis for their claims before this Tribunal.”⁶⁷⁴ The Respondent adds:

[S]hould Claimants prevail in both proceedings, they will necessarily obtain conflicting judgements.

Claimants' reliance on opposite assumptions of law and facts cannot be allowed by this Tribunal.⁶⁷⁵

538. *Second*, there is a risk of double recovery if the Claimants succeed in the domestic proceedings and this arbitration. The Respondent argues that the Claimants could recover 100% of their interests in the Oak Loan in domestic proceedings plus at least

⁶⁷² Letter to the Parties dated February 12, 2025.

⁶⁷³ Respondent's PHB, ¶ 31.

⁶⁷⁴ Respondent's PHB, ¶ 33.

⁶⁷⁵ Respondent's PHB, ¶ 32 (emphasis added).

31.7% of the value of their interests in the Oak Loan sought in this arbitration as NCWO payments, plus interest on both amounts.⁶⁷⁶

539. *Third*, there is a risk of conflict with European law and with the European Court of Justice. [REDACTED]

540. *Finally*, there is a risk of contradiction regarding the qualification of the Claimants' interests in the Oak Loan between what the Claimants claim in domestic courts and what they claim in this proceeding. [REDACTED]

541. The Claimants, by contrast, see no risk of conflict between this arbitration and the Portuguese proceedings, arguing:

Domestic proceedings will not conflict with the arbitration because the Portuguese courts and this Tribunal are called upon to answer different questions. Accordingly, a decision of this Tribunal cannot

⁶⁷⁶ Respondent's PHB, ¶ 35. [REDACTED]

See Respondent's PHB, ¶ 36.

⁶⁷⁷ Respondent's PHB, ¶¶ 37-38.

⁶⁷⁸ Respondent's PHB, ¶ 39 (citations omitted).

by definition conflict with any of the possible outcomes in the Retransfer Cases or the liability proceedings.⁶⁷⁹

(2) The Parties' Positions on the Consequences of the Risk of Conflict

542. As mentioned above, the Parties were also asked to address how the Tribunal might consider the consequences of a potential conflict between this proceeding and the domestic proceedings in Portugal, whether at the level of jurisdiction, admissibility, merits or quantum.

Jurisdiction

543. The Respondent primarily argues that the Tribunal should resolve the risk of conflicting decisions by declining jurisdiction based on the fork-in-the-road provision in Article 9(2) of the BIT.⁶⁸⁰

544. The Claimants, by contrast, deny any risk of conflicting decisions and reject the Respondent's jurisdictional objections. The Claimants add that any potential risk of double recovery could be addressed at the quantum phase of the proceeding and is "not an issue relevant to the jurisdiction phase."⁶⁸¹

Admissibility

545. The Respondent argues that if its jurisdictional objections are not upheld, the Tribunal could dismiss (or stay) the arbitration proceeding on admissibility grounds.⁶⁸² In other words, should the Tribunal not be convinced that the fork-in-the-road provision was triggered, the Respondent suggests the use of other tools to arrive at the same result:

63. To avoid both of these risks of contradictory decisions, the Tribunal could rely on the abuse of process.

⁶⁷⁹ Claimants' PHB, ¶ 17. The Claimants further argue against a possible conflict because the domestic proceedings do not share the same "fundamental cause" or "seek the same effect" as the arbitration proceedings, and because there is "no risk of double recovery." See Claimants' PHB, ¶¶ 14, 18.

⁶⁸⁰ Respondent's PHB, ¶ 42.

⁶⁸¹ Claimants' PHB, ¶ 26.

⁶⁸² Respondent's PHB, ¶ 60.

64. The abuse of rights doctrine, which can be regarded as an aspect of the principle of good faith, is an established principle of international law.

[...]

71. Therefore, should the Tribunal reject Respondent's jurisdictional objection on the basis of article 9(2), it would find that Claimants' initiation of this arbitration constitutes a clear abuse of process leading to the inadmissibility of their claims.⁶⁸³

546. To that end, citing the late Professor Gaillard, the Respondent argues that "a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success."⁶⁸⁴ It cites the decision in *Orascom v. Algeria* for the proposition that the initiation of multiple investment disputes "in relation to the same investment, the same measures and the same harm" is an abuse of process, rendering the claims inadmissible.⁶⁸⁵

547. The Claimants, by contrast, see no admissibility issues. In their view, there is no conflict between this arbitration and domestic proceedings.⁶⁸⁶

Merits

548. The Respondent argues that the risk of conflicting decisions should not be dealt with at the merits stage. Rather, the risk "can only be resolved by abandoning one or the other of these mutually exclusive procedures currently pending before the domestic Courts and this Tribunal."⁶⁸⁷

⁶⁸³ Respondent's PHB, ¶¶ 63, 64, and 71 (emphasis in PHB).

⁶⁸⁴ Respondent's PHB, ¶ 65 (emphasis in PHB).

⁶⁸⁵ Respondent's PHB, ¶ 66 (emphasis in PHB).

⁶⁸⁶ Claimants' PHB, ¶ 26.

⁶⁸⁷ Respondent's PHB, ¶ 82.

549. The Claimants see no risk of conflict relevant to the merits stage of the arbitration.⁶⁸⁸
They add:

This Tribunal's mandate is to apply the facts as presented by the Parties to the law under the BIT. It does not need to (and, respectfully, should not) engage in an enquiry about whether there is coherence between its decision in these international proceedings and possible future decisions in domestic proceedings.⁶⁸⁹

Quantum

550. The Respondent argues that the risk of conflict cannot be dealt with at the level of quantum, as “the risk is not limited to double compensation but also [to] the contradictory legal findings that will coexist in the arbitral system vis-à-vis the domestic system.”⁶⁹⁰ The Respondent adds:

[W]hat the Tribunal should seek to do is avoid putting the parties in a situation where an unfair or incorrect payment has been made. Even if remedies existed under Portuguese law (*quod non*), they would be outside the control of this Tribunal and are not guaranteed. Moreover, they would not be adequate if (i) the Claimants dissipated their assets, (ii) transferred once more their legal position/alleged rights in the Portuguese proceedings so that such remedies would not apply or their application would become extremely difficult or (iii) the contradiction (and risk of double compensation) stemmed from a decision of the English court, which would be rendered irrespective of the decisions rendered [...] in Portuguese proceedings.⁶⁹¹

551. The Claimants, by contrast, argue that “any risk of double recovery (*quod non*) is appropriately deferred to the quantum phase.”⁶⁹² They argue:

In the extremely unlikely event that the Portuguese courts issue a decision in the domestic proceedings that includes a compensatory element first, this Tribunal could offset such compensation from any

⁶⁸⁸ Claimants' PHB, ¶ 26.

⁶⁸⁹ Claimants' PHB, ¶ 26.

⁶⁹⁰ Respondent's PHB, ¶ 84.

⁶⁹¹ Respondent's PHB, ¶ 85 (emphasis in PHB).

⁶⁹² Claimants' PHB, ¶ 27 (emphasis in PHB).

compensation awarded by the Tribunal at the quantum stage. And as described above, in the (likely) event that this Tribunal's award precedes, in time, any award of compensation by Portuguese domestic courts, Portuguese law would apply to preclude double recovery.⁶⁹³

(3) The Tribunal's Analysis

Applicable Legal Provisions

552. There appears to be no disagreement that the Parties' dispute is governed by the ICSID Convention, the terms of the BIT, principles of international law, and, where applicable, EU and national laws.

553. Article 25(1) of the ICSID Convention provides:

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

554. Article 25(1) of the Convention thus establishes three indispensable conditions for ICSID jurisdiction:

1. The dispute must be of a legal nature and arise directly out of an investment (*ratione materiae*);
2. The dispute must oppose a Contracting State (or a constituent subdivision or agency of a Contracting State) and a national of another Contracting State (*ratione personae*); and
3. The parties must have given their consent in writing to submit the dispute to ICSID (*ratione voluntatis*).

555. Article 9 of the BIT expresses each Contracting Party's advance consent to submit disputes with an "investor" of the other Contracting Party (defined in BIT Article 1(2))

⁶⁹³ Claimants' PHB, ¶ 27.

concerning an “investment” (defined in BIT Article 1(1)) to a competent court of a Contracting Party or to ICSID conciliation or arbitration (see para. 471 above). An investor may, as here, consent to ICSID arbitration through the submission of its request for arbitration.⁶⁹⁴

Procedural Economy

556. Based on the Tribunal’s findings below that it lacks jurisdiction over the Claimants’ claims due to the conflict between the ongoing judicial proceedings in Portugal and this arbitration, and considering the arguments and evidence available at this stage of the proceeding, the Tribunal declines to rule on the Respondent’s other preliminary objections, for reasons of procedural economy.

The Claimants’ Pursuit of Mutually Exclusive Relief on Contradictory Grounds

557. From the outset of the proceeding, the Respondent has complained about the Claimants’ ongoing judicial proceedings in Portugal. In its Request for Bifurcation, the Respondent argued that “the primary factual and legal grounds of the present dispute are subject to legal proceedings before the Portuguese courts involving the Claimants.”⁶⁹⁵ The Respondent framed its jurisdictional objection in this regard principally in terms of the fork-in-the-road provision in BIT Article 9(2).⁶⁹⁶ That provision, the Respondent argues, is “designed to prevent the investor having several bites at the cherry,” and it mitigates the risk of conflicting decisions, overlapping damages, and unnecessary expense.⁶⁹⁷

558. The Parties and their legal experts addressed the legal implications of the ongoing judicial proceedings in Portugal in written submissions before the Hearing, at the Hearing on Jurisdiction, and in their Post-Hearing Briefs. The Tribunal has carefully reviewed the Parties’ submissions and expert testimony on these issues. To the extent

⁶⁹⁴ Request for Arbitration, ¶ 25 (“The Claimants hereby consent to submit the dispute to the Centre for arbitration in accordance with the Convention and the BIT.”).

⁶⁹⁵ Bifurcation Request, ¶ 102.

⁶⁹⁶ Memorial on Jurisdiction, ¶ 269.

⁶⁹⁷ Memorial on Jurisdiction, ¶ 269.

that those arguments are not referred to expressly, they are subsumed in the Tribunal's analysis.

559. A majority of the Tribunal considers that the claims presented by the Claimants in this arbitration rest on two key factual and legal premises.

560. *First*, the Oak Loan is assumed to be with BES, not with Novo Banco. As the Claimants explain in their PHB, “[t]he factual and legal enquiry in the arbitration is predicated on the assumption that the Oak Loan remained in BES following the resolution.”⁶⁹⁸

561. *Second*, the Claimants are entitled to a fair NCWO process, and prompt NCWO payments, arising from resolution measures imposed by the BoP. As the Claimants explain in their Rejoinder: “As repeatedly affirmed in this and the Claimants’ previous written pleadings, the Claimants’ claims in this arbitration are based on the Respondent’s violations of the substantive protections of the BIT [REDACTED] [REDACTED]”⁶⁹⁹

562. In contrast, the claims of the Claimants and their affiliates in Portuguese judicial proceedings rest on two different factual and legal premises.

563. *First*, the Oak Loan is not properly with BES, but should have been transferred to Novo Banco. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁶⁹⁸ Claimants’ PHB, ¶ 15.

⁶⁹⁹ Rejoinder, ¶ 359. See also Claimants’ PHB, ¶ 15 (“This Tribunal is required only to determine whether the Respondent has breached its obligations under the BIT, including by failing to make NCWO payments to the Claimants.”).

⁷⁰⁰ Claimants’ PHB, ¶ 16. There is no dispute that the Claimants in the arbitration are, or can become, parties to the Retransfer Cases. See Claimants’ PHB, ¶ 29 (“The BIT Claimants in the arbitration are not parties to the Retransfer Cases in the Portuguese courts – with the exception of Silver Point Mauritius, which is a claimant in [REDACTED] [REDACTED] – but the Claimants could be added as parties without much ado in the future, as provided for in Portuguese procedural law.”). See also [REDACTED]

564. *Second*, the Claimants and their affiliates seek repayment of 100% of their interests in the Oak Loan (plus damages) through Portuguese courts, rather than (at least) 31.7% of the interests claimed as NCWO rights in this proceeding. The Claimants state in their Rejoinder:

As the Claimants explained in their Counter-Memorial on Jurisdiction – by reference to the Respondent’s own admission in its Memorial on Jurisdiction – if the applicants in the Retransfer Cases are successful, the outcome would be that “the Oak Loan is in Novo Banco (and not BES)”. In those circumstances, “no [...] right to receive NCWO payments” would arise, and the Claimants would be entitled to recover their credits in full.⁷⁰¹

565. There is no dispute between the Parties that this arbitration and the domestic proceedings in Portugal rest on different – and indeed opposite – factual and legal premises. The Respondent argues: “Claimants are pursuing opposite claims based on one sole alleged investment but on two opposite – and mutually exclusive – factual basis.”⁷⁰² The Claimants themselves similarly argue: “[T]he domestic Portuguese proceedings and the arbitration proceedings rest on assumptions that are not only distinct but are, in fact, opposite.”⁷⁰³
566. The Parties further agree on two consequences arising from the ongoing judicial proceedings in Portugal.
567. *First*, if the Claimants succeed in the Retransfer Cases, any entitlement they may have to NCWO payments will be extinguished with retroactive effect, such that the Claimants never would have been BES creditors post liquidation and never would have been entitled to NCWO rights. The Respondent argues in this regard, “should Claimants obtain a favourable decision in the ‘Retransfer Cases’, their NCWO rights

⁷⁰¹ Claimants’ Rejoinder ¶ 386 (quoting Counter-Memorial on Jurisdiction, ¶ 326, and referencing Memorial on Jurisdiction, ¶ 275).

