

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

NAFTIRAN INTERTRADE CO. (NICO) LIMITED

Claimant

and

KINGDOM OF BAHRAIN

Respondent

ICSID Case No. ARB/22/34

Decision on Preliminary Objections

Members of the Tribunal

Dr. Claus von Wobeser, President
Dr. Eduardo Silva Romero, Arbitrator
Prof. Maxi Scherer, Arbitrator

Secretary of the Tribunal

Mr. Alex B. Kaplan

Date of dispatch to the Parties: June 15, 2026

REPRESENTATION OF THE PARTIES

Representing Naftiran Intertrade Co. (NICO) Limited:

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Mr. Emmanuel Foy
Ms. Hamideh Barmakhshad
Ms. Akosua Asirifi
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Representing Kingdom of Bahrain:

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2022
BIT or Treaty	The Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, dated June 15, 1999
C-[#]	Claimant's Exhibit
CBB	Central Bank of Bahrain
CISADA	United States Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010
Cl. C-Mem.	Claimant's Counter-Memorial on Jurisdiction dated December 2, 2024
Cl. Mem.	Claimant's Memorial on the Merits dated May 9, 2024
Cl. PHB	Claimant's Post Hearing Brief dated October 15, 2025
Cl. Rej.	Claimant's Rejoinder on Jurisdiction dated May 27, 2025
CL-[#]	Claimant's Legal Authority
ECB	European Central Bank
Hearing	Hearing on Jurisdiction held July 16-18, 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
	
LCA	Labuan Companies Act
LFSA	Labuan Financial Services Authority

NICO	Naftiran Intertrade Company Limited
NIOC	National Iranian Oil Company
R-[#]	Respondent's Exhibit
Resp. Mem.	Respondent's Memorial on Jurisdiction dated October 7, 2024
Resp. PHB	Respondent's Post Hearing Brief dated October 15, 2025
Resp. Reply	Respondent's Reply on Jurisdiction dated April 8, 2025
RL-[#]	Respondent's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal reconstituted on June 13, 2025

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 Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, dated June 15, 1999 (the “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 (the “ICSID Convention”).
2. The claimant is Naftiran Intertrade Co. (NICO) Limited (“NICO” or the “Claimant”), a company registered in the Federal Territory of Labuan, Malaysia.
3. The respondent is Kingdom of Bahrain (“Bahrain” or the “Respondent”).
4. The Claimant and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute relates to the Claimant’s claim under the BIT arising out of its deposits in two Bahraini banks, which refuse to transfer the funds on account in favour of NICO out of Bahrain. At issue in this ruling is whether the Tribunal has jurisdiction over NICO’s claim.

A. PROCEDURAL HISTORY

6. On December 5, 2022, ICSID received a request for arbitration dated December 5, 2022, from NICO against Bahrain (the “Request”).
7. On December 15, 2022, the Secretary-General of ICSID registered the Request 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.

8. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
9. The Tribunal was, at first, composed of Claus von Wobeser, a national of the United Mexican States and the Federal Republic of Germany, President, appointed by agreement of the Parties; Bernard Hanotiau, a national of the Kingdom of Belgium, appointed by the Claimant; and Maxi Scherer, a national of the Federal Republic of Germany, appointed by the Respondent.
10. On January 30, 2024, the Secretary-General, in accordance with Rule 21(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), 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. Anna Holloway, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. On February 29, 2024, the Respondent notified the Tribunal and the Claimant that it intended to file preliminary objections and to request bifurcation of the proceeding. The Claimant responded on March 16, 2024, stating that the Respondent’s request for bifurcation “is unwarranted and in any event premature.”
12. Also on February 29, 2024, in its second letter, the Respondent requested a further disclosure from Arbitrator Hanotiau. On March 5, 2024, Arbitrator Hanotiau provided an additional disclosure confirming his “total independence and impartiality in the present case.” On March 7, 2024, the Claimant filed its comments to the Respondent’s letter of February 29, 2024.
13. On March 5, 2024, ICSID circulated draft Procedural Orders Nos. 1 and 2 to the Parties for discussion. The Parties submitted their joint comments on the proposed drafts on March 18, 2024.
14. In accordance with ICSID Arbitration Rule 29(3), the Tribunal held a first session with the Parties on March 20, 2024, by videoconference. The following persons attended:

Members of the Tribunal

Dr. Claus von Wobeser, President of the Tribunal

Prof. Bernard Hanotiau, Arbitrator

Prof. Maxi Scherer, Arbitrator

ICSID Secretariat

Ms. Anna Holloway, Secretary of the Tribunal

Ms. Ekaterina Minina, Paralegal

On behalf of the Claimant

Dr. Hamid Gharavi, Derains & Gharavi

Mr. Emmanuel Foy, Derains & Gharavi

Ms. Déborah Schneider, Derains & Gharavi

Ms. Akosua Asirifi, Derains & Gharavi

Mr. David Jisu Lee, Derains & Gharavi

[REDACTED] NICO

[REDACTED] NICO

On behalf of the Respondent

Mr. Mark Levy KC, A&O Shearman

Mr. David Herlihy, A&O Shearman

Ms. Katrina Limond, A&O Shearman

Ms. Aashna Agarwal, A&O Shearman

Mr. Andrew Hashim, A&O Shearman

[REDACTED] (Ministry of Foreign Affairs)

[REDACTED] (Ministry of Foreign Affairs)

[REDACTED] (Ministry of Foreign Affairs)

[REDACTED] (Ministry of Foreign Affairs)

[REDACTED] Kingdom of Bahrain

15. Following the first session and further exchanges between the Parties on the proposed draft, on May 7, 2024, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from July 1, 2022, that the procedural language would be English, and that the place of proceeding would be Paris, France.
16. Also on May 7, 2024, the Tribunal issued Procedural Order No. 2 concerning transparency and confidentiality of the proceeding.

17. On May 9, 2024, the Claimant filed its memorial on the merits, together with the Witness Statements of [REDACTED] [REDACTED] [REDACTED] the Expert Report of Mr. Anton de Feuardent (including Appendices 1-3 and Exhibits FL-1.1 to FL-34 and Tables CT-1.1 to CT-6), Exhibits C-0022 through C-0272, and Legal Authorities CL-0001 through CL-0070 (the “Memorial on the Merits”).
18. On May 14, 2024, the President of the Tribunal, Dr. Claus von Wobeser, conveyed an additional disclosure regarding his possible candidacy for an appointment in the ICC commercial arbitration case where Naftiran Intertrade Company is listed as “other relevant entit[y]”. The President confirmed his independence and impartiality in this case, but invited the Parties to comment on such possible appointment.
19. Following exchanges between the Parties regarding the procedural timetable of the proceeding, on June 3, 2024, the Tribunal issued Procedural Order No. 3 recording the finalized procedural calendar.
20. In accordance with the recorded procedural calendar, on June 24, 2024, the Respondent filed its request to address the objections to jurisdiction as a preliminary question pursuant to ICSID Convention Article 41(2) and ICSID Arbitration Rule 44, together with Exhibits R-0001 through R-0005 and Legal Authorities RL-0001 through RL-0022 (the “Request for Bifurcation”).
21. On July 8, 2024, the Claimant filed its observations on the Request for Bifurcation, together with Exhibits C-0273 through C-0276 and Legal Authorities CL-0071 through CL-0104.
22. On July 9, 2024, Arbitrator Maxi Scherer conveyed an additional disclosure to the Parties and confirmed her independence and impartiality in the present case.
23. On July 15, 2024, the Respondent filed a response to the Claimant’s observations, together with Legal Authorities RL-0023 and RL-0024, followed by the Claimant’s observations of July 22, 2024, filed together with Legal Authorities CL-0105 and CL-0106.

24. On August 12, 2024, the Tribunal issued Procedural Order No. 4 granting in part the Respondent's request to bifurcate some of the Respondent's jurisdiction objections; the proceeding on the merits was suspended.
25. On September 2, 2024, Arbitrators Maxi Scherer and Bernard Hanotiau conveyed their respective additional disclosures to the Parties.
26. On October 7, 2024, the Respondent filed its memorial on jurisdiction, together with the Legal Opinion of Tan Sri Dato' Cecil Abraham (together with Exhibits TSDCA-0001 to TSDCA-0035), Exhibits R-0006 through R-0016, and Legal Authorities RL-0025 through RL-0043 (the "Memorial on Jurisdiction").
27. On December 2, 2024, the Claimant filed its counter-memorial on jurisdiction, together with the Legal Opinion of Messrs. Mohd Hishamudin and Palpanaban Devarajoo (together with Exhibits DSMHYDPN-0001 to DSMHYDPN-0048), Exhibits C-0277 through C-0304, and Legal Authorities CL-0107 through CL-0126 (the "Counter-Memorial on Jurisdiction").
28. On January 27, 2025, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents. The Respondent attached Exhibits R-0017 and R-0018 and Legal Authorities RL-0044 through RL-0046 to its request.
29. On February 3, 2025, the Claimant sought leave from the Tribunal to submit a short response to the new arguments made by the Respondent in its request for production of documents. The following day, February 4, 2025, the Respondent objected to the Claimant's request, but reserved a right to respond to the Claimant's submission. The Respondent filed further comments on the Claimant's request on February 6, 2025. On the same date, the Tribunal granted leave to the Claimant to submit a short response to the new arguments made by the Respondent and granted the Respondent leave to submit any responsive comments.
30. On February 10, 2025, the Claimant filed its observations on the Respondent's request for production of documents as directed by the Tribunal. And the Respondent, in turn, filed its response to the Claimant's observations on February 12, 2025.

31. On February 21, 2025, the Tribunal issued Procedural Order No. 5 concerning production of documents.
32. On March 6, 2025, the Claimant notified the Tribunal that some of the documents produced by the Claimant in 2024 “have seemingly been improperly disclosed to third parties, either by Respondent itself, or by its legal counsel, for use in other proceedings.” The Claimant requested that the Respondent and its counsel confirm that the documents in this proceeding “will be kept strictly confidential and not disclosed to any third parties without prior consent from Claimant or leave from the Tribunal.”
33. On March 9, 2025, the Respondent objected to the Claimant’s allegations of March 6, 2025, denying that it or its counsel improperly disclosed documents produced by NICO in this proceeding. The Respondent, nevertheless, confirmed that it will continue to keep any documents produced by the Claimant strictly confidential.
34. On March 10, 2025, Arbitrator Maxi Scherer conveyed an additional disclosure to the Parties.
35. On March 21, 2025, the Claimant, pursuant to paragraph 20 of Procedural Order No. 2 on transparency and confidentiality, requested certain redactions to Procedural Order No. 5 (concerning document production), and all future procedural orders, decisions, and awards. Redactions included “names of the witnesses in the present arbitration, [...] NICO’s financial and legal advisers, service agents, and strategic business partners.” On April 1, 2025, the Tribunal invited the Respondent’s comments in accordance with Procedural Order No. 2. The Respondent submitted its comments on April 8, 2025, objecting to the Claimant’s request as “unclear what information NICO is seeking to redact” and stating that the Claimant did not provide “explanation or justification” for redactions in any future orders, decisions, and awards. The Respondent, however, agreed to several discrete redactions of names in Procedural Order No. 5. On April 25, 2025, the Tribunal indicated that in accordance with the process set out in Procedural Order No. 2, the Parties were to seek an agreement on redactions, failing which, the Tribunal will decide on any disputed redactions. The Parties submitted their agreed redactions on May 8, 2025.

36. On April 8, 2025, the Respondent filed a reply on jurisdiction, together with the Second Legal Opinion of Tan Sri Dato' Cecil Abraham (together with Exhibits TSDCA-0036 to TSDCA-0040), Exhibits R-0019 through R-0051, and Legal Authorities RL-0047 through RL-0055 (the "Reply on Jurisdiction").
37. On April 28, 2025, Arbitrator Bernard Hanotiau conveyed an updated disclosure to the Parties.
38. On May 11, 2025, the Claimant requested a two-week extension for filing of its rejoinder. On May 12, 2025, the Respondent objected to the Claimant's request that would necessitate moving the deadlines for notification of witnesses and experts but noted that it agreed to a one-week extension. On May 13, 2025, the Tribunal granted the Claimant's extension request and fixed new dates for the remainder of the procedural calendar.
39. On May 19, 2025, the Respondent filed a proposal for "resignation or disqualification" of Arbitrator Bernard Hanotiau, together with Exhibits R-0052 through R-0065 and Legal Authorities RL-0056 through RL-0071. In its proposal, the Respondent invited Arbitrator Hanotiau to resign from the Tribunal; "failing such a resignation, Bahrain request[ed] the unchallenged arbitrators or, if applicable, the Chairman of the ICSID Administrative Council to disqualify Professor Hanotiau."
40. On May 22, 2025, ICSID notified the Parties of Arbitrator Bernard Hanotiau's resignation, noting that President Claus von Wobeser and Arbitrator Maxi Scherer have consented to the resignation in accordance with ICSID Arbitration Rule 25(2). The Secretary-General further notified the Parties that the proceeding was suspended pursuant to ICSID Arbitration Rule 26(2) until the vacancy on the Tribunal was filled. ICSID Arbitration Rule 26(3) provides that the vacancy shall be filled by the same method by which the arbitrator's appointment was made. The Secretary-General invited the Claimant, who appointed Bernard Hanotiau, to appoint another arbitrator. ICSID further sought the Parties' views on the arrangements for the upcoming hearing.
41. On May 27, 2025, the Claimant indicated that it would "convey its position within the next days on the recent developments including the impact of same on the hearing."