⁷⁰² Respondent’s PHB, ¶ 32 (emphasis omitted).

⁷⁰³ Claimants’ PHB, ¶ 17 (emphasis added).

would be extinguished, and Claimants would be excluded from participating in any NCWO process.”⁷⁰⁴ The Claimants themselves similarly argue:

If the Retransfer Cases result in a holding that the Oak Loan was incorrectly placed in BES by the BOP, the Claimants’ participation in the NCWO process as NCWO rightsholders will cease. This is because (1) only “creditor[s] of the credit institution” (i.e., BES) are entitled to NCWO payments arising out of the resolution of BES, (2)

such that “the Claimants would never have been BES creditors, and therefore, never entitled to [...] NCWO” to begin with.⁷⁰⁵

568. *Second*, if the Claimants succeed in the Retransfer Cases, they (and not simply their non-Mauritian affiliates) could recover their interests in the Oak Loan. The Respondent argues:

Indeed, Claimants could formally become parties to the domestic proceedings through a mere procedural formality. Until then, they are informally party to the proceedings and are bound by the decisions that will be rendered in the Portuguese proceedings.⁷⁰⁶

569. The Claimants similarly argue:

The BIT Claimants in the arbitration are not parties to the Retransfer Cases in the Portuguese courts – with the exception of Silver Point Mauritius, which is a claimant in – but the Claimants could be added as parties without much ado in the future, as provided for in Portuguese procedural law.⁷⁰⁷

570. The Tribunal further notes that all three Claimants are parties to , in which the Claimants and other

⁷⁰⁴ Respondent’s PHB, ¶ 29 (emphasis added).

⁷⁰⁵ Claimants’ PHB, ¶ 11 (emphasis in italics in the PHB, underlining added). As the Claimants’ legal expert, , explains: “Should there be an annulment of the Bank of Portugal’s Decisions, that annulment will be retroactively effective [...]. [T]he underlying idea is to reinstate the situation that would have existed had those illegal decisions never been made.” Tr. Day 4, 818:13-20 (Claimants’ expert).

⁷⁰⁶ Respondent’s PHB, ¶ 88.

⁷⁰⁷ Claimants’ PHB, ¶ 29. See also Respondent’s PHB, ¶ 88.

applicants seek [REDACTED]
[REDACTED] recognition that the Oak Loan was transferred in 2014 to Novo Banco and must be satisfied by Novo Banco.⁷⁰⁸

571. In sum, the Parties recognize that (i) this arbitration and the Portuguese judicial proceedings rest on opposite legal and factual premises in key respects; (ii) a successful outcome in the Retransfer Cases would eliminate, with retroactive effect, the factual and legal bases for this arbitration; and (iii) the Claimants could claim their interests in the Oak Loan through domestic judicial proceedings in Portugal. The Parties disagree, however, on the ensuing consequences.
572. The Tribunal recalls how the Claimants define the present dispute. In their submissions, the Claimants emphasize that their claims in this arbitration arise from the Respondent's alleged failures to give effect to the Claimants' putative NCWO rights, stating:

A relevant preliminary question is "what is the 'dispute' under the BIT?". The Claimants have maintained throughout the arbitration, which counsel confirmed at the Hearing, that "Claimants' claims under the BIT concern Respondent's Treaty violations arising from its failure to carry out an NCWO process and make NCWO payments."⁷⁰⁹

573. The Claimants stress that their claims in this arbitral proceeding concern *only* the NCWO process and NCWO payments. In the Claimants' words:

⁷⁰⁸ See Applicants' Claim on [REDACTED]. While this case was initiated after the Claimants filed their Request for Arbitration, it confirms that all three Claimants continue to petition the Portuguese courts to determine that the Oak Loan was incorrectly placed in BES.

⁷⁰⁹ Claimants' PHB, ¶ 50. See also, e.g., Counter-Memorial, ¶ 270 ("[T]he specific dispute at issue [...] concern[s] the Respondent's failure to complete the NCWO process and make NCWO payments [...]."); *ibid.*, ¶ 326 ("In these arbitration proceedings, the Claimants seek to recover damages relating to the value of their NCWO entitlements [...]."); Rejoinder, ¶ 302 ("Respondent could (and indeed should) have made NCWO payments in the past eight years because it was reasonable, proportionate and fair for it to do so. It is the Respondent's egregious failures in these respects [...] that gave rise to the dispute."); *ibid.*, ¶ 359 ("[T]he Claimants' claims in this arbitration are based on the Respondent's violations of the substantive protections of the BIT through its delay and failure to make their NCWO payments in a timely manner."); *ibid.*, ¶ 379 ("[T]he Claimants' claims are that the Respondent has [...] failed to progress the NCWO process and make payments to the Claimants, in violation of the substantive protections of the BIT.").

[T]his Tribunal is only called upon to determine whether Portugal's acts and omissions in relation to the NCWO process and its failure to make NCWO payments to Claimants have violated the BIT, causing damage to Claimants for which they are entitled full reparation under the customary international law standard.⁷¹⁰

574. As articulated by the Claimants, each of their claims on the merits (whether they have merits or not) concerns the Respondent's alleged failures concerning the NCWO process and NCWO payments.⁷¹¹

575. Significantly, the Claimants base their claims in this arbitration on a set of assumed facts that the Oak Loan remains in BES and that the Claimants have NCWO rights arising from the BES resolution. In the Claimants' words:

In the arbitration [...] the Claimants' claims are based on an assumption [REDACTED] that the Oak Loan remains in BES. Based on that set of assumed facts, the Claimants seek full reparation under the customary international law standard [REDACTED]

576. A majority of the Tribunal considers that the ongoing Retransfer Cases in Portugal seek to eliminate the factual and legal bases for the rights invoked and relief requested in this arbitration. The Claimants (and affiliates representing their interests) argue in those cases that the Oak Loan is *not* properly with BES, and should *not* have been subjected to the impugned resolution measures.⁷¹³ Instead, the Oak Loan should have been transferred to Novo Banco and should be paid in accordance with its terms. The

⁷¹⁰ Counter-Memorial, ¶ 316.

⁷¹¹ See Memorial on Merits, ¶¶ 237 (expropriation), 272 (fair and equitable treatment), 302 (most-favored-nation treatment), 311 (effective means), 321, 323 (full protection and security).

⁷¹² Claimants' Rejoinder, ¶ 370 (emphasis added). See also *ibid.*, ¶ 395(b) ("This Tribunal is not called upon to make any finding of law as regards the allocation of Claimants' credits in Novo Banco or BES, but rather to assume that although the retransfer decisions have been already challenged before the Portuguese courts in the domestic proceedings, [REDACTED], these decisions remain applicable, and thus that the Oak Loan remains in BES.").

⁷¹³ See n. 703, *supra*, and accompanying text.

Claimants therefore deny that they have any NCWO rights at all, let alone a right to NCWO payments.

577. According to the Claimants, their advancement of contradictory positions in the Retransfer Cases creates no risk of conflict with this proceeding, including because the domestic courts and this Tribunal are called on to adjudicate different questions.⁷¹⁴ A majority of the Tribunal disagrees. The questions at issue in the Retransfer Cases are inextricably linked to the rights claimed in this arbitration. The existence of NCWO rights under Portuguese law is a necessary predicate for the Claimants' pleaded claims in this arbitration. To reiterate, the Claimants state that "this Tribunal is *only* called upon to determine whether Portugal's acts and omissions in relation to the NCWO process and its failure to make NCWO payments to Claimants have violated the BIT."⁷¹⁵

578. The Parties have cited several prior arbitral decisions addressing parallel proceedings.⁷¹⁶ A majority of the Tribunal considers these decisions to be of limited relevance. In those cases, claimants generally have sought similar relief on overlapping or duplicative grounds across different *fora*. In the majority's view, the Claimants here, by contrast, [REDACTED]
[REDACTED].⁷¹⁷

579. The majority further considers that [REDACTED]
[REDACTED].⁷¹⁸ Through their ongoing litigation

⁷¹⁴ See n. 681, *supra*, and accompanying text.

⁷¹⁵ Counter-Memorial, ¶ 316 (emphasis added).

⁷¹⁶ See, e.g., *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, May 31, 2017 (**RL-0091**); *Ampal-American Israel Corp. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, Feb. 1, 2016 (**RL-0268**).

⁷¹⁷ For this reason, the Tribunal also finds that the doctrine of *lis pendens* is not engaged on the present facts. See, e.g., *Hydro S.r.l., Costruzioni S.r.l. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, Apr. 24, 2019, ¶ 593, (**CL-0042**) ("If a claim is to be excluded as having already been brought before a different forum, under the doctrine of *lis pendens*, the claim already brought elsewhere must (at least) be fundamentally the same as the claim now sought to be brought before the Tribunal.").

⁷¹⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, reprinted, Cambridge 1987 referenced at <https://www.trans-lex.org/101100> (last accessed: March 15, 2026) ("It is a principle of good faith that 'a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another [...]. Such a principle

in the Retransfer Cases in Portuguese courts, [REDACTED]

[REDACTED] a principle at the “crux of investment arbitration.”⁷¹⁹

580. The Tribunal majority decides this issue as a matter of principle, while recognizing that many investment tribunals similarly have endorsed the principle of good faith. The tribunal in *Stabil v. Russia*, for example, observed that good faith “encompasses the principle of consistency and the Latin maxim of *allegans contraria non audiendus est* (colloquially translated as ‘one cannot blow hot and cold’), which has often been applied by international courts and tribunals.”⁷²⁰

581. This application of the principle of good faith finds ample support in international law and investment treaty jurisprudence. The *Stabil* tribunal, for instance, noted in this regard:

A number of investment tribunals have similarly acknowledged the importance of good faith in a variety of contexts. For example, tribunals have found that the principle of consistency stems from “the more generally conceived requirement of good faith” and have disallowed inconsistent behavior by States vis-à-vis foreign investors, accentuating the principle that “[a] State that has taken a particular position may be under an obligation to act consistently with it on another occasion.”⁷²¹

has its basis in common sense and common justice, and whether it is called ‘estoppel’ or by any other name, it is one which courts of law have in modern time most usefully adopted.”) (quoting *Cave v. Mills*, England, Court of Exchequer (162), 7 Hurlstone & Norman, pp. 913, 927).

⁷¹⁹ *Carlos Esteban Sastre et al. v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, Nov. 21, 2022, ¶ 253 (RL-0154) (“The principle of good faith is at the crux of investment arbitration. Investment treaties and associated conduct by the parties must be interpreted in good faith, as required by the Vienna Convention on the Law of Treaties. Investments must be made in good faith and both the investor, and the State must act in good faith in their dealings with each other.”).

⁷²⁰ *Stabil LLC (Ukraine) et al. v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, June 26, 2017, ¶ 166.

⁷²¹ *Stabil LLC (Ukraine) et al. v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, June 26, 2017, ¶ 167 (citations omitted).

582. The tribunal in *Chevron Corp. v. Ecuador* further observed:

Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement derived from Article VI of the Treaty. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can “have it both ways” or “blow hot and cold”, to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.⁷²²

583. The tribunal in *RWE AG v. The Netherlands* similarly observed:

It is inherently contradictory for the Netherlands to challenge the jurisdiction of this ICSID Tribunal outside of the ICSID regime by proceeding before the EU domestic courts and then come back to this ICSID Tribunal to claim costs. In taking these contrary positions, the Netherlands' application for costs fails on the basis of the Netherlands' failure to adhere to the international law maxim *allegans contraria non-est audiendus* (“a person adducing to the contrary may not be heard”, or as paraphrased by Lord McNair, a party “cannot blow hot and cold”).⁷²³

584. Leading commentators have taken the same position. Bernardo Cremades, for example, has written that “[t]he duty to arbitrate in good faith is infringed upon [...] when the principle *non venire contra factum proprium* is violated [...]”.⁷²⁴

⁷²² See, e.g., *Chevron Corp. et al. v. Republic of Ecuador*, PCA Case 2009-23, Second Partial Award on Track II, Aug. 30, 2018, ¶ 7.106. (emphasis added).

⁷²³ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Order of Discontinuance and Decision on Costs, Jan. 12, 2024, ¶ 63. See also *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Annulment Proceeding, Decision on Stay of Enforcement of the Award, Dec. 12, 2019, ¶ 35 (“As indicated by the *Chevron* tribunal, basic principles of good faith prevent Caratube from arguing in favor of a legal standard that is in direct contradiction with the legal standard that Caratube relied on and from which it benefited when it requested the continuation of the stay of enforcement of an ICSID award.”).

⁷²⁴ Bernardo M. Cremades, “Good faith in international arbitration,” *American University International Law Review*, Vol. 27, Issue No. 4, 2012, pp. 761-788; also published in *World Arbitration and Mediation Review*, Vol. 6, Issue No. 2, 2012, pp. 217-243.

585. Here, in the majority's view, [REDACTED]

[REDACTED]
[REDACTED]
and the arbitration agreement derived from Article 9 of the BIT. [REDACTED]

[REDACTED] in the context of ICSID's self-contained regime for dispute settlement, by which the parties' choice of ICSID arbitration is presumed to be exclusive.⁷²⁵

The Claimants' Assumed Facts and Negation of Jurisdictional Predicates

586. In the majority's view, the problem of the Claimants' multiplicity of claims on contradictory legal grounds in different fora is compounded by their inability to affirmatively assert in this arbitration – without qualification or contradiction – that they hold NCWO rights. Instead, the Claimants insist that the Tribunal should proceed on the basis of a "set of assumed facts," which the Claimants have not established and do not propose to establish.⁷²⁶ As the Claimants' counsel stated at the Hearing:

Claimants in this Arbitration are saying: "Let us assume for argument's sake that Portugal is right, that the Oak Loan is in BES. If that assumption is correct, what are the Claimants' NCWO rights in the BES resolution, and has Portugal breached its Treaty obligations by failing to implement a proper NCWO process and make NCWO payments?"⁷²⁷

587. The Claimants stated similarly in their PHB:

This Tribunal is not called upon to make any finding of fact or law
as regards whether the Oak Loan moved to Novo Banco or remained

⁷²⁵ See, e.g., ICSID Convention, Art. 26 ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy [...]."); Stephan Schill *et al.*, eds., *Schreuer's Commentary on the ICSID Convention*, Third Edition, Cambridge University Press 2022, Art. 26, ¶ 168 ("Art. 26 creates a presumption that the parties intended to resort to ICSID arbitration to the exclusion of all other means of dispute settlement. This is expressed in the Report of the Executive Directors to the Convention: [...] 'It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26.'").

⁷²⁶ Claimants' Rejoinder, ¶ 370.

⁷²⁷ Tr. Day 1, 276:16-22 (Claimants' counsel) (emphasis added).

in BES. The factual and legal enquiry in the arbitration is predicated on the assumption that the Oak Loan remained in BES following the resolution.⁷²⁸

588. A majority of the Tribunal considers that the Claimants: (i) assert claims premised on the Respondent's alleged failure to carry out an NCWO process and make NCWO payments; (ii) decline to affirmatively assert that the Oak Loan remains in BES or that NCWO rights apply, instead inviting the Tribunal to proceed on assumed facts; and at the same time (iii) actively contradict those very predicates in their (and their affiliates') domestic proceedings in Portugal. The Claimants [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], at this jurisdictional stage of the proceeding.

589. Article 41(1) of the ICSID Convention provides that "[t]he Tribunal shall be the judge of its own competence." That provision, the tribunal in *Inceysa v. El Salvador* observed, "implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation."⁷²⁹ An ICSID tribunal, in fact, is "obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence [...] under penalty of infringing its obligation under Article 41 of the ICSID Convention."⁷³⁰

590. It is well established that a claimant bears the burden to establish those premises. As the tribunal in *Phoenix Action v. Czech Republic* observed:

In the Tribunal's view, it cannot take all the facts as alleged by the Claimant as granted facts, as it should do according to the Claimant,

⁷²⁸ Claimants' PHB, ¶ 15 (emphasis added). See also Counter-Memorial, ¶ 252 ("The Claimants' challenge concerns their rights and the Respondent's obligations under the BIT, assuming that the Oak Loan remains in BES [REDACTED]"); Rejoinder, ¶ 370.

⁷²⁹ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, ¶ 149 (RL-0026).

⁷³⁰ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, ¶ 155 (RL-0026).

but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent.

If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.⁷³¹

591. A majority of the Tribunal considers that the Claimants [REDACTED]

592. For the majority, this jurisdictional question does not turn on whether the Claimants and their affiliates ultimately succeed or fail in domestic proceedings in Portugal. The jurisdictional defect, instead, concerns the *existing, ongoing* efforts by the Claimants and their affiliates in Portugal to establish – by the Claimants’ own admission⁷³² – that the Oak Loan is not properly with BES and, accordingly, that the Claimants *never* held NCWO rights and *never* were entitled to NCWO payments. That is, [REDACTED]

[REDACTED] For the majority, these conclusions flow inexorably not only from the evidence in the record but also from the Claimants’ own statements concerning the specific relief sought in legal proceedings in Portugal and the factual and legal bases for their claims in this arbitration.

⁷³¹ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶¶ 60-61. See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, June 1, 2012, ¶ 2.9 (“[T]his Tribunal is here required to determine finally whether it has jurisdiction over the Claimant’s CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant’s favour.”); *Westmoreland Mining Holdings, LLC v. Canada (II)*, ICSID Case No. UNCT/20/3, Final Award, January 31, 2022, ¶ 193 (“The question of burden of proof arises only with respect to matters of fact, where each party has the burden of establishing those facts that they assert. If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction.”).

⁷³² See para 567, *supra*.

⁷³³ See paras. 572-573, *supra*.

593. For the majority, this is not an issue of the admissibility or merits of the Claimants' claims. Rather, it is an issue of jurisdiction derived from the most fundamental requirements of adjudicatory consent. A majority of the Tribunal concludes that the Respondent did not consent, in Article 25(1) of the ICSID Convention or Article 9 of the BIT, to adjudicate claims based on "assumed" and contingent factual and legal premises that are threatened with retroactive negation through domestic legal proceedings currently being prosecuted by the Claimants and their affiliates in Portugal.

Authority for the Tribunal's Decision

594. The majority considers the decision within its authority for two principal reasons.

595. *First*, the Respondent plainly, and consistently, put at issue the legal consequences arising from the Claimants' ongoing judicial proceedings in Portugal. For example, in its Memorial on Jurisdiction, the Respondent argued:

81. [...] [REDACTED], less than a month after Silver Point Mauritius acquired its interests in the Oak Loan, it initiated proceedings before the Administrative Court of Lisbon challenging [REDACTED] the non-transfer of the Oak Loan to Novo Banco.

82. All three Claimants also initiated a civil liability action against Portugal on [REDACTED] before the Administrative Court of Lisbon claiming that they were entitled to receive as compensation the full amount due under the Oak Loan [REDACTED]

[REDACTED] While maintaining in litigation in Portugal that the Oak Loan never should have been transferred to BES and that they are therefore entitled to full recovery of the debts they are allegedly due under the Oak Loan, [REDACTED] their NCWO payments which they claim amount to 31.7% of their credits in the Oak Loan as valuated by Deloitte.

84. More than seven years [REDACTED]

596. A majority of the Tribunal considers the conflicts issue a different characterization of the legal and factual situation complained of by the Respondent throughout this proceeding. The Tribunal is not bound by the legal arguments invoked by the Parties and is free to adopt its own legal assessment, so long as it does not surprise the Parties.⁷³⁵ For the majority, there is no surprise here: the legal consequences of the domestic proceedings have been before the Parties from the outset of the preliminary objections phase, which the Parties extensively addressed in their submissions and through expert testimony. The Tribunal also afforded the Parties sufficient opportunity to address the relevance of the conflicts issue, both by posing targeted questions at the Hearing and by instructing the Parties in writing to respond to those issues in their PHBs.
597. *Second*, the Tribunal may raise the conflicts issue independently in any event. Under ICSID Arbitration Rule 43:
- (1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal (“preliminary objection”).
- [...]

⁷³⁴ Memorial on Jurisdiction, ¶¶ 81-84 (citations omitted) (emphasis added).

⁷³⁵ See *Quiborax S.A. and Non-Metallic Minerals S.A v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015, ¶ 92 (CL-0043) (“When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia* – or better, *iura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.”); Stephan Schill *et al.*, eds., *Schreuer’s Commentary on the ICSID Convention*, Third Edition, Cambridge University Press 2022, Art. 42, ¶ 248 (identifying *iura novit curia* among the general principles of law recognized in the practice of ICSID tribunals).

- (3) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.

598. A majority of the Tribunal considers that its present findings fall squarely within the scope of issues contemplated by this Rule. In particular, the conflict is not a defect that could be waived by a respondent's silence or inaction, but rather concerns a foundational requirement that the Tribunal is entitled to – and, if circumstances require, must – address independently.
599. Before concluding, the Tribunal wishes to acknowledge the Claimants' contention that their multiple claims in Portuguese courts have been pending for several years without meaningful progress. The Tribunal majority is mindful that the practical effect of dismissing this proceeding is to defer these issues to the court proceedings initiated by the Claimants and their affiliates in Portugal. The effectiveness of those proceedings, however, is not a matter for this Tribunal to resolve. The Tribunal's mandate is limited to assessing the impact of those proceedings on the claims submitted to arbitration. As explained above, the Claimants cannot pursue this arbitration while simultaneously maintaining positions in the Retransfer Cases that negate the basis for their claims in the arbitration. The Tribunal's decision necessarily is without prejudice to the Claimants' ability, if they so wish, to commence future BIT claims following completion or withdrawal of the domestic judicial proceedings.⁷³⁶

VI. COSTS

A. THE CLAIMANTS' COST SUBMISSIONS

600. In their Submission on Costs, the Claimants argue that the Respondent should bear all of the Claimants' costs, *i.e.*, all of the arbitration costs, as well as the Claimants' legal

⁷³⁶ See, e.g., *Ampal-American Israel Corp. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, Feb. 1, 2016, ¶ 334 (**RL-0268**) ("It lies in the power of Ampal, as 100% owner of MAGL through Ampal Energy Ltd (Israel) to cure the abuse here identified were Ampal and MAGL to elect [...] to submit the MAGL portion of the claim made in the *Maiman* arbitration to the exclusive jurisdiction of the present Tribunal, relinquishing that part of the claim in the *Maiman* arbitration, or conversely to pursue such claim only in the latter proceeding.").

fees and expenses, and experts' and witnesses' s fees and expenses (“**Claimants’ legal costs**”).⁷³⁷ The Claimants’ Legal Costs amount to [REDACTED]

Legal fees and expenses

Fietta LLP fees
 Fietta LLP expenses
 PLMJ Advogados fees and expenses
 Saadeh Rahman LLP fees
 Saadeh Rahman LLP expenses

[REDACTED]

Experts’ and witnesses’ fees and expenses

Mr. [REDACTED] fees and expenses
 [REDACTED] fees and expenses
 [REDACTED] fees and expenses
 [REDACTED] expenses

[REDACTED]

TOTAL

[REDACTED]

B. THE RESPONDENT’S COST SUBMISSIONS

601. In its Submission on Costs, the Respondent argues that the Claimants should bear all the costs and expenses of these proceedings, *i.e.*, all of the arbitration costs, as well as the Respondent’s legal fees and expenses, experts’ fees and expenses and other expenses (“**Respondent’s Legal Costs**”).⁷³⁸ The Respondent’s Legal Costs amount to EUR 1,564,942.56, as follows:

Legal fees and expenses

EUR 1,500,000

Experts’ fees and expenses

EUR 20,000

Other Expenses

EUR 44,942.565

⁷³⁷ Claimants’ Submission on Costs, ¶ 2.

⁷³⁸ Respondent’s Submission on Costs, ¶¶ 6-8.

C. THE TRIBUNAL'S DECISION ON COSTS

602. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

603. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

604. In exercising its discretion, the Tribunal considers (i) the outcome of the proceeding; (ii) the complexity of the issues; (iii) the reasonableness of the Parties' costs; and (iv) the Parties' procedural conduct.

605. Outcome of the proceeding. The Claimants' claims are dismissed for lack of jurisdiction.

606. Complexity of the issues. As the Award and dissenting opinion make clear, the Claimants' claims presented many complex issues, including the relationship between the Portuguese judicial proceedings and this arbitration.

607. Reasonableness of the Parties' costs. The Tribunal considers both Parties' costs to be reasonable, particularly given the complexity of the issues before the Tribunal and the extensive factual record. In particular, the Tribunal received voluminous material concerning the Oak Loan, Portuguese and EU law, and judicial proceedings in Portugal and the United Kingdom.