42. Also on May 27, 2025, in accordance with established procedural calendar, the Claimant filed its rejoinder on jurisdiction, together with the Second Legal Opinion of Messrs. Mohd Hishamudin and Palpanaban Devarajoo (together with Exhibits DSMHYDPN-0049 to DSMHYDPN-0063), Exhibits C-0305 through C-0317, and Legal Authorities CL-0130 through CL-0149 (the “Rejoinder on Jurisdiction”). Since the proceeding was suspended, ICSID notified the Parties that this submission will be transmitted to the Tribunal once it has been reconstituted and the proceeding has resumed.
43. On May 31, 2025, the Claimant submitted its objections to the Respondent’s request for resignation or disqualification of Arbitrator Bernard Hanotiau, stating that it “will endeavor to appoint a replacement arbitrator” “from the limited pool of arbitrators who can work with Iranian entities and available and to prepare and attend a hearing at such short notice.”
44. By letter of June 2, 2025, the Respondent submitted its comments to the Claimant’s letter of May 31, 2025. The Respondent expressed its view that confirming the upcoming hearing arrangement would be “imprudent,” citing several factors relating to the appointment of new arbitrator and reconstitution of the Tribunal. The Respondent indicated that it was open to finding alternative dates for the hearing. On the same date, ICSID informed the Parties that absent agreement between the Parties, ICSID will maintain the present hearing arrangements. Upon reconstitution, the Tribunal will rule on any applications by either party regarding hearing dates and arrangements.
45. On June 8, 2025, the Claimant indicated that it expected to appoint an arbitrator within the next few days and on June 10, 2025, it appointed Dr. Eduardo Silva Romero, a national of the French Republic and the Republic of Colombia, in accordance with ICSID Arbitration Rule 26(3).
46. On June 10, 2025, the Claimant notified which witnesses it intended to call at the hearing.
47. On June 11, 2025, the Respondent objected to the Claimant’s statement that “the Tribunal is now reconstituted” and to the Claimant’s request for the documents of this proceeding to be shared with its appointee. The Respondent emphasized the steps that must be taken before the Tribunal was to be reconstituted.

48. On June 13, 2025, Dr. Eduardo Silva Romero accepted his appointment as arbitrator. On the same date, ICSID notified the Parties that the Tribunal was reconstituted and the proceeding was resumed pursuant to ICSID Arbitration Rule 26(4). ICSID also notified the Parties that Mr. Alex Kaplan, ICSID Senior Counsel, will serve as Secretary of the Tribunal.
49. By letter of the same date, the Respondent requested that the pre-hearing organizational meeting scheduled in two working days be vacated citing the circumstances of suspension of the proceeding and the reconstitution of the Tribunal. On June 14, 2025, the Claimant objected to the Respondent's request. The Respondent submitted its comments on the Claimant's objections on June 15, 2025.
50. On June 16, 2025, ICSID circulated draft hearing protocol for review by the Parties. ICSID also notified the Parties that the Tribunal postponed the pre-hearing organizational meeting to the newly proposed dates.
51. On June 17, 2025, the Respondent requested a short extension to submit its notification of witnesses. The Tribunal granted the request the next day and on June 17, 2025, the Respondent provided the names of the witnesses it intended to examine at the hearing.
52. On June 23, 2025, the Claimant objected to the Respondent's belated notification of witnesses, stating that the Respondent should have provided that information on June 10, 2025, as the Claimant did, or, at the very latest, on June 13, 2025, after the proceeding was resumed. The Claimant further objected to the Respondent calling Messrs. [REDACTED] and [REDACTED] arguing that such call "appear[ed] to be driven by causing nuisance rather than any materiality to the bifurcated issues." The Claimant also noted that [REDACTED] was of advanced age and resided in Iran.
53. On June 30, 2025, the Claimant notified the Respondent and the Tribunal that [REDACTED] will not be able to prepare or attend the hearing, noting that he was neither an employee nor an advisor to the Claimant.
54. On June 30, 2025, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference. The following persons were in attendance:

Tribunal:

Dr. Claus von Wobeser, President of the Tribunal

Dr. Eduardo Silva Romero, Arbitrator

Prof. Maxi Scherer, Arbitrator

ICSID Secretariat:

Mr. Alex Kaplan, Secretary of the Tribunal

Ms. Ekaterina Minina, ICSID Paralegal

On behalf of the Claimant:

Mr. Emmanuel Foy, Partner for Derains & Gharavi

Mr. Romain Dethomas, Counsel at Derains & Gharavi

Mr. Onur Oksan, Senior Associate at Derains & Gharavi

Ms. Akosua Asirifi, Associate at Derains & Gharavi

Ms. Hamideh Barmakhshad, Associate at Derains & Gharavi

Ms. Summia El-Awawdeh, Paralegal at Derains & Gharavi

On behalf of the Respondent:

Mr. Mark Levy KC, Partner at A&O Shearman

Mr. David Herlihy SC, Partner at A&O Shearman

Ms. Katrina Limond, Counsel at A&O Shearman

Mr. Godwin Tan, Associate at A&O Shearman

Ms. Aashna Agarwal, Associate at A&O Shearman

Mr. Andrew Hashim, Associate at A&O Shearman

Ms. Zahra Abdul-Malik, Trainee at A&O Shearman

[REDACTED], Advisor

[REDACTED], Advisor

[REDACTED], Advisor

[REDACTED], Ministry of
Foreign Affairs

55. On July 2, 2025, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing. The issue of [REDACTED] appearance at the hearing was discussed, among other things, with the Tribunal ordering the Claimant to undertake its best efforts to produce the witness either in person or virtually.
56. By communications of July 3, 2025, each Party addressed the issue of [REDACTED] appearance at the hearing. On July 9, 2025, the Claimant notified the Tribunal and the Respondent that it had contacted [REDACTED] who “regret[ted] that the circumstances do

not enable him to prepare and testify.” The Claimant reiterated the witness’ age and complicated situation in Iran.

57. A hearing on jurisdiction was held in Paris, France, from July 16 to July 18, 2025 (the “Hearing on Jurisdiction”). The following persons were present at the Hearing:

Tribunal:

Dr. Claus von Wobeser, President of the Tribunal
Dr. Eduardo Silva Romero, Arbitrator
Prof. Maxi Scherer, Arbitrator

ICSID Secretariat:

Mr. Alex Kaplan, Secretary of the Tribunal

On behalf of the Claimant:

Counsel:

Dr. Hamid Gharavi, Partner for Derains & Gharavi
Mr. Emmanuel Foy, Partner for Derains & Gharavi
Mr. Onur Oksan, Senior Associate at Derains & Gharavi
Ms. Akosua Asirifi, Associate at Derains & Gharavi
Ms. Hamideh Barmakhshad, Associate at Derains & Gharavi
Ms. Summia El-Awawdeh, Paralegal at Derains & Gharavi
Mr. Kian Moradi, Intern, Derains & Gharavi
Ms. Romane Froute Mfayokurera, Intern, Derains & Gharavi

Party Representatives:

[REDACTED] Head of Legal Affairs, NICO
[REDACTED] Legal Department, NICO

On behalf of the Respondent:

Counsel:

Mr. Mark Levy KC, Partner at A&O Shearman
Mr. David Herlihy SC, Partner at A&O Shearman
Ms. Katrina Limond, Counsel at A&O Shearman
Mr. Godwin Tan, Associate at A&O Shearman
Ms. Aashna Agarwal, Associate at A&O Shearman
Mr. Andrew Hashim, Associate at A&O Shearman
Mr. Aditya Menon, Trainee at A&O Shearman

Party Representatives:

[REDACTED] Advisor
[REDACTED] Advisor
[REDACTED] Advisor
[REDACTED] Ministry of
Foreign Affairs

Court Reporter:

Ms. Anne-Marie Stallard, The Court Reporter Limited

Observer:

Mr. Michael Hingston, ArbBoutique

58. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Witnesses:

[REDACTED]
[REDACTED]

Experts:

Mr. Dato' Seri Mohd Hishamudin Yunus, Malaysian law expert, RDS Partnership

Mr. Datuk Palpanaban Devarajoo, Malaysian law expert, RDS Partnership

Mr. Tan Jun Yu, Associate, RDS Partnership

On behalf of the Respondent:

Expert:

Tan Sri Dato Cecil Abraham

59. On September 2, 2025, the Tribunal informed the Parties that in their post-Hearing submissions, to be filed simultaneously by October 15, 2025, they should address the Tribunal's list of questions that it would send by September 15, 2025, and that there would be a Hearing on Closing Submissions on November 10, 2025 in Paris. The Tribunal also instructed the Parties to file their Statements of Costs by December 10, 2025.
60. On September 16, 2025, the Tribunal sent its list of questions to the Parties.
61. Further to the Parties' exchanges of October 11 and 13, 2025, the Tribunal instructed the Parties to present their Post-Hearing Briefs in accordance with the existing parameters and timetable.
62. The Parties filed simultaneous post-hearing briefs on October 15, 2025. Together with its brief, the Respondent filed Exhibits R-0067 to R-0070 and Legal Authorities RL-0072 to RL-0075.

63. On the same date, the Respondent filed its response to the motion presented by the Claimant during the last day of the Hearing regarding Tan Sri Dato' Cecil Abraham's evidence, together with Legal Authorities RL-0076 to RL-0078.
64. On October 16, 2025, the Tribunal confirmed that the Hearing on Closing Submissions would take place on November 10, 2025 at the Paris Arbitration Centre (Delos) and, on October 21, 2025, invited the Parties to confer on the Hearing structure and revert by October 27, 2025.
65. On October 23, 2025, the Claimant filed a request for leave to introduce two new Exhibits into the record, in response to the Respondent's most recent introduction of Exhibits and Legal Authorities.
66. On October 27, 2025, the Tribunal directed the Respondent to file its comments on the Claimant's request for leave at the earliest opportunity and no later than October 29, 2025.
67. On October 27 and 29, 2025, the Parties confirmed their agreement on the Hearing schedule.
68. In response to the Tribunal's direction of October 27, 2025, the Respondent filed its comments on the Claimant's request for leave to introduce two new factual exhibits into the record on October 29, 2025.
69. On November 4, 2025, the Tribunal granted leave for the immediate introduction of the Parties' new exhibits and legal authorities into the record and invited the Parties to indicate by November 7, 2025 whether they wished to file short written submissions directed specifically and exclusively to the other Party's newly introduced Exhibits and Legal Authorities.
70. Pursuant to the Tribunal's leave, the Claimant filed Exhibits C-0319 and C-0320 on November 7, 2025.
71. On the same date, the Tribunal confirmed the Parties' agreed Hearing schedule.

72. A Hearing on Closing Submissions was held at Delos in Paris on November 10, 2025. The following persons were present at the Hearing:

Tribunal:

Dr. Claus von Wobeser	President
Dr. Eduardo Silva Romero	Arbitrator
Prof. Maxi Scherer	Arbitrator

ICSID Secretariat:

Mr. Alex Kaplan	Secretary of the Tribunal
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For the Claimant:

Counsel

Dr. Hamid Gharavi	Derains & Gharavi
Mr. Emmanuel Foy	Derains & Gharavi
Ms. Hamideh Barmakhshad	Derains & Gharavi
Mr. Onur Oksan	Derains & Gharavi
Ms. Summia El-Awawdeh	Derains & Gharavi

For the Respondent:

Counsel

Mr. Mark Levy KC	A&O Shearman
Mr. David Herlihy SC	A&O Shearman
Ms. Katrina Limond	A&O Shearman
Mr. Godwin Tan	A&O Shearman
Ms. Aashna Agarwal	A&O Shearman
Ms. Azou Bouexiere	A&O Shearman

Party Representatives

[REDACTED]	Advisor
[REDACTED] (virtual attendance)	Advisor
[REDACTED] (virtual attendance)	
[REDACTED] (virtual attendance)	Advisor
[REDACTED] (virtual attendance)	Ministry of Foreign Affairs

Court Reporter:

Ms. Anne-Marie Stallard

73. On November 28, 2025, the Parties filed their responses to the questions posed by the Tribunal during the Hearing on Closing Submissions.

- 74. The Parties filed their submissions on costs on December 10, 2025.
- 75. On December 15, 2025, Professor Maxi Scherer made a disclosure to the Parties.
- 76. On December 17, 2025, the Claimant filed a request for leave to submit comments on the Respondent's submission on costs. On the same date, the Respondent objected to the request.
- 77. On May 26, 2026, the Tribunal informed the Parties that it required additional time to issue the Decision on Preliminary Objections, and that it expected to issue the decision by June 12, 2026.

II. JURISDICTION

- 78. Bahrain has objected to the Tribunal's jurisdiction, and in this bifurcated phase the following three issues pertaining to Bahrain's objections shall be determined: (A) whether NICO's claims are an abuse of process; (B) whether the Treaty applies to events occurring before its entry into force or when NICO lacked Malaysian nationality; and (C) whether NICO was incorporated in Labuan during the absence period from December 2014 to March 2018.

A. WHETHER NICO'S CLAIMS ARE AN ABUSE OF PROCESS

(1) The Parties' Positions

a. Bahrain's Position

(i) The Legal Test for an Abuse of Process Objection

- 79. For Bahrain, NICO's claims are an abuse of process and are therefore inadmissible. Bahrain posits that there is abuse of process where "(i) an investor acquires the nationality of a contracting party to a BIT after a dispute with the other BIT contracting party is

reasonably foreseeable; and (ii) the investor then seeks to pursue claims under the BIT in respect of that dispute.”¹

80. Bahrain therefore wholly disagrees with NICO’s characterization of the applicable test to determine whether there was an abuse of process: NICO insists that (a) Bahrain must show that a potential dispute was foreseeable to a “high degree of probability” and (b) that Bahrain must demonstrate that NICO intended to seek treaty protection or otherwise lacked good faith. As set out below, Bahrain expands on its interpretation of the abuse of process test.²

81. Bahrain further explains that the test for an abuse of process is an objective test, determined on the balance of probabilities, requiring a holistic consideration of all the circumstances of the case. It looks to *Transglobal v. Panama* for this proposition, where the tribunal stated:

*To determine whether an abuse of rights has occurred, tribunals have considered all the relevant circumstances of the case, including, for instance, the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.*³

82. Bahrain acknowledges that it bears the burden of proof in establishing an abuse of process; and though NICO asserts that this threshold is “high”, Bahrain underscores, citing *Alverley v. Romania*, that this does not mean that a different standard of proof—beyond the balance of the probabilities—applies.⁴

¹ Respondent’s Reply on Jurisdiction, April 8, 2025 (“Resp. Reply”), ¶ 51, citing Respondent’s Memorial on Jurisdiction, October 7, 2024 (“Resp. Mem.”), ¶ 72; Respondent’s Post Hearing Brief, October 15, 2025 (“Resp. PHB”), ¶ 58.

² Resp. Reply, ¶ 55.

³ Resp. Reply, ¶ 52, quoting Authority RL-41, *Transglobal Green Energy LLC. and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, June 2, 2016, ¶ 103 and referring to Authority RL-35, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, ¶ 177; and Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, March 16, 2022, ¶ 384; see also Resp. Mem., ¶¶ 74-76.

⁴ Resp. Reply, ¶¶ 53-54, citing Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, March 16, 2022, ¶¶ 366, 368.

83. Further, Bahrain asserts that NICO bears the burden of explaining, through evidence available to it, why it has changed nationality multiple times and its rationale for the re-domiciliations to Labuan specifically. And the Tribunal itself has stated in its Procedural Order No. 4 that “to analyze whether an abuse of process took place would involve a detailed review of Claimant’s contemporaneous motives, which involves very careful consideration of the information available to Claimant prior to and at the time of its restructuring(s).”⁵

1. Foreseeability of a Dispute

84. Bahrain explains, citing a multitude of cases, that there is an abuse of process when the facts giving rise to a potential dispute were reasonably foreseeable to a reasonable investor prior to a claimant’s change in nationality. It is not necessary that the claimant’s claim, as pleaded, be foreseeable, says Bahrain. “The test is objective, and will be met so long as a dispute would have been foreseeable to a reasonable investor ... It does not require proof that a particular investor actually foresaw that which was objectively foreseeable.”⁶

85. Though NICO argues that a dispute must be foreseeable to a “high degree of probability at the time of the restructuring”, Bahrain says that this position is contradicted by several investment treaty decisions recognizing that a dispute need only be “reasonably” foreseeable without more. Here, Bahrain again cites to the *Cascade* tribunal with approval.⁷

86. In any event, Bahrain says that a dispute *was* clearly foreseen before NICO’s re-domiciliations to Labuan. Therefore, under NICO’s own test—requiring that a dispute must be foreseeable to a high degree of probability—the foreseeability requirement is met.⁸

87. Nor does Bahrain agree with NICO that an abuse of process is more likely to have occurred if the restructuring took place immediately after the alleged breaches and if a BIT claim is submitted shortly afterwards. For Bahrain, this is not a necessary condition. Again, relying

⁵ Resp. Reply, ¶ 54, referring to Procedural Order No. 4 (*emphasis added*).

⁶ Resp. Reply, ¶ 56 (collecting cases), referring to Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021, ¶¶ 342-343.

⁷ Resp. Reply, ¶ 57, referring to Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021, ¶¶ 345-347.

⁸ Resp. Reply, ¶ 58, citing Cl. C-Mem, ¶ 28.

chiefly on *Cascade v. Panama*, Bahrain observes that specific State action is usually preceded by a period of a deteriorating relationship, and therefore, the longer a relationship deteriorates the more foreseeable State action may become. Bahrain therefore counters that the longer duration between State action and restructuring may, in fact, be more indicative of an abuse of process since a potential dispute would be more clearly foreseeable. Citing *BRIF-TRES v. Serbia*, Bahrain demonstrates that a dispute was deemed to be foreseeable or highly probable to the claimants in that case at least 12 years before the acquisition at issue.⁹

2. Intention and Bad Faith

88. Bahrain refutes NICO's argument that an element of intent or, at the very least, lack of good faith by a claimant is required to prove an abuse of process. For Bahrain, if a State can demonstrate that an investor obtained the relevant nationality when the dispute against the State was reasonably foreseeable, the investor's claim will be inadmissible. There is no requirement to show that an investor intended to benefit from treaty protection. Bahrain points to four reasons for this.¹⁰
89. First, the test, according to Bahrain, for an abuse of process is objective. NICO does not disagree, but it complains that there is no evidence on the record to demonstrate that it re-domiciled to Labuan intending to secure treaty protection. Bahrain critiques NICO's view here stating that an abuse of process test that requires proof of the investor's intention, as espoused by NICO, is subjective—not objective—and runs contrary to the objective nature of the foreseeability test.¹¹

⁹ Resp. Reply, ¶ 59 citing Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021, ¶ 347 and Authority RL-25, *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, January 30, 2023, ¶ 209.

¹⁰ Resp. Reply, ¶ 61, citing Resp. Mem., ¶¶ 75, 78.

¹¹ Resp. Reply, ¶ 62, citing Resp. Mem., ¶¶ 75-77.

90. Second, Bahrain observes that abusive investors will rarely be upfront about changing corporate nationality to obtain treaty protection and may withhold such evidence. Again, it cites to *Cascade v. Panama* for this proposition.¹²
91. According to Bahrain, NICO underscores that Bahrain “failed to mention” that the *Cascade* tribunal focused on the “when” and the “why” of the timing and circumstances of the change of nationality. Bahrain does not disagree with this; indeed, the timing and circumstances of NICO's re-domiciliations are important. But for Bahrain, the timing and circumstances of the re-domiciliations at issue here are shown through the evidence produced—and tellingly for Bahrain—withheld by NICO.¹³
92. Third, Bahrain also rebuts NICO’s allegation that it failed to mention that in *Cascade v. Turkey*, “the restructuring had been motivated by the desire to acquire more treaty protection”¹⁴ and the abuse of process objection was upheld. Here, Bahrain presents a hypothetical scenario demonstrating that where a change of nationality to a more favourable jurisdiction—availing an entity of treaty protection—would be allowed where that company changed nationality without knowing about the treaty advantages. Through this hypothetical, Bahrain seeks to demonstrate that ignorance of the law cannot be rewarded—a notion that NICO previously accepted for itself in the briefing.¹⁵
93. Fourth, Bahrain posits that NICO’s interpretation of the abuse of process test incentivizes companies to avoid documenting the reasons for transferring jurisdiction to gain treaty protection, allowing easy circumvention of the doctrine of abuse of process.¹⁶
94. Bahrain provides three examples of cases where investment treaty tribunals held that proof of bad faith is not required. For example, in *Philip Morris v. Australia*, a case that Bahrain says NICO cites with approval elsewhere, the tribunal stated that “[i]t is equally accepted

¹² Resp. Reply, ¶ 63, citing Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021, ¶ 344.

¹³ Resp. Reply, ¶ 64a.

¹⁴ Resp. Reply, ¶ 64b, citing Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021.

¹⁵ Resp. Reply, ¶ 65, citing Cl. C-Mem, ¶ 122.

¹⁶ Resp. Reply, ¶ 66.

that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test.”¹⁷

95. In the alternative, Bahrain says that even if, contrary to its primary contention, the Tribunal determines that Bahrain must prove that NICO re-domiciled to Labuan when its dispute with Bahrain was foreseeable but must show NICO did so intending to obtain treaty protection, the circumstance and evidence bring this contention to bear.¹⁸
96. Bahrain finds this evidence and NICO’s internal decision making even though Bahrain is only privy to what NICO has shared in this arbitration. Bahrain says that NICO in its document production engaged in a selective waiver of privilege, meaning that it places legal advice on the record where it may serve its case but redacts and asserts privilege over other advice that clearly relates to its shifting domiciliation.¹⁹
97. Bahrain underscores that even though NICO argues that it chose Labuan for tax and regulatory reasons only, ████████ accepted during the hearing that Labuan “wasn’t better from a tax perspective compared to the other three” jurisdictions under consideration by NICO.²⁰
98. For this reason, Bahrain cites to authorities showing that where tribunals have found an abuse of process, they have not required direct evidence. Instead, they have based their finding of abuse on a holistic examination of the circumstances. Again looking to *Alverley v. Romania*, Bahrain explains that the tribunal stated that it “must look at all of the evidence which has been put before it—by both parties—and the gaps in that evidence.”²¹ Bahrain further posits that what constitutes sufficiently persuasive evidence will depend on the facts of each case.²²

¹⁷ Resp. Reply, ¶ 67a, citing Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, ¶ 539.

¹⁸ Resp. Reply, ¶ 68.

¹⁹ Resp. Reply, ¶ 69; see Cl. C-Mem, ¶¶ 33.2 and 33.3.

²⁰ Resp. PHB, ¶ 60; see Tr. Day 1, 220:21 – 221:1; see also Tr. Day 1, 69:6-16.

²¹ Resp. Reply, ¶ 70a, citing Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, March 16, 2022, ¶ 368.

²² Resp. Reply, ¶ 71.

99. In the further alternative, even if the Tribunal determines that NICO did not re-domicile for treaty protection, there is still an abuse of process as the re-domiciliations were inconsistent with the objectives of the Treaty and the ICSID Convention to promote long-term economic cooperation between Malaysia and Bahrain.²³
100. It is for similar reasons, Bahrain says, that if the Tribunal accepts NICO's argument that Bahrain must prove a lack of good faith, a prospect with which Bahrain disagrees, then NICO's conduct meets this threshold. According to Bahrain, NICO has: (1) changed its nationality "in the grey period [...] between good relations and a full-fledged dispute"²⁴; (2) restructured to avoid sanctions; (3) relied on a nationality predicated on misrepresentations; (4) sought to apply the Treaty in a manner contrary to the intentions of the contracting parties or fundamental principles of international law.²⁵

(ii) NICO's Claims Based on Re-domiciliations Are an Abuse of Process

101. Bahrain explains that based on the available evidence, (i) a dispute with Bahrain was reasonably foreseeable by NICO before its respective re-domiciliations or, alternatively, (ii) the restructurings were inconsistent with the object and purpose of the Treaty. Thus, by acquiring Labuan nationality in this way, NICO's claims in this arbitration are inadmissible as an abuse of process.²⁶

1. A Dispute Was Reasonably Foreseeable by May 4, 2011

102. Bahrain says that NICO advances contradictory positions as to when a dispute was foreseeable, but ultimately accepts that a dispute could have been foreseen in November 2012, when it became aware of the 2010 CBB Directive. At the same time, Bahrain says that NICO claims that a dispute only became foreseeable in December 2022, i.e., when this arbitration was commenced.²⁷

²³ Resp. Reply, ¶ 72.

²⁴ Resp. Reply, ¶ 70d, citing Authority CL-107, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award (Excerpts) and Marc Lalonde's Dissenting Opinion, July 16, 2012, ¶ 403.

²⁵ Resp. Reply, ¶ 73d, citing Resp. Mem., ¶ 103.

²⁶ Resp. Reply, ¶ 74.

²⁷ Resp. Reply, ¶ 76; see also Cl. C-Mem, ¶ 79.

103. Since the test for an abuse of process is objective, proof of NICO’s actual knowledge of a dispute is not necessary. For this reason, Bahrain says that using this objective test, a potential dispute with Bahrain was objectively foreseeable as of May 4, 2011. In advancing this position, Bahrain cites to (a) the CBB Directive that had been enacted since September 8, 2010 and GFH and Ithmaar’s refusal to execute NICO’s transfer instructions;²⁸ (b) GFH and Ithmaar’s informing NICO that they “had been instructed by the CBB not to process any transfer instructions issued by Iranian entities, including NICO”;²⁹ (c) NICO’s complaint to the CBB that both GFH and Ithmaar “contacted us stating that they could not make those transfers because NICO’s accounts with both banks were blocked at your verbal instructions”;³⁰ (d) NICO’s submission that in April 2011, when Ithmaar referenced for the first time in writing the adverse instructions received from the CBB, NICO threatened legal action thereafter;³¹ (e) further correspondence from Ithmaar refusing to share the directives from the CBB.³²
104. From these events, Bahrain observes that NICO should have been certain that—as of May 4, 2011—the directives giving rise to the present dispute were brought about by the CBB or prompted by Bahrain. Therefore, it was objectively foreseeable that, as of that date, NICO had a potential dispute against Bahrain.³³

2. A Dispute Was Reasonably Foreseeable Before the January 2012 Re-domiciliation

²⁸ Resp. Reply, ¶ 77a, referring to Claimant’s Memorial on the Merits, May 9, 2024 (“Cl. Mem.”), ¶¶ 116-118, 120; C-9, GFH’s letter to NICO, December 22, 2010; C-200, Email NICO to GFH, December 22, 2010; C-201, NICO’s transfer order to GFH in the amount of EUR 10,000,000, December 23, 2010; C-202, Exchange of emails between NICO and GFH, December 22 and 23, 2010; C-195, Letter from GFH to NICO, October 18, 2010.

²⁹ Resp. Reply, ¶ 77b; C-68, NICO Internal email, January 20, 2011, p. 1.

³⁰ Resp. Reply, ¶ 77c, citing Cl. Mem., ¶ 129; C-10, NICO’s Letter to CBB (██████████, ██████████) March 8, 2011, p. 1; C-71, Email from NICO to the Central Bank of Bahrain, March 8, 2011, p. 3.

³¹ Resp. Reply, ¶ 77d, referring to Cl. Mem., ¶ 139 citing to C-12, Ithmaar’s Letter to NICO, April 21, 2011.

³² Resp. Reply, ¶ 77e, citing to C-72, Exchange of emails between NICO and Ithmaar, May 4, 2011, p. 1.

³³ Resp. Reply, ¶¶ 78-79.