608. Parties' procedural conduct. The Parties conducted the arbitration professionally, cooperated on procedural issues, and argued their positions with commendable clarity and forthrightness.

609. In light of these factors, the Tribunal considers it appropriate for the Claimants to bear the costs of the arbitration and 50 percent of the Respondent's Legal Costs.

610. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses

President Sharpe	
Professor Stern	
Professor Schill	
ICSID's administrative fees	
Direct expenses	
Total	

611. The above costs have been paid out of the advances made by the Parties in equal parts.⁷³⁹ As a result, each Party's share of the costs of arbitration amounts to

612. Accordingly, the Tribunal, by majority, orders the Claimants to pay the Respondent
for the expended portion of the Respondent's advances to ICSID and
) to cover 50% of the Respondent's Legal Costs.

VII. AWARD

613. For the reasons set forth above, the Tribunal, by majority:

- (1) Declares that it lacks jurisdiction over the Claimants' claims;
- (2) Orders the Claimants to compensate the Respondent for its Legal Costs in this arbitration in the amount of .

⁷³⁹ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

⁷⁴⁰ Any conversion from euros into United States dollars has been made solely for ease of reference, using the euro–United States dollar exchange rate applicable on the date of this Award. The euro amounts awarded remain authoritative.

- (3) Orders the Claimants to compensate the Respondent for its share of the costs of the arbitration in the amount of [REDACTED].

[Signed]

Professor Dr. Stephan Schill
Arbitrator

Subject to the attached dissenting opinion

Date: June 10, 2026

[Signed]

Professor Brigitte Stern
Arbitrator

Date: June 10, 2026

[Signed]

Mr. Jeremy K. Sharpe
President of the Tribunal

Date: June 10, 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**SUFFOLK (MAURITIUS) LIMITED, MANSFIELD (MAURITIUS) LIMITED AND
SILVER POINT MAURITIUS**

Claimants

and

PORTUGUESE REPUBLIC

Respondent

ICSID Case No. ARB/22/28

DISSENTING OPINION

PROFESSOR DR. STEPHAN W. SCHILL

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INTRODUCTION

1. I am unable to join my esteemed colleagues in their decision that the Tribunal “lacks jurisdiction over the Claimants’ claims”¹ because they consider that, in the present arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”) and in certain pending proceedings in Portuguese courts (which are referred to as the “**Retransfer Cases**”),² [REDACTED]
[REDACTED] In my reading of the procedural law that applies in the present arbitration, and in my understanding of the facts of the case, the majority reaches a result that is fundamentally mistaken in substance and at odds with the procedural framework of the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings in force as of 1 July 2022 (“**2022 Arbitration Rules**”), which apply in the present case.
2. After recalling the procedural posture the proceedings are in at the time of the Award and summarizing the majority’s core reasoning, I will, in the following, lay out the reasons for my disagreement with the Tribunal majority. As I will explain in more detail, the majority (i) incorrectly qualifies the issue on which it declines jurisdiction as going to jurisdiction, rather than admissibility or merits, (ii) incorrectly assumes the power to raise the issue in question *proprio motu* in the context of proceedings on bifurcated preliminary objections that the issue was not part of, (iii) incorrectly decides on the issue without having determined that the Centre has jurisdiction and that the Tribunal is otherwise competent to hear the dispute, (iv) incorrectly decides on the issue, without respecting the Parties’ right to be heard, based on a legal theory and legal authorities that are not part of the record and have not been brought to the Parties’ attention for comment, and (v) incorrectly

¹ Award, para 613(1).

² For the definition of the term Retransfer Cases, see Award, para 326. This definition encompasses Cases [REDACTED]. In addition, the majority also makes reference to Case [REDACTED] in the present context, but does so, I understand, [REDACTED]

[REDACTED] See Award, para 570 and text in note 708.

³ Award, para 578. Similarly, *ibid* para 585.

characterizes [REDACTED]
[REDACTED].

I. PROCEDURAL BACKGROUND AND MAJORITY'S CORE REASONING

3. In Procedural Order No. 3 (“**PO3**”), dated 1 March 2024, the Tribunal decided to accept the Respondent’s Request for Bifurcation and bifurcated six preliminary objections that the Respondent had raised against the Claimants’ claim that their rights under the Agreement between the Portuguese Republic and the Republic of Mauritius for the Mutual Promotion and Protection of Investments (“**Portugal-Mauritius BIT**”) have been breached in connection with the treatment of the Claimants’ purported interests in the Oak Loan in liquidation proceedings resulting from the insolvency of Banco Espírito Santo, S.A. (“**BES**”). The Oak Loan, which constitutes the Claimants’ alleged investment, had been extended to BES by the Claimants’ predecessors and had been placed, as part of the resolution measures adopted by the Bank of Portugal (“**BoP**”) following BES’s insolvency, with BES, which was to be liquidated as the non-viable “bank bad,” rather than with Novo Banco S.A. (“**Novo Banco**”), the “good bank” created to continue doing business with a significant part of BES’s debt and credit portfolio. The Parties’ submissions on these preliminary objections, which were reframed by the Respondent during the written phase of the bifurcated proceedings as five, not six, preliminary objections, are accurately and in detail summarized in the Award.⁴
4. Despite its decision to bifurcate, the majority of the Tribunal in the Award does not decide on a single one of these preliminary objections but “declines to rule on [them] for reasons of procedural economy.”⁵ Instead, the majority finds that the Tribunal “lacks jurisdiction over the Claimants’ claims”⁶ on the basis of an issue that was first raised by the Tribunal’s President in reaction to the Claimants’ opening presentation and later spelled out in more

⁴ See Award, Section V.A-E. Notably, the Respondent subsumed what were originally its second and third objections—that is, that the Claimants have not made protected investments and that the Claimants have acquired their purported investments in violation of the laws and regulations of Portugal—as belonging to an overarching category of preliminary objection, namely that the Tribunal lacks jurisdiction *ratione materiae*. See also *ibid* para 146 fn 88.

⁵ Award, para 556.

⁶ Award, para 613(1).

detail in the directions given by the Tribunal to the Parties for post-hearing submissions.⁷ That issue concerns, as stated already above, what the majority qualifies as [REDACTED] [REDACTED]⁸ between what the Claimants pursue in the present ICSID arbitration and what they (respectively their predecessors-in-interest (“predecessors”)), which are often also referred to as their non-Mauritian affiliates in these proceedings) seek in the Retransfer Cases in the Portuguese courts.

5. This conflict or contradiction, in the majority’s view, arises because the Claimants advance in the present arbitration that they have been treated in breach of the Portugal-Mauritius BIT in the administration of BES’s bank resolution proceedings because the rights the Claimants have under Portuguese law following the BoP’s decision to place the Oak Loan with BES, which include, but are not necessarily limited to, rights to be treated under the no-creditor-worse-off (“NCWO”) principle, have not been respected. At the same time, the Claimants (respectively their predecessors) challenge before the Portuguese courts [REDACTED] [REDACTED] of the decisions taken by the BoP to place the Oak Loan with BES, rather than with Novo Banco, which the majority understands [REDACTED] [REDACTED] [REDACTED].⁹

6. For the majority, [REDACTED] [REDACTED] [REDACTED] and the arbitration agreement derived from Article 9 of the [Portugal-Mauritius] BIT.”¹⁰ In addition, the majority considers that, [REDACTED]

⁷ See Award, paras 533 and 534 for the questions posed by the President in reaction to the Claimants’ opening presentation and the questions formulated as part of the directions for post-hearing submissions.

⁸ Award, paras 578 and 585.

⁹ See Award, para 588 (“A majority of the Tribunal considers that the Claimants: (i) assert claims premised on [REDACTED]; (ii) decline to affirmatively assert that the Oak Loan remains in BES or that NCWO rights apply, instead inviting the Tribunal to proceed on assumed facts; and at the same time (iii) actively contradict those very predicates in their (and their affiliates’) domestic proceedings in Portugal. The Claimants [REDACTED]

[REDACTED], at this jurisdictional stage of the proceeding.”).

see also Award, paras 576, 577, and 592.

¹⁰ Award, para 585. See also *ibid* para 579.

[REDACTED]

[REDACTED]

[REDACTED]¹¹ This, in the majority's view, has the consequence that there is a lack of jurisdiction *ratione voluntatis*. As stated by the majority, "Respondent did not consent, in Article 25(1) of the ICSID Convention or Article 9 of the BIT, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. As the majority recognizes, [REDACTED]
[REDACTED]¹³ clearly fall outside the preliminary objections bifurcated in PO3.¹⁴ The issue in question has also not been characterized otherwise by either Party as going to jurisdiction *ratione voluntatis* and having the effect that the "dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal," as stated in Article 41(2) of the ICSID Convention and Rule 43(1) of the 2022 Arbitration Rules.¹⁵

II. VIOLATION OF RULES OF PROCEDURE

8. In my view, and with all due respect for my co-arbitrators, the way of handling the proceedings as summarized above, is procedurally inappropriate and at odds with both the ICSID Convention and the 2022 Arbitration Rules. As I will explain in detail, the majority's approach violates Rules 43 and 44 of the 2022 Arbitration Rules (which set out rules on preliminary objections and connected requests for bifurcation and limits the power of

¹¹ Award, para 591.

¹² Award, para 593.

¹³ Award, para 585. See also *ibid* para 578.

¹⁴ See specifically Award, para 532, where the majority recognizes that "[t]hese issues **go beyond** the Respondent's fork-in-the-road objection." See also *ibid* para 596 (stating that "the conflicts issue [is] a **different** characterization of the legal and factual situation complained of by the Respondent throughout this proceeding") (emphases added).

¹⁵ Apart from raising the relationship between the present arbitration and the Retransfer Cases as part of its fork-in-the-road objection, but under an entirely different framing (see Award, paras 473-497), the Respondent in its post-hearing brief explicitly states that if the relationship between these proceedings was analyzed as an abuse of process, such "an abuse of process must be dealt with at the level of admissibility" (see Respondent's Post-Hearing Briefs, para 68).

ICSID tribunals to raise other preliminary objections or the merits in bifurcated proceedings) (see sub-sections A and B), violates Article 41(2) of the ICSID Convention (which requires the Tribunal to determine the jurisdiction of the Centre and its own competence before refusing to exercise jurisdiction on grounds that have to be qualified as going to the admissibility of the claims before the Tribunal) (see sub-section C), and violates Rule 3(2) of the 2022 ICSID Arbitration Rules (which requires the Tribunal to respect the Parties' right to be heard) (see sub-section D).

A. Rule 44 of the 2022 Arbitration Rules

9. To start with, the approach taken by the majority violates Rule 44(3) of the 2022 Arbitration Rules, which governs the procedure to be followed in case preliminary objections have been bifurcated in response to a request for bifurcation, as was the case in the present proceedings following the issuance of PO3.¹⁶ According to Rule 44(3) of the 2022 Arbitration Rules, the proceedings on the merits shall be suspended (unless the Parties agree otherwise), the Tribunal has to fix time limits for submission “on the preliminary objection,” and finally deliver a ruling “on the preliminary objection” within a predetermined timeframe. Relatedly, Rule 45 provides that “[i]f a party does not request bifurcation of a preliminary objection ..., the preliminary objection shall be joined to the merits.”
10. Thus, as the wording of Rule 44(3) makes clear, the focus of the bifurcated proceedings is solely on the bifurcated preliminary objections, not on any other issues that may be at stake in the proceedings. Similarly, Rule 42(5) provides that a consequence of bifurcation generally is that the Tribunal “shall suspend the proceedings with respect to any questions to be addressed at a later phase, unless the parties agree otherwise.” The consequence of

¹⁶ Rule 44 of the 2022 Arbitration Rules provides in relevant part:

Rule 44

Preliminary Objections with a Request for Bifurcation

[...]

- (3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:
 - (a) suspend the proceeding on the merits, unless the parties agree otherwise;
 - (b) fix time limits for submissions on the preliminary objection;
 - (c) render its decision or Award on the preliminary objection within 180 days after the last submission, in accordance with Rule 58(1)(b); and
 - (d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

these rules is clear. As stated in *Schreuer's Commentary on the ICSID Convention*: “[w]here a Tribunal allows for bifurcation, it will limit its inquiry to the bifurcated issue and will not entertain legal arguments or consider evidence that relates to other matters.”¹⁷

11. In the present arbitration proceedings, by raising additional grounds other than those that had formed part of the bifurcated preliminary objections proceedings and grounding a decision to reject its “jurisdiction” on such grounds, the majority contravenes Rule 44(3) of the 2022 Arbitration Rules and, by implication, Article 44 of the ICSID Convention.

B. Rule 43 of the 2022 Arbitration Rules

12. The majority’s approach can also not be justified by reference to Rule 43(3) of the 2022 Arbitration Rules, as suggested by the majority.¹⁸ Pursuant to this provision, which reflects prior practice of ICSID tribunals in applying their powers under Article 41(2) of the ICSID Convention, “[t]he Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.” Importantly, the *proprio motu* powers under Rule 43(3) are limited to matters that concern either “the jurisdiction of the Centre” or the Tribunal’s “own competence.”
13. Granted, ICSID tribunals often enough lack the desired clarity in differentiating whether an issue goes to the “jurisdiction of the Centre” (a matter regulated in Article 25 of the ICSID Convention) or concerns a tribunal’s “own competence” (a concept used in Article 41(2) of the ICSID Convention), as well as in relating these concepts to the widely used concepts of an arbitral tribunal’s jurisdiction (in the sense of the power or ability of the tribunal to hear a case at all, which confounds aspects going to the Centre’s jurisdiction and to an ICSID tribunal’s competence) and of the admissibility of a claim (referring to characteristics of the claim that militate against the exercise of otherwise existent jurisdiction).¹⁹ What should be clear, in my view, however, is that, contrary to what the

¹⁷ Ursula Kriebaum, ‘Article 41’ in Stephan W. Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (3rd edn, OUP 2022) para 169 (relying on *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No ARB/11/13, Award on Jurisdiction (16 July 2013) paras 33-34).

¹⁸ Award, paras 597-598.

¹⁹ For discussion, see, for example, Ursula Kriebaum, ‘Article 41’ in Stephan W. Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (3rd edn, OUP 2022) paras 12-14; Andrea Steingruber, ‘Some Remarks on Veijo Heiskanen’s Note “Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration”’ (2014) 29 ICSID Rev 675; Hanno Wehland, ‘Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules’ in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Wolters Kluwer 2017) 227; Facility Rules’ in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer 2017); Veijo Heiskanen, ‘Menage a trois? Jurisdiction,

majority states when qualifying the issue at stake as going to jurisdiction *ratione voluntatis*,²⁰ [REDACTED]

[REDACTED], is an issue that neither goes to the jurisdiction of the Centre in the sense of Article 25 of the ICSID Convention, nor does it concern a matter going to the Tribunal's competence in the sense of its power to hear a case at all (jurisdiction *stricto sensu*). Instead, the grounds on which the majority declines jurisdiction in connection with [REDACTED]

[REDACTED]²¹ are not jurisdictional at all, but have to be seen as going to either the admissibility of the Claimants' claims or to their merits.

14. That the issue in question in the majority's own reading goes to the admissibility of the claim, rather than to the Tribunal's jurisdiction *stricto sensu*, is already evidenced by the fact that the majority dismisses "jurisdiction" without prejudice.²² This shows that the majority itself does not consider there to be a fundamental defect with the authority of the Centre or the Tribunal to hear the dispute, but rather a shortcoming in respect of the claims brought at this moment in time.
15. One reaches the same conclusion—that the issue goes to the admissibility of the claim—when looking closely at the reasons the majority relies on to support its conclusion that it lacks "jurisdiction." On the one hand, the majority considers that the [REDACTED]

Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 ICSID Rev 231; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (CH Beck Hart Nomos 2015) 1212; August Reinisch, 'Jurisdiction and Admissibility in International Investment Law' (2017) 16 Law & Pract Int'l Courts & Tribs 21; Saar A Pauker, 'Admissibility of Claims in Investment Treaty Arbitration' (2018) 34 Arb Int'l 1; Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill 2018). For an analysis of the difference between a tribunal's jurisdiction and the admissibility of the claim, see in particular *Supervision y Control SA v Republic of Costa Rica*, ICSID Case No ARB/12/4, Award (18 January 2017) paras 268-274 (**Exhibit RL-0046**).

²⁰ See Award, paras 585 and 593.

²¹ Award, para 585. See also *ibid* para 578.

²² See Award, para 599. Notably, the authority, on which the majority relies for this point—*Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) (**Exhibit RL-0268**)—treats the conflict the tribunal sees in that case, and which it qualifies as an abuse of process, as going to the admissibility of the claim, not as going to its jurisdiction; it also addresses the issue of an abuse of process only after first having ruled on a number of other preliminary objections in order to establish its jurisdiction over the claim in question. See *ibid* paras 312 ff.

[REDACTED]

[REDACTED]

[REDACTED] However, contrary to what the majority suggests,²⁴ compliance with the principle of good faith, just as the absence of an abuse of process, are not elements of the Parties' consent to arbitrate formed on the basis of Article 9 of the Portugal-Mauritius BIT. Indeed, Article 9 of the Treaty states nothing to that effect. On the contrary, as is well-established in arbitral jurisprudence, a lack of compliance with good faith, as well as an abuse of process, in the initiation of an investment treaty arbitration go to the admissibility of a claimant's claim, rather than to the existence of the parties' consent.²⁵

16. On the other hand, the majority considers that the Claimants have failed to prove the existence of facts on which the Tribunal's jurisdiction is based, which is equally a matter that would not, on the facts of the present case, defeat the Tribunal's jurisdiction in its entirety. While I agree with the proposition that "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage,"²⁶ I do not agree that the

²³ Award, para 579. Similarly, *ibid* para 585.

²⁴ Award, para 585.

²⁵ Indeed, numerous investment-treaty tribunals have more or less explicitly confirmed that abuse of process and compliance with good faith are issues that concern the admissibility of the claims, rather than a tribunal's jurisdiction. See in particular, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 2.10 (**Exhibit RL-0040**); *Orascom TMT Investments S.à.r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/3, Award (31 May 2017) paras 545-546 (**Exhibit RL-0091**); *Alverley Investments Limited and Germen Properties Ltd v Romania*, ICSID Case No. ARB/18/30, Award (16 March 2022) paras 360-362 (**Exhibit CL-0018**); *WM Mining Company, LLC v Mongolia*, ICSID Case No. ARB/21/8, Award (29 August 2024) para 119; *Sanum Investments Limited v Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1, Decision on Jurisdiction, Admissibility and Liability (20 December 2024) paras 378-379. See also *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) paras 312 ff (**Exhibit RL-0268**), where the tribunal addresses the issue of an abuse of process as a matter of admissibility after first having ruled on a number of other preliminary objections in order to establish its jurisdiction over the claim in question. For a similar position in respect of investment arbitrations outside the ICSID context, see *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 588 (**Exhibit RL-0036**); *Clorox España SL c La República Bolivariana de Venezuela*, Laudo (17 June 2021) paras 406-409 (**Exhibit CL-0244**). The same position has been confirmed by the International Court of Justice in *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment (6 June 2018) [2018] ICJ Reports 292, 334-335, paras 139, 145. See also Ursula Kriebaum, 'Article 41' in Stephan W Schill and others (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, OUP 2022) para 104 (listing good faith and the prohibition of abuse of process among the concepts that concerns admissibility, unless the formulation of the instrument of consent suggests that it would result in a lack of consent). The Respondent endorses this position as well. See Respondent's Post-Hearing Briefs, para 68 (stating that "an abuse of process must be dealt with at the level of admissibility").

²⁶ Award, para 590 (quoting *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) para 61 (**Exhibit RL-0020**)).

[REDACTED], concerns a jurisdictionally relevant fact on which this Tribunal's jurisdiction as such hinges.²⁷ Neither the status of the Claimants as "investors" pursuant to Article 1(3) of the Portugal-Mauritius BIT, nor the existence of "investments" in the sense of Article 1(1) of the Portugal-Mauritius BIT, would necessarily be affected by whether the Claimants (respectively their predecessors) succeed, or not succeed, in the Retransfer Cases [REDACTED]

[REDACTED] After all, although the majority remains entirely silent on what it considers as the Claimants' "investment," it is clear that the NCWO rights are not the "investment" that the Claimants claim to be protected under the Portugal-Mauritius BIT. On the contrary, the "investment" is the Claimants' alleged interest in the Oak Loan, which remains in place even if the BoP's decisions were annulled in the future and even if NCWO rights, which are currently valid and presumed to be lawful under Portuguese law unless and until annulled by a Portuguese court, as a result cease to exist.²⁸

17. Instead, what [REDACTED] that the majority focuses on goes to is an issue as to whether the Claimants' claims for breach of the Portugal-Mauritius BIT have merit on their substance. Those claims on the merits potentially²⁹ could be undermined if the Oak Loan were to be placed with Novo Banco following an annulment in the Retransfer Cases by the Portuguese courts of the BoP's decision to place the Oak Loan with BES. Indeed, as the majority explains itself, "[a]s articulated by the Claimants, each of their **claims on the merits** (whether they have merits or not) concerns the Respondent's alleged failures concerning the NCWO process and NCWO payments."³⁰ Similarly, the majority explains that "[t]he questions at issue in the Retransfer Cases are inextricably linked to **the rights claimed** in this arbitration. The existence of NCWO rights under Portuguese law is a necessary predicate for the Claimants' **pleaded claims** in this

²⁷ See Award, paras 588-593.

²⁸ Further on the possible effect of the Retransfer Cases, see paras 44-45 below.

²⁹ I say potentially here because it remains possible that even if the Claimants (respectively their predecessors) are successful in the Retransfer Cases, and the Oak Loan is ultimately put in Novo Banco, the Claimants' investment in the Oak Loan has nevertheless been treated contrary to the Portugal-Mauritius BIT because of a prejudice suffered while being subjected to the NCWO process which is not repaired by a claim against Novo Banco under the Oak Loan, such as a failure to be heard during the NCWO process. For further details, see para 45 below.

³⁰ Award, para 574 (emphasis added).

arbitration.”³¹ In other words, [REDACTED], this could potentially negatively have an impact on whether the “claims on the merits,” “the rights claimed,” or the “pleaded claims” have substance, but it would not put into question the existence of the Oak Loan as the Claimants’ purported investment on which the Tribunal’s jurisdiction *ratione materiae* rests under Article 9 of the Portugal-Mauritius BIT.³²

18. While there is no doubt that a respondent in an ICSID arbitration is free to raise a breach of the principle of good faith, or the existence of an abuse of process, and equally invoke a claimant’s failure to plead a case on the merits, as preliminary objections, such objections are not appropriate to be raised *proprio motu* by an ICSID tribunal in the present circumstances. For a start, it is questionable whether an ICSID tribunal is at all empowered to raise admissibility-related objections *proprio motu*.³³ One of the reasons for this is that admissibility-related objections are, in principle, waivable by a party,³⁴ and an ICSID tribunal would interfere with the principle of party equality, which is laid down in Rule 3(2)

³¹ Award, para 577 (emphases added).

³² [REDACTED] Such a failure could be raised by a respondent party to an ICSID arbitration as a preliminary objection, and an ICSID tribunal could entertain it as part of its competence over the dispute. However, this is equally an issue that does not concern the Tribunal’s “jurisdiction” *stricto sensu*, but goes to the admissibility of the Claimants’ claims. See Ursula Kriebaum, ‘Article 41’ in Stephan W Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (3rd edn, OUP 2022) para 106 (“Tribunals have applied [the *prima facie*] test in a large number of cases. It does not appear to be controversial in principle. The majority of these tribunals has referred to the matter as jurisdictional. Strictly speaking, this is not correct. What happens is that tribunals find it inappropriate to proceed with a case that is evidently meritless. The issue is not whether the Centre lacks jurisdiction or the tribunal lacks competence. Rather, the relevant question is whether the Claimant’s claim is *prima facie* meritless, which leads to the dismissal of the case.” (internal references omitted)). See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction (29 June 2018) para 198 (**Exhibit RL-0081**).

³³ *Supervision y Control SA v Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) para 270(c) (**Exhibit RL-0046**); *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/3, Decision on Jurisdiction (24 October 2011) para 95 (relying on *Case concerning the Elettronica Sicula SpA (ELSI) (United States v Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15). In this sense also Ursula Kriebaum, ‘Article 41’ in Stephan W Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (3rd edn, OUP 2022) para 67; Hanno Wehland, ‘Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules’ in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Wolters Kluwer 2017) 227, 234; Andrea Steingruber, ‘Some Remarks on Veijo Heiskanen’s Note “Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration”’ (2014) 29 ICSID Rev 675, 681. See also *Achmea BV v The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) para 120.

³⁴ See *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/3, Decision on Jurisdiction (24 October 2011) para 94; *Supervision y Control SA v Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) para 270(b) (**Exhibit RL-0046**). See also Ursula Kriebaum, ‘Article 41’ in Stephan W Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (3rd edn, OUP 2022) para 67.

of the 2022 Arbitration Rules, if it starts one-sidedly making the case for one of parties.³⁵ Furthermore, raising the failure of a claimant to plead a case on the merits under Rule 43(2) of the 2022 Arbitration Rules in bifurcated proceedings is inappropriate because such a preliminary objection involves an analysis of the merits of a claim, the proceedings on which have been suspended pursuant to Rule 44(3)(a) of the 2022 Arbitration Rules. By raising the issue *proprio motu*, the majority thus interferes with the Parties' prerogative to present their respective positions in the procedural manner that they see fit and prejudices the merits without the Parties having requested that the Tribunal engage in such an assessment at the present stage of the proceedings.