105. If the Tribunal does not accept foreseeability as of May 4, 2011, Bahrain, in the alternative, also puts forth six reasons why a dispute was foreseeable before the January 2012 re-domiciliation.³⁴
106. First, NICO for the first time argued in the Counter-Memorial that “the earliest evidence” of its awareness of the 2010 CBB Directive is November 2012, referring to a letter from [REDACTED] to Ithmaar.³⁵ NICO says that it was not able “to comprehend the relevant facts, and assess the possibility of a breach by Bahrain” until then.³⁶ But Bahrain points to correspondence after May 2011 that demonstrates that a potential dispute against Bahrain was foreseeable. Here, Bahrain refers to various correspondence with Bahraini banks between May and October 2011 referring to “directives received from the Central Bank of Bahrain”.³⁷ This correspondence resulted in NICO’s counsel sending more correspondence to the CBB on 6 October 2011 noting that “NICO’s funds were frozen upon the Central Bank of Bahrain instruction due to purported sanctions”.³⁸ So for Bahrain, NICO’s claim that it learned of the contents of the 2010 CBB directive on November 26, 2012 is false.³⁹
107. Second, NICO states that it was “never put on notice of the CBB’s adverse actions” or officially notified by the CBB before November 2012,⁴⁰ but for Bahrain, this is irrelevant. Correspondence from the government to the investor regarding the adverse action is not required to conclude that an investor committed an abuse of process, and such a requirement would be impractical given that there were 400 financial institutions in Bahrain at the relevant time and potentially hundreds of thousands of depositors.⁴¹
108. Third, for Bahrain, NICO’s argument that the letters sent by GFH and Ithmaar in 2010 and 2011 could have been due to the banks’ overzealous interpretation of the Central Bank of

³⁴ See also Resp. Mem., ¶¶ 17-34.

³⁵ Resp. Reply, ¶ 81, citing to C-74, Letter from [REDACTED] to Ithmaar, November 26, 2012.

³⁶ Resp. Reply, ¶ 81, referring to Cl. C-Mem, ¶ 84.

³⁷ Resp. Reply, ¶ 83a, citing to Cl. Mem., ¶¶ 143-145, 148, C-73, Email from NICO to Ithmaar, May 10, 2011; C-13, GFH’s Letter to NICO, September 27, 2011; C-211, NICO’s Final Legal Notice to GFH, October 6, 2011; C-212, Letter from GFH to NICO, October 11, 2011; C-214, Letter from Ithmaar to NICO, October 9, 2011.

³⁸ Resp. Reply, ¶ 83b.

³⁹ Resp. Reply, ¶ 84, citing to Claimant’s Counter-Memorial on Jurisdiction, December 2, 2024 (“Cl. C-Mem.”), ¶ 91.

⁴⁰ Cl. C-Mem., ¶¶ 83, 86-87.

⁴¹ Resp. Reply, ¶¶ 86, 87.

Bahrain (“CBB”)/European Central Bank (“ECB”) directive⁴² is unconvincing. Bahrain observes that the CBB directive at issue asked licensees and Bahrain to comply with UNSC resolutions imposing sanctions on Iran and the United States Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”). From this, NICO, even if it did not have the actual directive, knew the effect of the directive and the other foundational facts underpinning its allegations.⁴³

109. Fourth, Bahrain is similarly unconvinced by NICO’s allegation that it suspected that the Bahraini banks’ reliance on alleged and uncommunicated directives from the ECB were simply excuses advanced by the Bahraini banks for their own unwillingness or ability to comply with the transfer requests. For Bahrain, NICO’s own case belies this argument given that from December 2010 onwards Bahraini banks were referring to the CISADA and other Iran related sanctions and this compelled NICO to write to the ECB to complain about this very issue.⁴⁴
110. Fifth, NICO’s assertion that it was not foreseeable prior to January 2012 that a dispute would arise because it had no reason to believe that the CBB would have been behind the blockage of its funds, given that no adverse action had been taken against Future Bank or the CBI deposits. Bahrain is again unconvinced by this position given that NICO was specifically informed that the Bahraini banks were acting under the instructions of the CBB, and NICO complained to the CBB about the blockage of funds. Here, Bahrain reminds that the Tribunal is only seeking to determine the foreseeability of NICO’s dispute with Bahrain for the non-return of its funds. NICO’s reference to Bahrain’s treatment of Future Bank or the CBI is not relevant.⁴⁵
111. Sixth and last, NICO refers to correspondence after November 26, 2012 to support its position of when it became aware of the ECB’s involvement in the restriction on its funds. This correspondence contradicts NICO’s claim in the merits memorial that it was

⁴² Cl. C-Mem., ¶ 91.

⁴³ Resp. Reply, ¶ 89, citing to Cl. Mem., ¶¶ 116, 117, 120, 126, 129-130, 242.5, 242.6 and 242.7.

⁴⁴ Resp. Reply, ¶ 90; see Cl. Mem., ¶¶ 116-148.

⁴⁵ Resp. Reply, ¶¶ 91-93.

convinced that the CBB was behind the restrictions as early as May 2011.⁴⁶ Bahrain observes that even if a dispute develops slowly over time, this does not necessarily affect when a dispute became foreseeable.⁴⁷

3. A Dispute Was Reasonably Foreseeable Before the March 2018 Re-domiciliation

112. For Bahrain, it is untrue that NICO claims that Bahrain “failed to particularize, let alone substantiate” a foreseeable dispute prior to the 2018 Malaysian court decision.⁴⁸
113. First, as Bahrain pointed out in the Memorial, in June and September 2015, NICO’s legal counsel sent letters to the ECB referring to Bahrain’s obligations under the Treaty. Thus, NICO cannot credibly state it had no foresight of a dispute with Bahrain when it applied to the Labuan authorities. Bahrain observes that NICO has not attempted to explain away this contention.⁴⁹
114. Second, NICO claims that no dispute was foreseeable in March 2018 because it had assumed that after it reinstated its Labuan personality, Bahrain would procure the release of its funds. But this claim of NICO makes no sense for Bahrain, as it had been almost eight years since NICO’s funds had been allegedly blocked by the ECB and so a claim against Bahrain was long since foreseeable.⁵⁰
115. Third and last, NICO asserts that the foreseeability of a dispute at the time of the 2018 Malaysian court decision is irrelevant because NICO never engaged in any corporate restructuring nor effected any change of nationality in 2018. Instead, NICO recorded, by way of the 2018 decision, the fact that it had had at all times remained a Malaysian company since January 2012. Bahrain confirms that this is an unpersuasive line of argument. The method in which NICO acquired Labuan nationality in 2018 is not relevant to assessing whether there was an abuse because the 2018 Malaysian court decision was a

⁴⁶ Resp. Reply, ¶ 94.

⁴⁷ Resp. Reply, ¶ 95, quoting Cl. C-Mem., ¶ 96.

⁴⁸ Resp. Reply, ¶ 95, quoting Cl. C-Mem., ¶ 96.

⁴⁹ Resp. Reply, ¶¶ 96, 97, referring to Resp. Mem., ¶ 87.

⁵⁰ Resp. Reply, ¶¶ 98-101, citing Authority RL-25, *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, January 30, 2023, ¶ 210.

result of NICO actively applying to the Malaysian authorities for a return to Labuan instead of seeking a continuation in Nevis.⁵¹

4. A Dispute Was Reasonably Foreseeable Before the December 2022 Re-domiciliation

116. Bahrain cites as incorrect NICO's contention that the dispute became foreseeable when it initiated arbitration in December 2022 against Bahrain.
117. Bahrain disagrees with NICO that there must be a close proximity in time between when the domiciliation occurred and when the arbitration was commenced. For Bahrain, the longer NICO's funds have allegedly been blocked the more foreseeable a dispute would be. Nor can NICO rely on its contention that it was only in December 2022 when it understood that the blockage of its funds had been orchestrated by Bahrain. Here, Bahrain says that NICO has failed to refer to any developments that took place in 2022 that would solidify this understanding.⁵²

(iii) The Circumstances Surrounding NICO's Domicile Changes Indicate that There Was an Abuse of Process

118. If the Tribunal disagrees with Bahrain and finds that a dispute was not reasonably foreseeable before NICO re-domiciled to Labuan in 2012 and 2018, then the Tribunal can still find on the balance of probabilities that NICO re-domiciled for the purposes of obtaining treaty protection. To this end, Bahrain further demonstrates, in the alternative, that the re-domiciliations were contrary to the objectives of the treaty and the ICSID Convention.

1. Circumstances Surrounding the Re-domiciliation in January 2012

119. Bahrain refutes NICO's contention that the move from Jersey to Labuan was due to "a legitimate corporate rationale and logical business reasons."⁵³ Bahrain says that the

⁵¹ Resp. Reply, ¶¶ 102-103.

⁵² Resp. Reply, ¶ 104.

⁵³ Resp. Reply, ¶ 107, quoting Cl. C-Mem., ¶ 45; See also the Witness Statement of [REDACTED] May 9, 2024, ¶ 14.

contemporaneous evidence does not explain why Labuan was chosen for the re-domiciliation at all.⁵⁴

120. In mid-February 2011, [REDACTED] advised NICO of available offshore tax havens that NICO could domicile to, i.e., Labuan, Mauritius, Nevis, and Seychelles. According to the Counter-Memorial, NICO elected Labuan because it “had low to no taxation at the time.”⁵⁵
121. Yet, Bahrain states that [REDACTED] did not advise NICO to choose Labuan over the other three jurisdictions for tax reasons—noting that in fact Labuan had “negligible” corporation tax, where the other jurisdictions had none. Further the [REDACTED] report stated that in Labuan, offshore companies “cannot engage in shipping and/or gas/oil operations in Malaysia” and there is no such restriction in the other three jurisdictions. Bahrain asserts that indeed the ability to engage in oil and gas operations in a jurisdiction would matter to a company whose primary business concerned the oil and gas sector.⁵⁶
122. Tellingly for Bahrain, no other candidate jurisdiction had a BIT in place with Bahrain except for Malaysia.⁵⁷
123. Bahrain observes that there is nothing else on the record to support NICO’s choice of Labuan; the record otherwise only contains explanations of why it left Jersey. A letter from NICO to NIOC states that the departure was “based on legal advice from our attorney” and “following our investigations”. Bahrain addressed a document production request to NICO on this very issue, but NICO stated that the “documents requested do not exist.” Bahrain finds that this is unlikely and extreme.⁵⁸
124. Bahrain therefore urges the Tribunal to proceed to draw the conclusion from the little evidence before it that NICO has failed to establish that its choice of Labuan was prompted by “genuine business and commercial reasons that had nothing to do with securing treaty

⁵⁴ Resp. Reply, ¶ 107.

⁵⁵ Resp. Reply, ¶ 108, quoting Cl. C-Mem., ¶ 49; C-290, Email from [REDACTED] to NICO, February 16, 2011.

⁵⁶ Resp. Reply, ¶ 109; C-290, Email from [REDACTED] to NICO, February 16, 2011.

⁵⁷ Resp. Reply, ¶ 110.

⁵⁸ Resp. Reply, ¶ 114.

protection”.⁵⁹ In the absence of any other explanation, Bahrain says that the Tribunal should find that on the balance of probabilities, NICO chose Labuan to enable it to take advantage of treaty protection in respect of an ongoing, or at least foreseeable, dispute.⁶⁰

125. Additionally, Bahrain asserts that NICO has itself noted that it left Jersey to avoid sanctions and transparency requirements to combat terrorism and financial crime, confirming that the re-domiciliation was not for the purpose of genuine economic activity. And to be sure, Bahrain says that NICO’s pointing to other Iranian-owned Jersey entities leaving that jurisdiction for Labuan is wholly irrelevant to the Parties in this case.⁶¹

2. Circumstances Surrounding NICO’s Purported Reinstatement of Labuan Nationality in 2017 and 2018

126. Bahrain asserts that NICO’s excuse for “re-acquiring” Labuan nationality, i.e., that it had always remained since 2012 a Malaysia incorporated company, is false. Instead, Bahrain characterizes the reinstatement of Labuan nationality as abusive given that a dispute with Bahrain was afoot.⁶²
127. First, NICO could not have been a Malaysian company during the period for which it sought to reacquire nationality. This is because NICO had to leave Labuan during the absence period due to sanctions. Bahrain highlights that NICO’s own lawyers in 2017 stated in correspondence that “it is a virtual certainty that NICO would have been struck-off from the register of companies of Labuan [...] at that time”.⁶³ Yet paradoxically, NICO somehow asserts that it was a Labuan company continuously since 2012.⁶⁴
128. Further, in 2015 and 2016, NICO received notifications from the Gambian government that NICO was in fact not incorporated in that country. Yet, NICO did not inform Labuan authorities that its Gambian registration was invalid nor did it seek reinstatement in the Labuan registry at that time. Instead, it chose to keep operating in The Gambia registry for

⁵⁹ Resp. Reply, ¶ 116, quoting Cl. C-Mem., ¶ 54.

⁶⁰ Resp. Reply, ¶ 116.

⁶¹ Resp. Reply, ¶ 119.

⁶² Resp. Reply, ¶¶ 120, 121.

⁶³ Resp. Reply, ¶ 123, quoting TSDCA-40, Letter from [REDACTED] to LFSA, February 20, 2017, p. 1.

⁶⁴ Resp. Reply, ¶ 123.

over a year after learning its registration was invalid, and thus, NICO did not interpret its invalidation in The Gambia as restoring its Labuan nationality under the Labuan Companies Act (“LCA”), which was what NICO represented to the Labuan High Court in 2018.⁶⁵

129. Therefore, Bahrain states that it was plainly abuse for NICO to assert it was a Malaysian investor during this period when Labuan was rejecting NICO from its jurisdiction.⁶⁶
130. Second, NICO has a demonstrated pattern of manipulative conduct relevant to assessing the motivations behind its re-domiciliations. This pattern is shown by NICO’s non-disclosure of three facts to the Labuan High Court: (i) NICO never engaged Gambian counsel upon learning of the defect in its corporate existence;⁶⁷ (ii) instead, NICO moved to Nevis with full knowledge of the invalidity of its Gambian registration, yet it represented to the Nevis authorities that it was a Gambian company;⁶⁸ (iii) NICO engaged with the Nevis authorities as a Nevis company, even though it already had had doubts regarding its registration in Nevis.⁶⁹
131. Third, Bahrain again says that NICO also made a false representation before this Tribunal and the Labuan Financial Services Authority (“LFSA”) by stating that it decided to apply for reinstatement based on Gambian and Nevis law opinions of December 2016.⁷⁰ In fact, Bahrain states, citing these opinions, that NICO never explained why it decided to apply to the LFSA for reinstatement in January 2017, which would have been the easier and logical choice over re-domiciliation in Labuan. Instead, NICO chose to reinstate itself in

⁶⁵ Resp. Reply, ¶¶ 124-125.

⁶⁶ Resp. Reply, ¶ 126.

⁶⁷ Resp. Reply, ¶ 127a, quoting TSDCA-26, Case file – March 2018 proceedings before the High Court of Sabah and Sarawak, February-March 2018.

⁶⁸ Resp. Reply, ¶ 127b; Cl. C-Mem., ¶ 62; C-32, Report from ██████████ October 13, 2014, 3.1(a); R-25, Email from ██████████ to NICO, March 29, 2016; R-26, Email from ██████████ to NICO, March 31, 2016.

⁶⁹ Resp. Reply, ¶ 127c; C-46, NICO’s Certificate of Transfer of Domicile to Nevis, August 19, 2016; C-45, NICO’s Certificate of Incorporation in Nevis, August 19, 2016; R-27, NICO’s Nevis Register of Directors as notarised on July 31, 2017 and apostilled on July 25, 2017, June 19, 2016; R-28, NICO’s Nevis Articles of Associations as notarised on July 31, 2017 and apostilled on July 25, 2017, August 19, 2016; R-29, NICO’s Nevis Certificate of Incumbency as notarised on July 31, 2017 and apostilled on July 25, 2017, June 21, 2017; R-14, NICO’s Nevis Certificate of Good Standing, August 17, 2017.

⁷⁰ Resp. Reply, ¶ 129.

Labuan where it faced significant challenges. Bahrain cites to evidence on the record in this regard, including correspondence from October 2016 between [REDACTED] and NICO indicating that “the possibility of [NICO] remaining or reinstating itself within Labuan [...] may not be practically possible.”⁷¹

132. Given the significant gaps in NICO’s evidence and motivations for seeking reinstatement in Labuan instead of staying in Nevis or re-domiciling in Jersey, Bahrain urges the Tribunal to find that on a balance of probabilities, NICO’s decision to pursue reinstatement in Labuan instead of staying in Nevis was motivated by treaty protection.⁷²
133. Fourth, when the LFSA refused to reinstate NICO, NICO and its advisors resorted to procuring the 2018 Malaysian Court decision through misrepresentations and concealment of material information, says Bahrain. It also made misrepresentations to the Nevis High Court, according to Bahrain.⁷³

(iv) NICO’s References to the Bahrain-Iran BIT Cannot Excuse its Abuse of Process

134. Bahrain states that NICO has not provided any authority showing that a parent company’s alleged ability to bring a claim under a different investment treaty is a defence to a claim of abuse of process. Therefore Bahrain says that NICO’s argument that its shareholders were at all times protected under the Iran-Bahrain BIT has no moment.⁷⁴
135. For Bahrain, even if the National Iranian Oil Company (“NIOC”), a shareholder of NICO, could find protection under the Bahrain-Iran BIT, NICO’s choice to re-domicile to Labuan to take advantage of the Treaty when this dispute was foreseeable would still be abusive. These two things can be true at the same time, according to Bahrain.⁷⁵

⁷¹ Resp. Reply, ¶ 132a, quoting C-292, Exchange of emails between [REDACTED] and NICO, August 25, 2016 to October 4, 2016, p 2.

⁷² Resp. Reply, ¶ 138.

⁷³ Resp. Reply, ¶ 140.

⁷⁴ Resp. Reply, ¶ 147.

⁷⁵ Resp. Reply, ¶¶ 147-149; Resp. Mem., ¶¶ 105-111.

136. Further, NICO could not bring a claim for the non-return of NICO’s funds under this other instrument for four reasons: (i) ICSID Convention arbitration is unavailable under the Iran-Bahrain BIT, and this is undisputed; further NICO would presumably need to avail itself of ICSID’s enforcement regime as a sanctioned entity; (ii) NIOC has no investment in Bahrain, and therefore has a tenuous claim to protection under the Iran-Bahrain BIT; (iii) NIOC’s claim, if any, would be of considerably less value than the present claim; and (iv) the two treaties do not contain the same substantive protections.⁷⁶

b. NICO’s Position

(i) Burden of Proof and the Applicable Standard

137. NICO first observes that Bahrain cannot and does not dispute that it bears the burden of proof to establish the elements of its abuse of process preliminary objection. Yet, Bahrain also tries to shift this burden, to NICO, relying on PO4 and *Alverly v. Romania*. NICO asserts that neither of these authorities support Bahrain’s position. All PO4 says, in NICO’s view, is that the Tribunal will undertake “a detailed review of Claimants’ contemporaneous motives based on information available to Claimant prior to and at the time of its restructuring.” Further, *Alverly v. Romania* is a fact-based exception to the well-established principle that the party asserting an abuse of process claim or defense bears the burden of proof; *Alverly v. Romania* is inapplicable to this case according to NICO.⁷⁷
138. NICO asserts that the claimants in *Alverley v. Romania* shuffled funds away from the Romanian parent to gain treaty protection, and they produced none of the evidence compelled for production by the tribunal to explain away the corporate changes at issue. NICO says that it, on the other hand, always had treaty protection available via the Iran-Bahrain BIT, given its Iranian shareholding, and NICO produced ample evidence that its

⁷⁶ Resp. Reply, ¶¶ 150-156.

⁷⁷ Claimant’s Rejoinder on Jurisdiction, May 27, 2025 (“Cl. Rej.”), ¶¶ 16-20, citing Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), March 16, 2022; Cl. C-Mem., ¶ 26, citing Resp. Mem., ¶ 77e.

2012 re-domiciliation and the process leading to the 2018 Decision were not motivated by any treaty protections.⁷⁸

139. NICO next disputes Bahrain’s position that the standard of proof is the balance of the probabilities. NICO says that Bahrain did not engage with the cases cited, such as *Philip Morris v. Australia*, which established that the threshold for a finding of abuse of process is high. Also, in *Chevron v. Ecuador (I)*, the tribunal stated “The high threshold also results from the seriousness of a charge of bad faith amounting to an abuse of process.”⁷⁹
140. The heightened standard of proof is warranted, NICO says, because the objection could strip away a “valid title of jurisdiction” and is in keeping with the maxim that the graver the charge, the more probative the evidence must be.”⁸⁰
141. Further, NICO details what is required of the first prong of the abuse of process test—foreseeability. Given the high standard, Bahrain must show that the specific dispute was foreseeable to the required high degree at the time of restructuring (and not that a potential dispute was reasonably foreseeable).⁸¹
142. NICO agrees that the foreseeability test is an objective one, but it does not agree that the test requires an analysis of what is “reasonably foreseeable” or “facts giving rise to a potential dispute.” Citing many cases to support its view, NICO explains that actual foresight of the dispute is required, and the restructuring of investments before a dispute has arisen for the purpose of treaty protection is perfectly legitimate.⁸²

⁷⁸ Cl. Rej., ¶ 20, citing Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), March 16, 2022.

⁷⁹ Cl. Rej., ¶¶ 21-26, citing Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, ¶ 539 and Authority CL-5, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. AA 34877, Interim Award, December 1, 2008, ¶ 143; see also Cl. C-Mem., ¶ 27.

⁸⁰ Cl. Rej., ¶ 26.

⁸¹ Cl. Rej., ¶ 27.

⁸² Cl. Rej., ¶¶ 28-33, citing Authority RL-35, *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010; Authority CL-100, *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, ICSID Case No ARB/11/17, Award, January 9, 2015; Authority RL-28-ENG, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award on Abuse of Process Argument, June 17, 2021; Authority CL-136, *Canepa Green Energy*

143. Thus, NICO says that Bahrain must demonstrate that at the time NICO re-domiciled in Labuan in 2012 and secured the 2018 Decision, the specific dispute with Bahrain was foreseeable to a “high” or “very high” “degree of foreseeability” and/or “actual foresight”. For NICO, Bahrain has not made this required showing, nor has it met its own “reasonable prospect” threshold.⁸³
144. Last, NICO introduces into the standard the requirement that an element of intent or lack of good faith is required to establish that the sole or determinative purpose of the restructuring was to obtain treaty protection. Because Bahrain cannot establish that the sole purpose of the restructuring was treaty protection, NICO asserts that Bahrain takes the extraordinary position—at odds with legal authority—that it only needs to establish foreseeability based on timing and circumstances.⁸⁴
145. NICO confirms that the case law requires that “to succeed in [an abuse of process] objection, the Defendant bears the burden of proving that indeed, the investment was restructured for the sole purpose of unduly gaining a procedural advantage.”⁸⁵
146. Nor can Bahrain meet its burden of proof via evidentiary gaps because according to NICO, there are none. Further, a case based upon evidentiary gaps cannot satisfy the high standard of proof at play here.⁸⁶

(ii) There Can Be No Abuse When Treaty Protection Was Always Available

Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain, ICSID Case No. ARB/19/4, Procedural Order No. 3 (Decision on Bifurcation), August 28, 2020; Authority CL-108, *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, December 14, 2023; Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), March 16, 2022; Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015; Authority CL-134, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013; Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, January 20, 2021.

⁸³ Cl. Rej., ¶ 34.

⁸⁴ Cl. Rej., ¶¶ 35, 36.

⁸⁵ Cl. Rej., ¶ 36, quoting Authority CL-7, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, December 15, 2014, ¶ 292.

⁸⁶ Cl. Rej., ¶ 38.

147. None of the re-domiciliations at issue can be found to be motivated by treaty protection where NICO, though its Iranian shareholders, was always protected under the Iran-Bahrain BIT.⁸⁷
148. NICO observes that Bahrain does not dispute that (i) NICO was at all relevant times ultimately owned by an Iranian shareholder; (ii) the Iran-Bahrain BIT has been in force since October 12, 2004; (iii) the BIT provides for investor-State arbitration and contains substantive treaty protections; and (iv) these treaty protections overlap with the Malaysia-Bahrain BIT.⁸⁸
149. Nor can Bahrain point to precedent where an abuse of process has been established when the claimant had and continues to have treaty protection via its shareholder.⁸⁹
150. While NICO agrees that the Iran-Bahrain BIT has no recourse to ICSID arbitration, this is of no help to Bahrain. The test for abuse of process looks to securing treaty access and arbitral jurisdiction, not any specific arbitral jurisdiction. NICO observes that treaties necessarily differ from one to another, and some provisions of the Iran-Bahrain BIT may well be more advantageous than the Malaysia-Bahrain BIT.⁹⁰
151. Bahrain's observation that NICO, as a sanctioned entity, may have invoked ICSID arbitration via the Malaysia-Bahrain BIT due to ICSID's enforcement mechanism is of no moment according to NICO. NICO says that the test of abuse of process refers to the gaining of arbitral jurisdiction, and not the post-arbitral enforcement phase.⁹¹
152. Nor can Bahrain lean on differences in the substantive treaty protections between the two BITs, given that the Iran-Bahrain BIT contains a Most Favoured Nations clause, which can be used to equalize the protections of the two instruments. Indeed, there is contemporaneous evidence, namely letters from [REDACTED] NICO's counsel to [REDACTED] the CBB, [REDACTED] dated June 2, 2015 and September 3,

⁸⁷ Cl. Rej., ¶ 74.

⁸⁸ Cl. Rej., ¶ 75, citing Resp. Reply, ¶¶ 146-156; Cl. C-Mem., ¶¶ 36-38.

⁸⁹ Cl. Rej., ¶ 76.

⁹⁰ Cl. Rej., ¶¶ 78, 79.

⁹¹ Cl. Rej., ¶¶ 80, 81.

2015, i.e., after NICO had re-domiciled to Malaysia, where NICO points to the protections of the Iran-Bahrain BIT.⁹²

(iii) The Timing of the Arbitration Is Incompatible With Treaty Shopping

153. NICO highlights that this arbitration was commenced with NICO's Notice of Dispute of December 2022, which is more than a decade after NICO's January 2012 re-domiciliation and almost four years after the 2018 Decision. This case, therefore, stands in stark exception to those cases where abuse of process was found in arbitrations commenced two to three years after the change of nationality or corporate restructuring at issue.⁹³
154. The delay and contemporaneous evidence that the re-domiciliations were driven by tax and corporate governance reasons, without any consideration for treaty protection, should alone suffice to dispose of Bahrain's abuse of process objection.
155. Bahrain says that abusive investors could circumvent an abuse of process objection by such a delay. To this NICO replies that it is implausible and lacks common sense that an investor would re-domicile in this way and then wait nearly a decade to bring a claim. And the one case cited by Bahrain—*BRIF-TRES v. Serbia*—is of no help to Bahrain because the dispute at issue was existing and known 12 years before the acquisition of the company by the investor.⁹⁴

(iv) The Abuse of Process Test Not Met Regarding NICO's January 2012 Re-domiciliation

1. First Prong – No Specific Dispute Was Foreseeable

⁹² Cl. Rej., ¶ 83, citing Resp. Reply, fn. 319; compare C-1, Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, June 15, 1999, with Authority CL-1, Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Islamic Republic of Iran and the Government of the Kingdom of Bahrain, October 19, 2002; see also Claimant's Post Hearing Brief, October 15, 2025 ("Cl. PHB"), ¶ 47.