19. In sum, the Respondent would have been free to address the relationship between the present arbitration and the Retransfer Cases, and the specific grounds on which the majority entered a finding that it lacked "jurisdiction," as a preliminary objection, and the Claimants would then have had a chance to respond to that objection. But the Respondent has not done so, which is a choice that an ICSID tribunal, in my understanding of the applicable procedural law, has to respect and cannot circumvent by raising such grounds as additional preliminary objections *proprio motu* in the procedural context of a bifurcated preliminary objections proceeding. By doing so, the majority contravenes Rule 43(3) of the 2022 Arbitration Rules and, by implication, Article 44 of the ICSID Convention.

C. Duty to Determine Jurisdiction of the Centre and Tribunal's Competence

20. In addition to considering that raising *proprio motu* admissibility-related preliminary objections that had not been raised by the Parties contravenes the procedural rules applicable to ICSID arbitrations, it is, in my view, also inappropriate, and in violation of the ICSID Convention, to decline to exercise jurisdiction based on admissibility grounds without having determined beforehand that the dispute falls under the jurisdiction of the Centre, and is otherwise within the Tribunal's own competence, as required under Article 41(2) of the ICSID Convention. This, however, is precisely what the majority does when entering a finding that it lacks "jurisdiction" based on the [REDACTED]

³⁵

Rule 3 of the 2022 Arbitration Rules provides in relevant part:

Rule 3

General Duties

[...]

- (2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

[REDACTED] without making determinations on any of the Respondent's preliminary objections and also otherwise refraining from entering any finding that the dispute is within the bounds of the jurisdiction of the Centre and the Tribunal's competence.

21. That such an approach is not in line with the procedural rules applicable to ICSID arbitration is firmly established in the practice of ICSID tribunals. For example, in *Micula v Romania (I)*, the tribunal explained:

Objections can be framed as matters of jurisdiction or as matters of admissibility, depending on the context in which they are raised. The Tribunal concurs with Respondent that an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction.³⁶

22. Similarly, the tribunal in *Supervision y Control v Costa Rica* emphasized:

Because of this distinction [i.e., between jurisdiction and admissibility], questions of jurisdiction must be analyzed before answering questions referring to admissibility, as the issues of jurisdiction refer to the Tribunal's power to hear this dispute overall, and not to specific claims.³⁷

23. Even assuming that it could have raised [REDACTED] *proprio motu (quod non)*, the majority in the present arbitration would have needed to do no less and would have first needed to find that the Claimants' claims are within the jurisdiction of the Centre and otherwise

³⁶ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 Sept 2008) para 63 (emphasis added). See also *Georg Gavrilovic and Gavrilovic doo v Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) para 412 (endorsing expressly the reasoning in *Micula*).

³⁷ *Supervision y Control SA v Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) para 274 (**Exhibit RL-0046**). See also *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) para 132 (**Exhibit RL-0159**). For examples on the order of analysis, which the majority relies on in the Award, see *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/3, Award (31 May 2017) (**Exhibit RL-0171**), where the tribunal first addressed objections to jurisdiction *ratione personae* (see *ibid*, Part V.B.) and *ratione materiae* (see *ibid*, Part V.C.), resulting in a finding that it had jurisdiction over the dispute, before addressing several objections that the claim was inadmissible, *inter alia* based on abuse of rights and the conclusion of a settlement agreement, and finding that indeed the claims were inadmissible (see *ibid*, Part V.D.4.); *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) paras 312 ff (**Exhibit RL-0268**), where the tribunal addresses the issue of an abuse of process as a matter of admissibility after first having ruled on a number of other preliminary objections in order to establish its jurisdiction over the claim in question. Cf also *Achmea BV v The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) para 115; *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award (12 July 2016) para 709.

within the Tribunal's competence, as required under Article 41(2) of the ICSID Convention. This, in turn, would have required to make a determination on most, if not all, of the preliminary objections the Respondent had raised and that the Tribunal had bifurcated in PO3. Both Parties would have been entitled to such a determination.

24. By failing to make the relevant determinations, and instead jumping ahead to make determinations on matters that concern the admissibility of the Claimants' claims, the majority violates its duty to determine its own competence, contrary to Article 41(2) of the ICSID Convention.
25. This way of proceeding is particularly problematic in the present case as the majority specifically decides that its rejection of "jurisdiction" is "without prejudice to the Claimants' ability, if they so wish, to commence future BIT claims following completion or withdrawal of the domestic judicial proceedings."³⁸ However, without deciding on any of the other preliminary objections, and without determining that the Centre otherwise has jurisdiction and the Tribunal competence, the majority leaves the possibility wide open that the Claimants (respectively their predecessors) drop the Retransfer Cases, which is one of the two possibilities mentioned by the majority that would allow the Claimants to return to an ICSID tribunal established under the Portugal-Mauritius BIT, only to then be told by a different ICSID tribunal constituted in such a future case, that the Centre's jurisdiction, or that tribunal's competence, is missing because of some other defect that has been raised as a preliminary objection by the Respondent already, but has not been decided on with *res judicata* effect, in the present proceedings.

D. Duty to Respect the Parties' Right to Be Heard

26. The final, but certainly not least important, reason why the majority's approach is procedurally deficient is that the majority bases its finding that it lacks "jurisdiction" on legal grounds, arguments, and theories that were neither raised with, nor addressed, by the Parties, nor could they otherwise reasonably have been anticipated by them. The majority thus fails in its duty to respect the Parties' right to be heard, which is a fundamental component of due process, is recognized as one of the "general duties" of an ICSID tribunal

³⁸ Award, para 599.

under Rule 3(2) of the 2022 ICSID Arbitration Rules,³⁹ and is accepted as a limit to the procedural principle *iura novit curia*, or better *iura novit arbiter*, which mandates an investment treaty tribunal, in exercising its public function as an adjudicatory body that administers international justice, to apply the applicable law on its own motion and to form an opinion as to the content of that law without being limited to the arguments or sources invoked by the Parties.⁴⁰

27. In the present case, none of the grounds on which the majority relies to decline “jurisdiction” in connection with the [REDACTED] [REDACTED] have been raised with, or were addressed by, the Parties, and therefore must come as a surprise to them. Thus, while the Respondent had raised a preliminary objection that the Claimants have committed an abuse of process, which is an aspect of the principle of good faith, that objection did not concern the relationship between the present arbitration proceedings and the domestic Retransfer Cases, but solely concerned the manner and timing of the Claimants’ purported acquisition of the Oak Loan.⁴¹ Conversely, the Respondent had only addressed the relationship between the present ICSID arbitration and the Retransfer Cases under its fork-in-the-road objection, but had not claimed as part of that objection that [REDACTED]; on the contrary, it had alleged that both sets of proceedings “share the same fundamental basis because they (i) share the same fundamental cause and (ii) seek the same effects.”⁴²
28. Also in their post-hearing submissions, the Parties did not address the arguments and legal theories the majority now invokes as a ground for finding that it lacks “jurisdiction.”⁴³ This

³⁹ For the text of Rule 3 of the 2022 Arbitration Rules, see n 35 above.

⁴⁰ For acceptance of this principle and of the parties’ right to be heard as a limit on a tribunal’s power, see eg *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015) para 295; *Quiborax SA and Non-Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 92 (**Exhibit CL-0043**). See further *Vestey Group Limited v Bolivarian Republic of Venezuela*, ICSID Case No ARB/06/4, Award (15 April 2016) para 118 (**Exhibit RL-0108**); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) para 172 (**Exhibit RL-0081**); *Astrida Benita Carrizosa v Republic of Colombia*, ICSID Case No ARB/18/5, Award (19 April 2021) para 20 (**Exhibit CL-0190**) (each with further references).

⁴¹ See Award, Section V.D. for the Parties’ arguments on the abuse-of-process objection.

⁴² Award, para 480. For the Parties’ arguments on the fork-in-the-road objection, see further Award, Section V.E.

⁴³ It should be noted though that in its post-hearing submissions the Respondent suggested that the risk of contradictory decisions in the present arbitration and the Retransfer Cases could be addressed through the lens of abuse of process. See Respondent’s Post-Hearing Briefs, paras 63-68. Apart from the fact that the Claimants could

is not surprising, given that the grounds ultimately adopted by the majority to decline “jurisdiction” because of [REDACTED]

[REDACTED] diverges significantly from how that issue was framed both in the question the Presiding Arbitrator had raised in reaction to the Claimants’ opening presentation and in the directions given to the Parties for their-post-hearing submissions. In both situations, as becomes clear from reading the respective passages, which are accurately reproduced in the Award,⁴⁴ the focus was on conflicting “outcomes” and “results” in the present arbitration proceeding and the domestic Retransfer Cases.⁴⁵

29. However, conflicting outcomes or results that the Tribunal cannot react to, or take into account in its decision-making are clearly matters that would only, if ever, occur in the future, and then also only in the scenario that the Tribunal, in the present arbitration, were first to find a violation of the Portugal-Mauritius BIT based on how the Claimants and their interests in the Oak Loans had been treated as part of BES’s liquidation proceedings, and subsequently the Retransfer Cases were to result in a decision [REDACTED]
- [REDACTED] that the Oak Loan properly would have to be placed with Novo Banco. By contrast, if the Retransfer Cases yield the result that [REDACTED]
- [REDACTED] the Oak Loan had all along been placed properly in BES, no conflicting outcomes or results can exist, independently of how the Tribunal would assess the treatment of Claimants’ investment in BES’s liquidation proceedings. Likewise, if the Retransfer Cases are decided prior to the Tribunal’s ruling on the Claimants’ claim for breach of the Portugal-Mauritius BIT, the Claimants and the Tribunal could avoid conflicting outcomes or results by taking appropriate action in the future. In any event, conflicting outcomes or results of the two

not react anymore to this last-minute introduction of new arguments, the Respondent made clear, however, that “an abuse of process must be dealt with at the level of admissibility” (ibid para 68).

⁴⁴ See Award, paras 533-534.

⁴⁵ See specifically Question 1 of the Tribunal in its directions to the Parties for post-hearing briefs, which premises the entire line of questions on the relationship between the Retransfer Cases and the present arbitration on the scenario that in the future the “‘Retransfer cases’ in Portuguese courts **result** in a holding that the Oak Loan was incorrectly placed in BES by the Bank of Portugal and instead is properly with Novo Banco so that Novo Banco and not BES is the debtor,” and Question 2, which focuses on how to deal with outcome-related risks, namely the “risk that **a decision of this Tribunal** could conflict with **the decision in Portuguese judicial and administrative proceedings**” (emphases added). For the Tribunal’s questions, see Award, para 534.

sets of proceedings are issues that can only arise in the future, and do not arise from the mere parallel pendency of the present ICSID arbitration and the Retransfer Cases.

30. By contrast, the reasons for concluding, as the majority does, that the Tribunal lacks “jurisdiction” because of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This, however, is a fundamentally different way of framing the issue than the way in which it was framed in the question the Presiding Arbitrator raised in reaction to the Claimants’ opening presentation and in the directions given to the Parties by the Tribunal for their post-hearing submissions.

31. In this context, it is also notable, and indeed worrisome from a due-process perspective, that almost the entire set of authorities that the majority relies upon to conclude that what it [REDACTED],

including but not limited to the decisions in *Stabil v Russian Federation*, *Chevron v Ecuador*, and *RWE v The Netherlands*, as well as the doctrinal writings by Bin Cheng and Bernardo Cremades,⁴⁷ is not part of the record so that the Parties have never had a chance to comment on them.

32. Submitting the majority’s legal theory, and the authorities on which it bases its legal views, to the Parties for comment would have been all the more important as it is far from settled jurisprudence under [REDACTED]

[REDACTED]

[REDACTED]

⁴⁶ Award, para 585. See also *ibid* para 578.

⁴⁷ See Award, paras 579-590 and footnotes 718, 720-724 and 731 (citing to the following authorities that are not part of the record of the case: Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprinted, Cambridge 1987); Bernardo M Cremades, ‘Good Faith in International Arbitration’ (2012) 27(4) *Am Univ Int’l L Rev* 761; *Stabil LLC (Ukraine) and others v Russian Federation*, PCA Case No 2015-35, Award on Jurisdiction (26 June 2017) paras 166 and 167; *Chevron Corp and others v Republic of Ecuador*, PCA Case No 2009-23, Second Partial Award on Track II (30 August 2018) para 7.106; *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Order of Discontinuance and Decision on Costs (12 January 2024) para 63; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Annulment Proceeding, Decision on Stay of Enforcement of the Award (12 December 2019) para 35; *Westmoreland Mining Holdings, LLC v Canada*, ICSID Case No UNCT/20/3, Final Award (31 January 2022) para 193).