⁹³ Cl. Rej., ¶¶ 88, 89; see also Cl. C-Mem., ¶¶ 77-79, citing Authority RL-11, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009; Authority RL-39, *ST-AD GmbH. v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, July 18, 2013; Authority CL-100, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, January 9, 2015.

⁹⁴ Cl. Rej., ¶ 90; see Authority RL-25, *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, January 30, 2023, ¶ 209.

156. NICO confirms that there was no specific BIT dispute that was foreseeable at the time of the January 2012 re-domiciliation from Jersey to Malaysia. NICO advances five independent reasons.
157. First, Bahrain kept NICO in the dark in relation to the underlying source, nature, and origin of the blockage of its funds. Indeed, Bahrain’s adverse actions and/or omissions leading to the First Refusals of January 17, 2012 and the Second Refusals of January 17, 2012—after the January 4, 2012 re-domiciliation were not contemporaneously notified to NICO.⁹⁵
158. Nor was NICO put on notice of the 2010 CBB Directive, which did not include any mandatory language requiring the Bahraini Banks to comply with US sanctions—so this directive could not have been the basis for the two refusals. And even if NICO was put on notice of this directive, it lacked coercive language that would have justified the blockage of NICO’s funds.⁹⁶
159. NICO says that the real drivers of the blockage of NICO’s funds appear to be informal and dissimulated anti-Iran policy driven instructions issued by Bahrain that only came to light during the hearing in *Bank Melli v. Bahrain*, as recorded in the November 9, 2021 award. The full extent of the instructions remain to this date dissimulated, given that Bahrain evaded document production orders in that arbitration.⁹⁷
160. NICO asserts that Bahrain’s response that it is irrelevant for NICO to have been put on notice of the CBB’s adverse actions or otherwise officially notified by the ECB before November 2012 is wrong. According to NICO it is highly relevant and material for NICO to have received notice of the reason for the blockage. NICO had multiple legitimate reasons to believe that its funds were blocked on bases other than the CBB directive. Under the circumstances the specific dispute at issue here was not and could not have been foreseeable let alone to the high degree that the relevant standard requires.⁹⁸

⁹⁵ Cl. Rej., ¶ 94.

⁹⁶ Cl. Rej., ¶ 95.

⁹⁷ Cl. Rej., ¶ 95, citing C-20, *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, November 9, 2021, ¶¶ 661, 664.

⁹⁸ Cl. Rej., ¶ 96.

161. NICO likewise critiques Bahrain’s alternative argument that it is “not logical, reasonable [...] to require the CBB to [have] notif[ied] individual depositors across hundreds of institutions.” NICO says that it was Bahrain’s obligation under the BIT to ensure due process and transparency and notify foreign investors of adverse measures. Nor can NICO be described as an ordinary individual depositor given its sovereign roots and the quantum of deposits.⁹⁹
162. Even assuming that the Tribunal would consider that no notification to NICO was required for the purposes of foreseeability, NICO posits that Bahrain’s abuse defence still fails because the contemporaneous evidence, which is not contradictory, shows that the earliest date by which interference from Bahrain became known to NICO was at the time of NICO’s November 2012 attorney letters to the Bahraini banks that NICO became aware of the 2010 CBB directive.¹⁰⁰
163. Second, NICO asserts that Bahrain is wrong to claim that NICO must have become aware of the 2010 CBB Directive before NICO’s November 2012 attorney letters. If it were true, for example, that NICO became aware of the 2010 CBB Directive upon the January 2012 re-domiciliation, it would have been illogical for NICO to delay its November 2012 attorney letters to the Bahraini banks by over 10 months, especially since Bahrain sought the release of its funds since March 8, 2011.¹⁰¹
164. Third, NICO could not have obtained the directive through Future Bank in 2010, as Bahrain suggests NICO and Future Bank are two separate entities, engaged in different lines of activities completely; they are not under common ownership as Bahrain suggests. Even if this were the case there were no adverse measures taken against a future bank until at least April 2015 and so there would have been no reason for Future Bank to signal a foreseeable dispute to NICO until that time.¹⁰²

⁹⁹ Cl. Rej., ¶ 97.

¹⁰⁰ Cl. Rej., ¶ 99, citing C-74, Letter from ██████████ to Ithmaar, November 26, 2012; and C-75, Letter from ██████████ to GFH, November 26, 2012.

¹⁰¹ Cl. Rej., ¶ 100.

¹⁰² Cl. Rej., ¶¶ 101-103.

165. Fourth, NICO asserts that Bahrain cannot dispute the revelatory nature of the November 2012 communication between NICO and the Bahraini banks. Nor can it describe the subsequent communications as mere “further exchanges”. NICO explains that the record reflects that it was only as of November 2012 when NICO became first aware of the 2010 directive, and only thereafter did it expressly refer to the directive with enough precision. It did so for the first time in its February 8, 2013 letters to GFH and Ithmaar and in its March 6, 2014 response to Ithmaar’s February 10, 2014 letter. It also proposed alternative solutions to overcome the hurdle created by the directive in its December 17, 2013 and March 6, 2014 letters. According to NICO, Bahrain cannot complain that NICO did not produce internal documents that refer to the CBB’s involvement in the non-return of NICO’s funds between September 8, 2010 and November 26, 2012 because there are none.¹⁰³
166. Fifth, taking a holistic view of the circumstances, the Tribunal must conclude that the dispute with Bahrain was not foreseeable as of January 4, 2012. NICO critiques Bahrain’s view that a potential dispute with Bahrain was foreseeable as of May 4, 2011. NICO says this is a made-up date corresponding to Ithmaar’s May 4, 2011 email refusing to disclose directives or circulars sent by the CBB. NICO avers that this letter cannot be found to be the basis of foreseeability.¹⁰⁴
167. NICO questions how Ithmaar’s refusal can be found to be the foreseeability hook. For NICO this correspondence reinforces NICO’s belief that the banks were using the CBB directives as an excuse to give their refusal of NICO’s requests the impression of legitimacy. This means, according to NICO, that the dispute was between NICO and the banks—not NICO and Bahrain.¹⁰⁵

¹⁰³ Cl. Rej., ¶ 104; see also C-218, NICO’s Counsel (██████████) letter to GFH, February 8, 2013; C-219, NICO’s Counsel (██████████) letter to Ithmaar, February 8, 2013; C-226, Letter from NICO to Ithmaar, March 6, 2014; C-221, Email from NICO to Ithmaar Bank, December 18, 2013; see also Cl. C-Mem., ¶ 92, explaining that still as of November 26, 2012 NICO explained to the Bahraini banks that there were no applicable Bahraini regulations preventing the release of its funds.

¹⁰⁴ Cl. Rej., ¶¶ 106-107; see also C-72, Exchange of emails between NICO and Ithmaar, May 4, 2011.

¹⁰⁵ Cl. Rej., ¶ 108.

168. Just days prior, on April 29, 2011, NICO sent an e-mail to Ithmaar in which NICO questioned the specific directive it was claiming to follow and requested a copy of correspondence between Ithmaar bank and the CBB together with answers to three questions seeking more information. The spirit of this e-mail shows that NICO was left in the dark. Conveniently for Bahrain, NICO says Bahrain makes zero reference to the April 29, 2011 e-mail because if they do it disposes of the flawed suggestion that the dispute with Bahrain was foreseeable as of May 4, 2011.¹⁰⁶
169. The Tribunal must therefore conclude that given the lack of transparency surrounding the blockage of NICO's funds including vague references by banks to directives and circulars issued by the ECB and sanctions without any explanation NICO's dispute with Bahrain could not have been objectively foreseeable let alone highly foreseeable as the standard requires.¹⁰⁷

2. Second Prong – No Evidence of Treaty Protection Underlying NICO's January 2012 Re-domiciliation to Malaysia

170. Even if the Tribunal concludes that the dispute between NICO and Bahrain had been foreseeable at the time of the January 2012 re-domiciliation to Malaysia, NICO says that Bahrain's objection would still fail on the second prong of the abuse of process test. This requires Bahrain to show that the predominant purpose of the restructuring was to secure treaty protection.¹⁰⁸
171. NICO voluntarily put on record extensive contemporaneous evidence showing that its January 2012 re-domiciliation was prompted by increasingly adverse regulatory pressures it was under in Jersey. NICO explains that Malaysia was selected as a relocation jurisdiction for tax and regulatory compliance reasons only without any consideration for

¹⁰⁶ Cl. Rej., ¶ 109.

¹⁰⁷ Cl. Rej., ¶ 111.

¹⁰⁸ Cl. Rej., ¶ 114.

treaty protection. NICO further explains that this was not surprising as NICO benefited at all times from treaty protection via its Iranian shareholders.¹⁰⁹

172. After Jersey incorporated into its domestic law the EU Council Regulation 9601/2010 dated October 25, 2010 on sanctions against Iran, Jersey put great pressure on NICO to disclose information about its parent company and pushed its service provider to resign in November 2010. With NICO's continuation in Jersey now impossible, the company was at risk of being dissolved.¹¹⁰
173. It was these adverse developments NICO says as opposed to any treaty protection concerns that prompted NICO to look for alternative domicile venues with the assistance of [REDACTED] [REDACTED] NICO illustrates that indeed [REDACTED] proposed various jurisdictions. Eighteen jurisdictions were shortlisted, and they were selected on criteria such as taxation, reputation, language, and United States' influence. None of the criteria included whether the country had a bilateral investment treaty with Bahrain. NICO notes that Malaysia did not even have a bilateral investment treaty with Bahrain as of the date of this e-mail because it entered into force weeks later. Of the shortlist of jurisdictions, NICO had inquired further about Montenegro which also does not have a bilateral investment treaty with Bahrain.¹¹¹
174. Meanwhile, NICO's good standing in Jersey was eroding. On January 18, 2011, the JFSC held its meeting with NICO conveying concerns about the reputational risk held in respect of NICO and other Iranian entities. Then on February 8, 2011, the JFSC refused to issue a certificate of good standing to NICO on grounds that the company has no authorized registered office there. Meanwhile, [REDACTED] continued its efforts to advise on a re-domiciliation venue for NICO. A second note of February 16, 2011 proposes 24 possible

¹⁰⁹ Cl. Rej., ¶ 115; see also Cl. C-Mem., ¶ 48, citing C-280, Letter from Jersey Financial Services Commission to [REDACTED] (agent in Jersey), January 25, 2011; C-281, Letter from Jersey Financial Services Commission to NICO, February 8, 2011; C-298, Letter from Jersey Financial Services Commission to [REDACTED] (Agents in Jersey), February 9, 2011; C-290, Email from [REDACTED] to NICO, February 16, 2011.

¹¹⁰ Cl. Rej., ¶ 115.1.

¹¹¹ Cl. Rej., ¶¶ 115.2-116.

jurisdictions out of a list of 100. [REDACTED] shortlisted four of those jurisdictions and three did not have any bilateral investment treaty with Bahrain.¹¹²

175. Bahrain critiqued [REDACTED] efforts as being unsupported by any legal analysis. However, NICO did obtain legal advice before deciding to change jurisdiction from NICO's Jersey lawyer, [REDACTED] who advised that NICO should re-domicile from Jersey to a different location. However, it was indeed [REDACTED] that advised NICO on the exact jurisdiction to which NICO would re-domicile. The selection was motivated by taxation security from sanctions and reputational considerations.¹¹³
176. Labuan was ultimately chosen, NICO continues, because as the minutes of the meeting of NICO's board of directors on June 9, 2011 reflect that Labuan "appeared to [...] be the simplest way of continuing with the company's business without having to either novate existing contracts or become involved in a very complex assets and liability transfer to a new entity and then for the company to be wound up."¹¹⁴ Indeed, NICO was not the only Iranian entity that decided to re-domicile to Malaysia in 2011.¹¹⁵
177. Nor does Bahrain's attempt to undermine extensive contemporaneous evidence voluntarily put on the record and produced by NICO on the grounds that it does not explain why NICO chose Labuan for the domiciliation succeed for two reasons.
178. First, even though Bahrain self-servingly claims that the only factor that distinguished Labuan from the other three jurisdictions shortlisted by [REDACTED] was that Malaysia had a BIT in place with Bahrain, there is no evidence to support this. NICO asserts that, to the contrary, the most plausible explanation is that Labuan was selected because it was the only one of the four shortlisted jurisdictions which overlapped with the

¹¹² Cl. Rej., ¶ 115.7, citing C-290, Email from [REDACTED] to NICO, February 16, 2011; R-49, [REDACTED] – offshore tax haven analysis, Attached to email dated February 16, 2011.

¹¹³ Cl. Rej., ¶ 115.7; see C-289, Letter from [REDACTED] to [REDACTED] February 17, 2011; C-291, Email from [REDACTED] to NICO (with attachment), January 11, 2011; C-290, Email from [REDACTED] to NICO, February 16, 2011; C-288, Letter from [REDACTED] ([REDACTED] Agent in Jersey) to Jersey Financial Services Commission, February 16, 2011; C-300, Letter from NICO to NIOC, June 12, 2011.

¹¹⁴ Cl. Rej., ¶ 115.8, quoting C-22, Minutes of Meeting of NICO's Board of Directors, June 9, 2011; See also Cl. C-Mem., ¶ 50.

¹¹⁵ Cl. Rej., ¶ 115.9.

18 jurisdictions already shortlisted in [REDACTED] earlier advice. Further, NICO explains that Labuan was the most internationally reputable jurisdiction out of the four identified with the additional advantage of being English speaking and sharing common religious and political features with Iran. NICO again observes in this regard that the BIT at issue was only in force as of January 28, 2011 just a few months before NICO decided to relocate to Malaysia.¹¹⁶

179. Second, NICO critiques Bahrain's attempts to draw parallels between this case and *Philip Morris v. Australia* and *BRIF-TRES v. Serbia* to justify "baseless adverse inferences". These cases are not helpful to Bahrain, according to NICO. In *Philip Morris v. Australia*, the tribunal there noted that there was no witness adduced nor any contemporaneous evidence that could speak to the restructuring at issue. Also in that case, the claimant admitted that restructuring was done partly in order to obtain treaty protection. In *BRIF-TRES v. Serbia*, there was also a failure to produce contemporaneous documents showing that the purchasing of shares there was driven by business reasons aiding the tribunal to conclude that the claims were abusive.¹¹⁷
180. NICO explains that the present case cannot be any further from these cases given the extensive contemporaneous documents on the record including evidence of its expulsion from Jersey, the business reasons for choosing Labuan, and the production of a witness [REDACTED] who could speak to these matters.¹¹⁸

(v) The Abuse of Process Test Not Met Regarding the January 2017 Process Leading Up to the 2018 Decision

1. First Prong – No Dispute Was Foreseeable When NICO in January 2017 Initiated the Process Leading Up to the 2018 Decision

181. NICO confirms that there was no specific BIT dispute and certainly not the one submitted to this Tribunal that was foreseeable to the required high degree at the time NICO initiated

¹¹⁶ Cl. Rej., ¶¶ 117, 118.

¹¹⁷ Cl. Rej., ¶ 119, citing Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015; Authority RL-25, *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, January 30, 2023.

¹¹⁸ Cl. Rej., ¶¶ 120-121.

in January 2017 the process of securing confirmation that it had continuously remained Malaysian national since January 2012. NICO puts forth four reasons in this regard.

182. First, NICO reminds that Bahrain's adverse actions and/or omissions leading to the Third Refusals as of January 2015, like the First and Second Refusals, had never been notified to NICO at the time. In any event, NICO says that at the time of the 2018 Decision NICO did not and could not have known the nature and extent of Bahrain's breaches of the Treaty and thus it could not have foreseen this dispute at that time.¹¹⁹
183. Second, again NICO invokes the 2010 CBB directive, which did not contain any mandatory language regarding compliance by Bahraini banks with US sanctions. Therefore, this directive could not have been the basis for the refusals in NICO's view. NICO opines that the refusals must have been the result of separate directives and interferences by Bahraini state organs pursuant to a political or undisclosed agenda. This is because, NICO says, shortly after the January 25 Third Refusals, the July 2015 JCPOA entered into force and provided for the lifting of all sanctions (including US ones) against Iranian entities. The United States' withdrawal from the 2015 JCPOA was announced only in May 2018, i.e., two months after the issuance of the 2018 decision.¹²⁰
184. NICO posits that no dispute could have been foreseeable because it could legitimately expect that Bahrain would comply with its international law obligations and procure the release of NICO's funds particularly after the July 2015 execution of the JCPOA.¹²¹
185. Third, nor could have any dispute been foreseen following the preliminary agreement on key parameters of the JCPOA in April 2015. Western countries swiftly moved to improve the diplomatic and economic relations with Iran actively encouraging the growth of business ties with Iranian entities. Tellingly, for NICO, the removal of NICO from the list of Specially Designated Nationals in January 2016 and the KYC information and document requests made by the Bahraini banks to NICO throughout 2016 by way of letters drafted in

¹¹⁹ Cl. Rej., ¶¶ 128-129; see also Cl. C-Mem., ¶¶ 15, 17.3, 18.

¹²⁰ Cl. Rej., ¶¶ 130-31.

¹²¹ Cl. Rej., ¶ 132.

a constructive and positive tone seeking to maintain the relationship show that no dispute was foreseen.¹²²

186. Fourth, NICO critiques Bahrain's attempts to mischaracterize correspondence between NICO and the CBB in 2015 including NICO's letters of June 2 and September 3, 2015 and a statement made by NICO's witness in this arbitration [REDACTED] who is the head of the trade and finance department of NICO. Bahrain's mischaracterization cannot stand.¹²³
187. For example, the June 2, 2015 letter is not helpful to Bahrain according to NICO because it records NICO's complaint about the conduct of Ithmaar Bank given that it is a bank regulated by the CBB. This supports the position that at the time it perceived the issue as a default by the banks. Nor can Bahrain point to [REDACTED] witness statement as helpful to its cause. In paragraph 47 of his witness statement, [REDACTED] merely conveys that "NICO[...] senior management decided after several months to explore the possibility of engaging legal proceedings against Ithmaar and GFH."¹²⁴ This shows that NICO never contemplated a dispute with Bahrain but rather a local action against Bahraini banks by the time that NICO had initiated the process in January 2017 leading up to the 2018 decision.¹²⁵

2. Second Prong – There Is No Evidence that the January 2017 Process Leading Up to the 2018 Decision Was Driven by Anything Other than Legitimate Business Reasons

188. NICO advances that, as already demonstrated by NICO there is extensive contemporaneous evidence that it produced on the record showing that the January 2017 process leading up to the 2018 Decision was prompted by legitimate contract continuity and legal certainty concerns. These were intended to alleviate the issues raised in October 2016 by one of NICO's strategic business counterparts such as [REDACTED] in connection with the potential adverse impact of NICO's invalid re-domiciliation on their contractual relationship. NICO further observes that Bahrain has not produced any evidence supporting

¹²² Cl. Rej., ¶ 133.

¹²³ Cl. Rej., ¶ 134.

¹²⁴ Witness Statement of [REDACTED] May 8, 2024, ¶ 47.

¹²⁵ Cl. Rej., ¶¶ 134.1-134.2.

its cause, which is not surprising, as NICO benefitted at all times from treaty protection via its Iranian shareholders.¹²⁶

189. For context, NICO's move from Labuan in December 2014 was triggered by the resignation of NICO's Malaysian corporate secretary and then the resignation of its successor due to foreign pressure put on Labuan corporate service providers. This alone, says NICO, shows that NICO's re-domiciliation out of Labuan had nothing to do with treaty protection.¹²⁷
190. NICO continues to explain that none of the six jurisdictions identified in the October 2014 [REDACTED] report which was again mandated by NICO to identify suitable jurisdictions for re-domiciliation had any bilateral investment treaties with Bahrain. This further confirms the absence of any treaty protection agenda. NICO highlights that the October 19, 2014 report of [REDACTED] explicitly listed three criteria used to propose shortlisted jurisdictions—the first being outside of Iran, the second allow a company like NICO to re-domicile in and out of that jurisdiction, and the third has a low/no tax regime.¹²⁸
191. On February 6, 2015 NICO inquired as to its status in The Gambia further to [REDACTED] e-mail of that date expressing concern that NICO's domiciliation there may not be valid because the certificate of continuation on hand was issued by the iCommerce Registry which is not recognized by the Gambian government. NICO explains that it intensified its searches for a solution to maintain its legal continuity and to safeguard its contracts and business relationships with its counterparts.¹²⁹
192. And then on March 9, 2016, NICO took action and decided to re-domicile to Nevis upon the advice of [REDACTED] Nevis does not have any BIT with Bahrain which further

¹²⁶ Cl. Rej., ¶¶ 64, 138, citing C-292, Exchange of emails between [REDACTED] and NICO, August 25, 2016 to October 4, 2016; and C-234, Joint Comprehensive Plan of Action, July 14, 2015; see also Cl. C-Mem., ¶ 65.

¹²⁷ Cl. Rej., ¶ 138.1; see C-37, Report from [REDACTED] December 15, 2014.

¹²⁸ Cl. Rej., ¶ 138.3; C-33, Report from [REDACTED] dated October 19, 2014, ¶ 1.1.

¹²⁹ Cl. Rej., ¶¶ 138.4-138.5.

confirms that the re-domiciliation there was driven by the lifting of sanctions and for the continuation of NICO's activities in an orderly manner.¹³⁰

193. After NICO's re-domiciliation was solidified in Nevis, it was confirmed from the Gambian Attorney General and Ministry of Justice that the iCommerce Registry was invalid. As a consequence, [REDACTED] informed NICO that its re-domiciliation to Nevis was therefore invalid, in turn, in its estimation.¹³¹
194. NICO explains that it was on the basis of legal advice that [REDACTED] requested that NICO confirm its continuing incorporation in Malaysia as a pre-condition for proceeding further with ongoing business dealings. And LFSA also recommended that NICO apply to the Labuan High Court for a declaration to be recognized as a Labuan company, confirming that it would not challenge such an application. NICO was so recognized by the Labuan High Court on March 7, 2018.¹³²
195. Bahrain seeks to attack NICO's assertion that it was a Labuan registered company since January 2012; NICO rebuts such opposition on six main grounds.
196. First, NICO says Bahrain is fundamentally wrong to suggest that NICO is seeking to "Acquire rights and standing under the treaty for a period in which it was not and could not have been a Malaysian company."¹³³ NICO posits that this is not the relevant test for abuse and in any event the Malaysian courts confirmed the Malaysian status of NICO since January 4, 2012 and its binding and unchallenged decision.¹³⁴
197. Second, Bahrain cannot argue that it is abusive for NICO to assert that it was a Malaysian investor during a period when Labuan was rejecting NICO from its jurisdiction. NICO says this is not relevant to the abuse of process test and in any event this argument cannot stand because NICO asserts its status as a Malaysian company based on the court's decision. This

¹³⁰ Cl. Rej., ¶ 138.6.

¹³¹ Cl. Rej., ¶¶ 138.7, 138.8.

¹³² Cl. Rej., ¶¶ 138.8-138.11; see C-52, Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, Malaysia, March 7, 2018.

¹³³ Cl. Rej., ¶ 141, quoting Resp. Reply, ¶ 122.

¹³⁴ Cl. Rej., ¶ 141.

decision cannot be disregarded unless it was tainted by fraud or material error which it is not.¹³⁵

198. Third, NICO says that it does not matter that it did not inform the Labuan authorities in 2015 or 2016 that its Gambian registration was invalid and that it did not seek reinstatement in the Labuan registry at this time. This does not speak to the test at hand for an abuse of process. Nor has Bahrain explained how these alleged shortcomings by NICO could indicate or approve a treaty protection intent.¹³⁶
199. Fourth, NICO attacks Bahrain’s argument that NICO was not transparent with Gambian and Nevis authorities, stating that this is relevant to “assessing the motivations behind NICO’s re-domiciliations”.¹³⁷ Again, this has no bearing on the question of whether NICO’s claims are an abusive process under international law and whether the application to the Labuan High Court was motivated by a treaty protection purpose.¹³⁸
200. Fifth, Bahrain is wrong, claims NICO, to take issue with NICO’s assertion that it applied to the LFSA for confirmation of its Malaysian status, noting that NICO failed to explain why it decided to apply to the LFSA for the January 2017 process leading up to the 2018 Decision. NICO responds that this was because it applied to the LFSA at the behest of [REDACTED] advice in October 2016 for business continuity reasons.¹³⁹
201. Sixth and last, NICO critiques Bahrain’s overlooking that neither The Gambia nor Nevis have treaties with Bahrain and urging that the predominant purpose of the January 2017 process leading up to the 2018 Decision was to gain treaty protection. Bahrain is wrong to suggest that NICO “had to” re-domiciliate to The Gambia and Nevis and that NICO only returned to Labuan once it became an option. This contention is inconsistent with Bahrain’s above-mentioned complaints as to NICO’s failure to cure its Gambian and Nevis

¹³⁵ Cl. Rej., ¶ 142.

¹³⁶ Cl. Rej., ¶ 143.

¹³⁷ Cl. Rej., ¶ 144; See Resp. Reply, ¶ 127.

¹³⁸ Cl. Rej., ¶ 144.

¹³⁹ Cl. Rej., ¶ 145.

registration and alleged misrepresentations to the Nevis authorities. But it also shows that the predominant purpose of NICO's domiciliation could not have been treaty protection.¹⁴⁰

(2) The Tribunal's Analysis¹⁴¹

202. This Tribunal must determine whether NICO's claims constitute an abuse of process by reason of (i) NICO's January 2012 re-domiciliation from Jersey to Labuan, and (ii) the January 2017 to March 2018 process leading to the 2018 Decision of the Labuan High Court. The Tribunal shall first address the applicable legal standard for an abuse of process, before turning to whether the 2012 re-domiciliation and the 2018 reinstatement meet that applicable standard.
203. The doctrine of abuse of right is a general principle of law that prohibits the exercise of a right for purposes other than those for which the right was established.¹⁴² Abuse of process is a subcategory of abuse of right that focuses on the misuse of procedural rights, in particular, the right to arbitrate.
204. It is well-settled that the threshold for the finding that the initiation of an investment arbitration constitutes an abuse of process is a high one. The tribunal in *Chevron v. Ecuador* rightly observed that this high threshold reflects the seriousness of the charge of bad faith inherent in such an objection.¹⁴³ The Tribunal accordingly finds that abuse of process may be established only in exceptional circumstances and on the basis of sufficiently persuasive evidence. The Tribunal shall take into consideration all the relevant circumstances as part of this analysis, including the timing of the purported investment, the timing of the claim,

¹⁴⁰ Cl. Rej., ¶ 147.

¹⁴¹ This decision is taken by majority and any reference to "the Tribunal" in the Tribunal's analysis parts should be read as "the Tribunal, by majority".

¹⁴² Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 539; Authority RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), March 16, 2022, ¶ 370.

¹⁴³ Authority CL-5 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. AA 34877, Interim Award dated December 01, 2008, ¶ 143.

the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.¹⁴⁴

205. Organising an investment for the sole purpose of enabling it to benefit from the protection of an international treaty to which it was not entitled, in order to protect itself from an existing or foreseeable dispute, constitutes a case of unacceptable forum shopping that justifies a denial of jurisdiction. In this regard, the Tribunal further endorses the following clarification of the *Alverley v. Romania* tribunal:¹⁴⁵

... the mere fact of restructuring an investment to obtain BIT benefits is not per se illegitimate, it becomes an abuse where this restructuring is undertaken to ensure BIT protection with regard to a specific dispute which has emerged or is emerging.