[REDACTED]

33. Notably, under the concept of estoppel, which is broadly viewed as the common law counterpart of the prohibition of *venire contra factum proprium*, the predominant approach, as reflected in the jurisprudence of the International Court of Justice⁴⁹ and of investment treaty tribunals,⁵⁰ is that inconsistencies alone are not contrary to good faith unless there has been detrimental reliance by the opposing party. Thus, the tribunal in *Nova Scotia Power v Venezuela*, in its discussion on estoppel, confirmed that

it is not enough that one party has engaged in inconsistent conduct. It is also necessary to determine that the opposing party was aware of such conduct, relied

⁴⁸ On the often interchangeable use of these different concepts, see only Timothy G Nelson, ‘Blowing Hot and Cold: State Commitments to Arbitrate Investment Disputes’ (2015) 9(2) World Arb & Med Rev 181, 181-182. Notably, the prohibition of *venire contra factum proprium* and estoppel are often equated as civil and common law counterparts. See eg *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru*, ICSID Case No ARB/03/28, Award (18 August 2008) para 231 (**Exhibit RL-0211**) (“This key aspect of good faith – known in various legal systems as *venire contra factum proprio non valet*, *la doctrina de los actos propios*, *allegans contraria non est audiendus*, estoppel or the principle of consistency – has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another.”) (emphases in the original); *Nova Scotia Power Incorporated (Canada) v República Bolivariana de Venezuela*, UNCITRAL, Laudo sobre Jurisdicción (22 April 2010) para 141 (“La existencia de la doctrina de *estoppel*, o la prohibición de *venire contra factum proprium*, está consolidada en el derecho internacional público, a pesar de que su existencia como un principio general del derecho o como una norma consuetudinaria es objeto de debate. Sí existe consenso entorno al origen de la doctrina, que en derecho internacional público se puede ver como conectado al principio de buena fe. Su aplicabilidad ha sido reconocida en el arbitraje de inversión desde hace tiempo.”) (emphasis in the original). Cf also Andreas Kulick, ‘About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals’ (2016) 27(1) EJIL 107, 114 and 128 (observing that “[a]lmost half of the decisions under scrutiny have remained unclear in their approach and/or have blurred or confounded the distinctive lines of estoppel and unilateral acts – again, without providing any reasons”).

⁴⁹ See eg *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* (Application to Intervene) Judgment (13 September 1990) [1990] ICJ Reports 92, 118; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Judgment (1 October 2018) [2018] ICJ Reports 507, 558 (**Exhibit RL-0216**). See also *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award (18 March 2015) para 438.

⁵⁰ See eg *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 159 (**Exhibit CL-0204**); *Cambodia Power Company v Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011) para 261 (**Exhibit RL-0213**); *AFC Investment Solutions SL v República De Colombia*, ICSID Case No ARB/20/16, Laudo sobre la Excepción Preliminar formulada por la Demandada con base en la Regla 41(5) de las Reglas de Arbitraje CIADI (24 February 2022) paras 306-307 (**Exhibit CL-0232**).

on it, and acted on the understanding that the first party would not depart from its original position.⁵¹

34. It is unclear whether, and if so why, anything different should apply under any of the related concepts invoked in this context, whether it is *venire contra factum proprium* or the prohibition to blow hot and cold (*allegans contraria non audiendus*). Of note, even the tribunal in *Chevron v Ecuador*, which the majority relies on prominently as one of its sources, qualifies “inconsistent statements” as being precluded by the duty of good faith not *tout court*, but only if “deliberately made for one party’s material advantage or to the other’s material prejudice,”⁵² thus suggesting the need for detrimental reliance.

35. In any event, the debate that undoubtedly exists as to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] would have required that the Parties be asked for comments on the majority’s legal theory and the authorities it relied on. Similarly, the authorities the majority references are not only themselves highly selective,⁵³ but questions can equally be raised as to whether they are actually supportive of the majority’s findings,⁵⁴ and whether the

⁵¹ *Nova Scotia Power Incorporated (Canadá) v República Bolivariana de Venezuela*, Laudo sobre Jurisdicción (22 April 2010) para 143 (“no es suficiente que una parte haya adoptado una conducta inconsistente. También es necesario determinar que la parte contraria estaba al corriente de dicha conducta, confió en ella, y actuó sobre el entendimiento de que la primera parte no se apartaría de la posición original” – a internal references omitted – translation into English by the dissenting arbitrator).

⁵² See Award, para 582 (relying on *Chevron Corp and others v Republic of Ecuador*, PCA Case No 2009-23, Second Partial Award on Track II (30 August 2018) para 7.106).

⁵³ Just note the host of doctrinal writings on abuse of process, estoppel, *venire contra factum proprium*, and the like, which was not taken into account. See eg Emily Sipiorski, *Good Faith in International Investment Arbitration* (OUP 2019); Andreas Kulick, ‘About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals’ (2016) 27(1) EJIL 107; Timothy G Nelson, ‘Blowing Hot and Cold: State Commitments to Arbitrate Investment Disputes’ (2015) 9(2) World Arb & Med Rev 181; Elliott Geisinger and others (eds), *Good Faith in International Arbitration Myth, Reality, Label or All of the Above?* (ASA Special Series/Kluwer 2024); Jan Paulsson, *The Unruly Notion of Abuse of Rights* (CUP 2020); Emmanuel Gaillard, ‘Abuse of Process in International Arbitration’ (2017) 32(1) ICSID Review 17; Meg Kinnear, ‘Procedural Good Faith in Investment Arbitration—What Is It and What Could It Be?’ (2026) 15(1) Am Univ Bus L Rev 1; Eric De Brabandere, “‘Good Faith’, ‘Abuse of Process’ and the Initiation of Investment Treaty Claims’ (2012) 3 JIDS 609; Hervé Ascensio, ‘Abuse of Process in International Investment Arbitration’ (2014) 13(4) Chinese JIL 763; Yuka Fukunaga, ‘Abuse of Process under International Law and Investment Arbitration’ (2018) 33(1) ICSID Review 181; John P Gaffney, “‘Abuse of Process’ in Investment Treaty Arbitration’ (2010) 11(4) JWIT 515.

⁵⁴ For example, it could validly be questioned whether the proposition the majority relies on in *Stabil v Russian Federation*, namely, that a State is required not to act inconsistently vis-à-vis foreign investors (see Award, paras 580 and 581, quoting *Stabil LLC (Ukraine) and others v Russian Federation*, PCA Case No 2015-35, Award on Jurisdiction (26 June 2017) paras 166 and 167), would not, when looking at the issue at play in *Stabil*, in fact apply to exclude a defense by the Respondent in the present arbitration to the effect that the Claimants cannot claim any NCWO rights on account that the Oak Loan should have been placed in Novo Banco instead of in BES, [REDACTED], rather than to limit the Claimants in [REDACTED]

[REDACTED]
[REDACTED]. All of this reinforces the point that it would have been necessary to hear the Parties on the majority's theory that the [REDACTED]
[REDACTED]
[REDACTED]

36. To be clear: I do not take issue with the principle of good faith and/or abuse of process constituting a general principle of law that can affect the admissibility of a claim presented to an investment treaty tribunal, nor do I disagree that the prohibition of *venire contra factum proprium* forms part of that principle. What I take issue with, apart from questioning whether it is at all appropriate to raise the issue in question *proprio motu* during proceedings dealing only with certain bifurcated preliminary objections, is that the majority relies on these doctrines and theories at the present stage of the proceedings, and in respect of the present factual circumstances, without having submitted either its theory, or the authorities on which it relies to ground them, to the Parties' for comments and without having engaged in a thorough analysis of what the principle of good faith, respectively the prohibition of an abuse of process, under public international law requires of foreign investors who are claimants in investment treaty proceedings.
37. Under these circumstances, it is not credible to purport, as the majority does, that the way in which the majority deals with the conflicts issue is but "a different characterization of the legal and factual situation complained of by the Respondent throughout this proceeding."⁵⁵ Instead, by basing its decision to decline "jurisdiction" on grounds that were neither raised with, nor addressed by, the Parties, nor could otherwise reasonably have been anticipated by them, the majority does not respect the right of the Parties, specifically that of the Claimants, to be heard, violating Rule 3(2) of the 2022 Arbitration Rules and, by implication, Article 44 of the ICSID Convention.

[REDACTED] pursuing a claim for breach of the Portugal-Mauritius BIT for mistreatment received while having been placed—as of yet still validly under Portuguese law!—into the NCWO process.

⁵⁵ Award, para 596.

III. RELATIONSHIP BETWEEN THE PRESENT ARBTRATION AND THE DOMESTIC PROCEEDINGS

38. The multiple procedural shortcomings that the majority's approach in the present proceedings raises are not the only reason why I must dissent from the present Award. I also disagree with the majority's assessment of how the present ICSID arbitration and the domestic Retransfer Cases relate to each other. In my view, the two sets of proceedings do not, at the present moment in time, [REDACTED]
[REDACTED]
[REDACTED]
39. To start with, it is important to highlight that, unlike in *Orascom v Algeria*, where the tribunal carried out an extensive comparative analysis of the relevant parallel proceedings,⁵⁶ the majority never provides in its reasoning a detailed comparison between the Retransfer Cases and the present ICSID arbitration, which would include, importantly, an assessment of the possible legal consequences following from each proceeding. Without such an analysis, it is difficult to see how the majority is able to come to the [REDACTED]
[REDACTED]
[REDACTED]
40. Instead, and as already addressed (see para 29 above), when comparing the two sets of proceedings, what becomes clear is that any conflict between the domestic Retransfer Cases and the present ICSID arbitration is not an actual, existing conflict, but only a potential one, and one that can arise, if at all, only in the future. Any such conflict or contradiction hinges on the dual eventuality that (i) this Tribunal were to hand down an award that is favorable to the Claimants based on the theory that the Portugal-Mauritius BIT has been breached in respect of the treatment of the Claimants' interests in the Oak Loan as creditors of BES during the NCWO process, and (ii) subsequently, the Claimants (respectively their predecessors) succeed in the Retransfer Cases, with that decision being implemented in a way that the Claimants can claim under the Oak Loan against Novo Banco. If either of those future eventualities does not come to pass, either because the Claimants (respectively their predecessors) do not succeed in the Retransfer Cases, or

⁵⁶ See *Orascom TMT Investments S.à.r.l. v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/3, Award (31 May 2017) paras 486-518 (**Exhibit RL-0091**).

that independently of the outcome of the Retransfer Cases, this Tribunal finds that no breach of the Portugal-Mauritius BIT has occurred, no conflict would ever arise.

41. Furthermore, there is also no actual conflict in how the claims are presented in the present ICSID arbitration and in the Retransfer Cases. In the present ICSID arbitration, the Claimants' claim for breach of the Portugal-Mauritius BIT is based on (i) the factual circumstance that, pursuant to several decisions of the BoP, the Oak Loan has been placed with BES, and (ii) the allegation that, in the liquidation proceedings that ensued, the Claimants' interests in the Oak Loan, including the NCWO and other procedural rights that follow under Portuguese law for all creditors whose claims in fact have been placed with BES, have been disregarded in breach of the standards of treatment laid down in the Portugal-Mauritius BIT. By contrast, in the Retransfer Cases, the submission is not that, as a matter of fact, the Oak Loan is placed with Novo Banco, but rather that the decision of the BoP that placed the Oak Loan with BES violated Portuguese law and should be annulled.
42. The differences between the position of the Claimants (respectively their predecessors) in the present ICSID arbitration and the Retransfer Cases may be subtle, but they are important. *First*, the Claimants (respectively their predecessors) are consistent in both the present ICSID arbitration and the Retransfer Cases in respect of the factual situation that is at the basis of both sets of proceedings. In both sets of proceedings, they accept the fact that the BoP had decided to place the Oak Loan with BES, and that ever since, the Claimants have been affected by the banking resolution measures following BES's insolvency. Similarly, in neither set of proceedings do the Claimants (respectively their predecessors) deny that as a consequence of the Oak Loan being placed in BES, certain rights of the creditors of BES follow, which include, but are not limited to, NCWO rights. It is only in the context of the Retransfer Cases that the Claimants (respectively their predecessors) [REDACTED] whereas in the context of the present ICSID arbitration they accept the legal situation under Portuguese law as a given, not least because this Tribunal has no competence to decide on the legality of the BoP decisions under Portuguese law. This, however, is not inconsistent behavior that evidences a lack of good faith, but reflects that the two sets of proceedings involve different causes of actions, requests, and applicable law.

43. Furthermore, the factual situation that the Claimants find themselves in in respect of the status of the Oak Loan and the rights that follow under Portuguese law, are not assumed facts, but actual facts, as is explicitly confirmed and agreed upon by both Parties' legal experts. Both [REDACTED] and [REDACTED] have in their expert testimonies unequivocally confirmed that the BoP's decisions are, as of the current state of affairs, and unless and until they are annulled, presumed legal; they are, in other words, legally valid and binding and produce effects under Portuguese law.⁵⁷ This, in turn, equally means that any NCWO rights that the Claimants may have as a consequence of the BoP's decision to place the Oak Loan with BES, rather than Novo Banco, are equally valid and binding and produce effects under Portuguese law unless and until annulled [REDACTED].
- [REDACTED] The Claimants' claim for breach of the Portugal-Mauritius BIT in connection with the Oak Loan having been placed in BES, whether rightly or wrongly under Portuguese law, is thus no hypothetical, but precisely the currently existing matter-of-fact situation that necessarily follows from the BoP's decisions being legally valid and enforceable under Portuguese law.
44. *Second*, considering the consequences of a possible success of the Claimants (respectively their predecessors) in the Retransfer Cases is important. Contrary to what is said by the majority, a successful outcome in the Retransfer Cases would not necessarily "eliminate, with retroactive effect, the factual and legal basis for this arbitration."⁵⁸ In making this assertion, which is in the Award presented as the agreed position between the Parties, the majority selectively and incompletely quotes the unrebutted testimony of the Claimants' legal expert, [REDACTED], who both in his written opinion and at the hearing clearly explained that the annulment of the BoP's decisions would not automatically result in the Claimants being restored as creditors of Novo Banco, but that the BoP would instead be obliged to implement the courts' annulment decision and issue a new decision on the

⁵⁷ Compare Tr. Day 4, 822:5-822:11 ([REDACTED] in reaction to questions by Arbitrator Stern: "the Decisions are now in effect and produce effects, and the effects are that the loan was -- the Oak Loan was brought under BES. This is the present state of affairs, and we have no way of final determining that this is not how they will continue to stand. So that is the very scenario where NCWO can be invoked, like any other BES creditor, regarding a credit under BES.") with Legal Opinion of [REDACTED] (20 September 2024), p 21 ("only the Bank of Portugal can revoke, modify or annul its Decisions, and only a competent court (which I will address further on) can declare them null and void. In this specific case discussed in this opinion, none of these situations has yet occurred; therefore, the Decisions of the Bank of Portugal under consideration are fully valid, effective, and binding.") and Tr. Day 3, 711:9-714:6 ([REDACTED] in reaction to questions by Mr. Duarte).

⁵⁸ Award, para 571. See also *ibid* paras 592 and 593.

Oak Loan liability; such a decision may very well again result in the Oak Loan being placed in BES.⁵⁹ In other words, even if the Claimants (respectively their predecessors) were successful in the Retransfer Cases, [REDACTED], this would not necessarily mean that the Claimants' status as creditors of BES would change.

45. Conversely, even in case the Claimants (respectively their predecessors) were successful in the Retransfer Cases, and the Oak Loan upon reassessment were to be placed with Novo Banco, this would not necessarily exclude every possible breach of the Portugal-Mauritius BIT, as suggested by the majority. Crucially, the Claimants' claims in the present proceedings are not limited to the allegation that they were denied NCWO payments to which they claim to have been entitled, but also raise allegations that they had been deprived of procedural rights they were entitled to as a consequence of the Oak Loan having been placed with BES (which includes most notably the right to be heard in the liquidation process).⁶⁰ Accordingly, even if the Claimants (respectively their predecessors) were to prevail in the Retransfer Cases, and even if this were to result in them being considered under Portuguese law never to have had any rights to NCWO payments as creditors of BES, this will not undo the fact that the Claimants have for an extensive time-period been treated in a manner that they allege to constitute a breach of the Portugal-Mauritius BIT.
46. Considering the above, I can see no contradiction when the Claimants claim in the present arbitration that their purported rights in the Oak Loan, following the decision of the BoP to place that loan with BES, have been violated in the administration of BES's liquidation in breach of the standards of treatment laid down in the Portugal-Mauritius BIT, while pursuing at the same time domestic court proceedings in which [REDACTED]

⁵⁹ Legal Opinion of [REDACTED] (11 November 2024) paras 8-9 ('[REDACTED], this will not automatically restore the claimants to the position of creditors of Novo Banco'); Tr. Day 4, 776:11-777:18 ([REDACTED] in reaction to questions by Mr. Vilhena de Freitas: "As you know, the consequence is not such of automatic nature as you state. The law grants the Bank of Portugal competence to decide what is the situation of each responsibility, liability pending on BES, given the Resolution. ... And so, if there is an annulment, we go back to the plan where we were before exercising that competence – that is, the plan preceding the enactment of that decision. So it will be the Bank of Portugal to issue a new Decision, which will decide, once again, what is the situation of that liability. And if the annulment was for formal reasons or for any other reason, there could be a renovation of that Decision where it would be decided again to place the liability in the sphere of BES.") and Tr. Day 4, 822:12-823:8 ([REDACTED] in reaction to questions by Arbitrator Stern). For the selective and incomplete reliance on [REDACTED] testimony, see Award, para 567 fn 705.

⁶⁰ Cf. for the Claimants' claims in this respect Award, paras 140-141, which includes complaints about having been deprived of procedural rights in the liquidation proceedings and NCWO process.

the decision of the BoP to place the Oak Loan with BES is challenged, as both sets of proceedings concern different measures and invoke different legal bases. They can therefore not be said to be contradictory and in breach of the Claimants' procedural duty of good faith. To draw an analogy: the arbitration proceedings and the domestic Retransfer Cases, in my view, relate to each other like a claim by a prisoner in one court proceeding that he or she has been mistreated while in prison relates to a claim he or she pursues in another court proceedings pending in parallel that his or her imprisonment has been wrongful in the first place. Whether the prisoner has been mistreated while in prison is independent of whether he or she has been rightly or wrongly imprisoned and therefore both proceedings are independent of each other and cannot be said to be contradictory.

47. Nothing, in my view, therefore support's the Tribunal's approach to declare at the present stage of the proceedings that it does not have jurisdiction and put the Claimants effectively to the choice of either (i) continuing to litigate the Retransfer Cases in the domestic courts and accept the fact that these cases have seen little, if any, progress since they were initiated (by now more than a decade ago),⁶¹ or (ii) withdrawing the Retransfer Cases and reinitiating arbitration proceedings under the Portugal-Mauritius BIT, albeit without any clarity as to the fate of any of the other preliminary objections raised by the Respondent. Instead, it would have very well been possible and fairer, and indeed required by the procedural rules under the ICSID Convention and the 2022 Arbitration Rules, to first decide on the Respondent's preliminary objections now, and in case these were not successful, or turn out to be intertwined with the merits, proceed to the merits stage of the present arbitration. By the time a hearing on the merits would have taken place, further time would have passed in which the Retransfer Cases might have progressed, including possibly in ways that would have made clear that no conflict or contradiction exists or will ever materialize. In any event, depending on the situation to be faced at the next stage of the

⁶¹ See Legal Opinion of (11 November 2024) para 30 ("the actions to challenge the Bank of Portugal's decisions that have been brought before the Portuguese administrative courts have been pending for almost ten years without there being any prospect of a decision being issued at first instance, which will undoubtedly be followed by several appeals."). In this context, it should also be noted that during the hearing, Claimants' legal expert testified that it was impossible to predict when the Retransfer Cases would conclude and that it was not unheard of that cases in administrative courts take 20 years for a first-instance decision to be rendered. The expert further stated that no procedural remedy was available under Portuguese law for a party to administrative court proceedings to accelerate the proceedings. See Tr. Day 4, 823:10-825:12 and 827:2-827:21 (in reaction to questions by Arbitrator Schill).

present arbitration, the relevant consequences could have been drawn at that juncture, rather than now.

48. Similarly, I fail to see how it can be considered to be abusive for the Claimants to pursue, in the present proceeding, claims on the basis of what at the present represents, as explicitly recognised by both Parties' legal experts, the valid and legally binding situation under Portuguese law, while maintaining in parallel the Retransfer Cases [REDACTED]. In effect, the majority is penalising the Claimants for proceeding to international arbitration in a situation that undoubtedly reflects the legally recognised existing state of affairs under Portuguese law and is allowing the Respondent to shield itself behind domestic court proceedings whose end is nowhere in sight, despite their pendency for over a decade.
49. At most, what could have conceivably been considered in accordance with the majority's logic about the relationship between the present arbitration proceedings and the Retransfer Cases is (i) whether the Retransfer Cases raise a prejudicial issue for the claims the Claimants have formulated in the present arbitration—in the sense that only a rejection of the Retransfer Cases could have lead to a plausible claim on the merits for breach of the Portugal-Mauritius BIT, while success in the Retransfer Cases would have undermined such a claim—and (ii) whether, as a consequence, the present arbitration proceeding should be stayed to allow for the proceedings raising the prejudicial issue, that is, the Retransfer Cases, to be resolved first.
50. In fact, the Tribunal's without-prejudice decision regarding "the Claimants' ability, if they so wish, to commence future BIT claims following completion or withdrawal of the domestic judicial proceedings"⁶² suggests precisely that, from the point of view of the majority, there is a prejudicial relationship between the Retransfer Cases and the present ICSID arbitration. Furthermore, the practice of investment treaty tribunals would have provided support for the proposition that ordering a stay of an ICSID arbitration in order to allow for a domestic proceeding to address a prejudicial issue is an available course of action for an ICSID tribunal.⁶³

⁶² Award, para 599.

⁶³ See *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction (27 November 1985) paras 82-87, 88(D); *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the

51. Likewise, such an approach would have aligned with how the relationship between the Retransfer Cases and other proceedings related to the fate of the Oak Loan were analyzed in other contexts. Thus, the UK courts have stayed the proceedings in which the Claimants' predecessors claim under the Oak Loan against Novo Banco because they considered the Retransfer Cases to raise a prejudicial issue that needed to be addressed first.⁶⁴ Similarly, in Case [REDACTED], a proceeding before the Portuguese courts against the Respondent, [REDACTED]
[REDACTED]
[REDACTED], the Respondent itself requested a stay of the proceedings, rather than a dismissal due to contradictory behavior of the Claimants, in order to allow the Retransfer Cases, which in the Respondent's view raise a prejudicial issue, to complete first.⁶⁵
52. Indeed, holding the Respondent to this very position would have corresponded to the majority's insistence, under its approach to good faith, on the importance of consistency in a party's litigation behavior when proceedings that relate to the same overarching controversy are pending in parallel in domestic courts and before an investment treaty tribunal. At the same time, viewing the Retransfer Cases as raising a prejudicial issue for the present arbitration proceedings, similarly to how the UK courts and the Respondent in Case [REDACTED] viewed the relationship between the Retransfer Cases and other proceedings that depend on whether the Oak Loan properly has been placed in BES, or correctly under Portuguese law should be placed with Novo Banco, also undermines any view that the Claimants' initiation of the present arbitration was contrary to good faith or even abusive. After all, as the UK proceedings and Case [REDACTED] show, it cannot

Tribunal on Objections to Jurisdiction (29 January 2004) paras 173-176, 177(c) (**Exhibit RL-0084**). Cf also *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) paras 339, 346(h) (**Exhibit RL-0268**) (requiring one of the claimants to elect by a determined date whether to pursue certain claims only in the ICSID arbitration, without making conclusive determinations on the claims admissibility).

⁶⁴ See Award, para 134 (with references to the relevant decisions of the UK courts). See also the subsequent decision of the UK High Court on a stay of the UK proceedings in *Guardians of New Zealand and others v Novo Banco*, Court Order from High Court of Justice of England and Wales, dated 16 November 2018 (**Exhibit C-0080**).

⁶⁵ See Statement of Reply filed before the Administrative Court of Lisbon (Proc. No. [REDACTED]), [REDACTED], paras 125-126 (**Exhibit C-0238**). This coincides with the position on the relationship between Case [REDACTED] and the Retransfer Cases expressed by Claimants' expert, [REDACTED]; see Tr. Day 4, 809:21-810:6 ([REDACTED] in reaction to questions by Arbitrator Schill).

be a violation of good faith if parallel proceedings are brought when one proceeding raises a prejudicial question for another.

53. Accordingly, what at most would have been appropriate would have been for the present ICSID arbitration to be stayed in order to await the outcome of the Retransfer Cases before the Portuguese courts. Such a stay, however, would have needed to be subject to the proviso that the Retransfer proceedings advance and come to an end within a reasonable period of time in order to avoid sending the Claimants knowingly into a denial of justice. And, of course, even such a course of action would have required first that a determination is made that the dispute is within the jurisdiction of the Centre and otherwise within the Tribunal's competence, and could not have been forced on the Parties at the present procedural stage in the context of a bifurcated preliminary objections proceeding based on the Tribunal raising an issue of admissibility *proprio motu*.

CONCLUSION

54. In conclusion, for all of the reasons stated above, I dissent from the Award.

[Signed]

Professor Dr. Stephan Schill
Arbitrator

Date: June 10, 2026