206. The Tribunal is not persuaded by Bahrain's contention that foreseeability of a dispute, taken alone, suffices to establish an abuse of process. The wealth of investment treaty authority, including *Philip Morris v. Australia*, *Tidewater v. Venezuela*, and *Cervin v. Costa Rica*, confirms that the objecting State must show, on the basis of all the relevant circumstances, both (i) that a specific dispute was foreseeable to the required degree at the time of the impugned restructuring, and (ii) that the main and determinative, if not sole, reason for the restructuring was the intention to access treaty protection.¹⁴⁶ While the existence of subjective bad faith need not be separately demonstrated, an inquiry into the predominant purpose of the restructuring is an integral part of the analysis.

¹⁴⁴ Authority RL-32, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award, July 12, 2016, ¶ 698; Authority RL-35, *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, ¶ 177, p. 48; Authority RL-41, *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, June 2, 2016, ¶ 103.

¹⁴⁵ Exhibit RL-1, *Alverley Investments Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts) dated March 16, 2022, ¶ 370

¹⁴⁶ Authority RL-9, *Philip Morris v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 495, 582-584; Authority CL-134, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013, ¶ 150, Authority CL-7, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, ¶¶ 287-292).

207. The Tribunal does not consider that the *Cascade v. Turkey* approach relied upon by Bahrain warrants a different conclusion: that decision turned on the premise of an investment so unreasonable in the circumstances that a dispute would already have been objectively foreseeable to any reasonable investor, which is not the situation here.¹⁴⁷
208. With respect to foreseeability of the dispute, the Tribunal adopts the formulation of the *Tidewater* and *Philip Morris* tribunals: a dispute is foreseeable when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialize.¹⁴⁸ Foreseeability is to be assessed objectively, by reference to the information that was, or reasonably should have been, available to the investor at the time of the restructuring.
209. With respect to the motive for the change of nationality, the Tribunal shares the view of the *Philip Morris* tribunal that it would not normally be an abuse of right to bring a treaty claim in the wave of a corporate restructuring where the restructuring was justified independently of the possibility of bringing such a claim.¹⁴⁹ Each case must be determined on a holistic consideration of all the relevant circumstances of the change of nationality.
210. In respect of the standard of proof, the Tribunal shares the Respondent's position (citing *Alverley v. Romania*) that a claimant may not simply shield itself behind the fact that the burden of proof of the abuse of process objection is on the respondent, since the majority of the evidence that is relevant to such issues will be within the claimant's sole possession or control. In that regard, the Tribunal agrees with the *Alverley* tribunal that: "[w]here a respondent produces evidence which points to an abuse of process, the claimant may bear the burden of adducing evidence to explain its actions, evidence to which it alone has access – if it wishes to refute the respondent's case."¹⁵⁰

¹⁴⁷ Authority RL-26, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, September 20, 2021, ¶444.

¹⁴⁸ Authority CL-134, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013, ¶ 150; Authority RL-9, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, ¶¶ 553-554.

¹⁴⁹ Authority RL-9, *Philip Morris v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 570.

¹⁵⁰ Authority RL-1, *Alverley Investments// Limited and Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), dated March 16, 2022, ¶ 364.

211. The Tribunal now turns to the first alleged abuse of process, namely NICO's January 2012 re-domiciliation from Jersey to Labuan.
212. The Tribunal has determined that the 2012 re-domiciliation did not constitute an abuse of process in this case. The Tribunal is satisfied that the dominant motive for the 2012 re-domiciliation was a legitimate one and that therefore the 'motive' prong of the abuse of process test is not met on the facts.
213. The contemporaneous record demonstrates that NICO was effectively forced out of Jersey in the wake of the implementation of EU sanctions and the Jersey Financial Services Commission's adverse posture toward Iranian-linked entities.¹⁵¹ In that context, [REDACTED] advised NICO to relocate following a multi-jurisdictional comparative assessment. The existence of an investment treaty with Bahrain was not a stated criterion of that assessment.¹⁵² The Tribunal notes that other Iranian-owned, Jersey-incorporated entities unconnected with Bahrain sought to re-domicile to Labuan during the same period for the same reasons, including NICO's subsidiary, [REDACTED] and Iran's state-owned company [REDACTED].¹⁵³
214. In the Tribunal's view, re-domiciliation to escape the indirect effects of international sanctions and a hostile regulatory environment is a legitimate business motive, which NICO has substantiated. Moreover, the Tribunal's conclusion that the main and determinative motive for the re-domiciliation was not for the purpose of accessing the BIT

¹⁵¹ Exhibit C-280, Letter from Jersey Financial Services Commission to [REDACTED] ([REDACTED] agent in Jersey), January 25, 2011; Exhibit C-281, Letter from Jersey Financial Services Commission to NICO, February 8, 2011; Exhibit C-298, Letter from Jersey Financial Services Commission to [REDACTED] February 9, 2011.

¹⁵² Exhibit C-290, Email from [REDACTED] to NICO, February 16, 2011, which states in relevant part "The list shows the criteria for selection of that jurisdiction which were: 1- Possibility of continuance to and from that location 2- Political climate /influence, control by another country 3- Sanctions against Iran 4- Taxation (corporation tax , withholding tax on dividends, withholding tax on interest, capital gains tax, 5- stamp duty, turnover tax, etc) 5- Exchange Control regulations 6- Language 7- Codified Applicable Laws (companies and commercial)"

¹⁵³ Exhibit C-280, Letter from Jersey Financial Services Commission to [REDACTED] ([REDACTED] agent in Jersey) dated January 25, 2011, p.1. Exhibit C-308, Certificate of Continuance Overseas of [REDACTED] issued by the Jersey Financial Services Commission dated October 14, 2011. Exhibit C-286, Email Exchange between [REDACTED] and NICO with attachment dated May 04, 2011; Exhibit C-287, [REDACTED] Certificate of Registration in Labuan issued by Labuan Financial Services Authority dated May 19, 2011; Exhibit C-306, Letter from the Jersey Financial Services Commission to [REDACTED] [REDACTED] dated October 04, 2011.

is reinforced by the fact that NICO subsequently attempted to redomicile to The Gambia and to Nevis, neither of which had a bilateral or multilateral investment treaty with Bahrain, and by the fact that NICO did not claim under the BIT until almost a decade after the 2012 re-domiciliation.¹⁵⁴

215. Turning to the January 2017 to March 2018 process leading to the 2018 Decision, the Tribunal observes at the outset that for the reasons set out in Section C, below, it has found that NICO did not lose its Malaysian nationality during the Absence Period. Accordingly, there was no acquisition or re-acquisition of Malaysian nationality in 2018 upon which an abuse of process objection may be grounded.
216. In any event, even if the 2018 Decision were to be characterized as a means by which NICO reacquired Malaysian nationality, the Tribunal nonetheless finds that the predominant purpose of NICO's reinstatement was not to secure access to protection under the BIT. The evidentiary record demonstrates that, in October 2016, ██████ expressed its concern to NICO over NICO's unclear corporate status, and it specifically requested NICO to clarify its position by reinstating itself in Labuan.¹⁵⁵ NICO's application for reinstatement was made three months after ██████ request.¹⁵⁶
217. Moreover, as above, the Tribunal notes that NICO did not file its claim until years later than the 2018 Decision. Based on its analysis of the circumstances of this case, the Tribunal accordingly finds that the apparent predominant purpose of the reinstatement was not to bring a claim under the BIT, notwithstanding that the Tribunal has separately concluded that NICO never reacquired Malaysian nationality.
218. The Tribunal accordingly concludes that NICO's claims do not constitute an abuse of process. Bahrain's objection to the Tribunal's jurisdiction on this ground is dismissed.

B. WHETHER THE TREATY APPLIES TO EVENTS OCCURRING BEFORE ITS ENTRY INTO

¹⁵⁴ Exhibit C-32, Report from ██████ October 13, 2014, ¶ 2.3 (proposing The Gambia as re-domiciliation jurisdiction); Exhibit C-33, Report from ██████ October 19, 2014, ¶ 1.1 (identifying criteria for shortlisted jurisdictions, none of which included BIT coverage); Cl. Rej., ¶¶ 138.3, 138.6. The Request for Arbitration was filed on December 5, 2022.

¹⁵⁵ Exhibit C-292, Exchange of emails between ██████ and NICO, dated August 15, 2016 to October 4, 2016.

¹⁵⁶ Exhibit C-48, Letter from ██████ to Labuan Financial Services Authority, January 11, 2017.

FORCE OR WHEN NICO LACKED MALAYSIAN NATIONALITY

(1) The Parties' Positions

a. Bahrain's Position

219. In PO4, the Tribunal ordered the Parties to address two *ratione temporis* questions: a.) “[t]o what extent does the Treaty apply to acts and omissions that occurred prior to its entry into force?”; and b.) “[t]o what extent must Claimant have nationality under the Treaty at the time of the alleged breach?”¹⁵⁷ In response to the Tribunal’s questions in PO4 arising from Bahrain’s Preliminary Objection 2, Bahrain argues that the Treaty does not apply in this case to acts and omissions occurred prior to its entry into force, nor to events occurring when NICO was not a Malaysian national.¹⁵⁸
220. In Bahrain’s view, nothing in the Treaty permits a departure from the customary rule of non-retroactivity of treaties in international law. Bahrain explains that treaties do not apply retroactively “[u]nless a different intention appears from the treaty or is otherwise established.”¹⁵⁹ According to Bahrain, this is consistent with the intertemporal principle under international law, which provides that an act of a state is not a breach of international law “unless the State is bound by the obligation in question at the time the act occurs.”¹⁶⁰
221. Bahrain argues NICO has failed to carry its burden of showing that the Treaty has retroactive effect.¹⁶¹ Bahrain asserts that Article 10 of the Treaty only clarifies the temporal range of investments to which the Treaty’s substantive protections apply but does not give those substantive protections retroactive effect and, in that regard, primarily relies on *SGS v. Philippines*. Bahrain notes that the tribunal in *SGS v. Philippines* dismisses the same argument that NICO makes regarding Article 10 of the Treaty. The *SGS v. Philippines* tribunal observes that Article II of the Switzerland-Philippines BIT does not “give the

¹⁵⁷ Procedural Order No. 4, August 12, 2024, ¶ 58.

¹⁵⁸ Resp. Mem., ¶¶ 86, 127.

¹⁵⁹ Resp. Mem., ¶ 113, citing Authority CL-48, Vienna Convention on the Law of Treaties, 1969, Article 28.

¹⁶⁰ Resp. Mem., ¶¶ 115-116, citing Authority CL-40, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/10, 2001, Article 13; Resp. Reply, ¶ 162.

¹⁶¹ Resp. Mem., ¶ 121; Resp. Reply, ¶ 164.

substantive provisions of the BIT any retrospective effect.”¹⁶² Bahrain further asserts that NICO has failed to prove any contrary intention to the principle of non-retroactivity. According to Bahrain, the absence of an express exclusion for disputes arising before the Treaty entered into force is not equal to clear language evidencing an agreement by Bahrain and Malaysia to give the Treaty retroactive effect.¹⁶³

222. Bahrain argues that as pertains to the first bifurcated question posed by the Tribunal, the Parties’ debate is now moot as NICO has conceded the Treaty does not apply to events prior to January 4, 2012 when NICO first re-domiciled to Labuan.¹⁶⁴ Bahrain asserts that “NICO concedes that the ‘Claimant does not assert that the Bahrain-Malaysia BIT’s Contracting States would have intended this treaty’s protections to extend to breaches that had taken place prior to an investor having acquired the nationality of a Contracting State under the BIT.’”¹⁶⁵ According to Bahrain, it follows that the Treaty cannot apply to events occurring prior to January 28, 2011, when the Treaty entered into force.
223. According to Bahrain, the Treaty does not apply to alleged breaches of customary international law that pre-date its entry into force. Bahrain argues NICO’s claims that “extensive caselaw” confirms breaches which occurred prior to the entry into force of a BIT could be referred to arbitration under the BIT’s dispute resolution clause to the extent they also constitute breaches of customary international law should be rejected. Bahrain asserts NICO’s claim is unsupported by the plain language of the Treaty and the sole case NICO relies on *Tekfen-TML v. Libya* is inapposite and distinguishable.¹⁶⁶ Bahrain states that in *Tekfen-TML*, the tribunal held the relevant treaty clause to be broad enough to include alleged breaches of customary international law prior to the treaty’s entry into force. Bahrain states the case is inapposite and distinguishable because Libya conceded the tribunal had jurisdiction to hear whether claimants were entitled to assert an alleged breach

¹⁶² Resp. Mem., ¶ 119, citing RL-38, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, ¶ 166.

¹⁶³ Resp. Mem., ¶¶ 120, 121.

¹⁶⁴ Resp. Reply, ¶¶ 160, 161.

¹⁶⁵ Resp. Reply, ¶ 160, citing Cl. C-Mem., ¶ 134.

¹⁶⁶ Resp. Reply, ¶¶ 167, 168, referring to Authority CL-126, *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, February 11, 2020.

of customary international law and the dispute settlement provision in the Bahrain-Malaysia Treaty (Article 7) is narrower than that in the Libya-Turkey BIT.¹⁶⁷ Bahrain further asserts that contrary to *Tekfen-TML*, many investment tribunals have held that they do not have jurisdiction over alleged breaches of customary international law, whether or not arising before the relevant investment treaty's entry into force. In this regard, Bahrain relies on *MCI v. Ecuador*, *Generation Ukraine v. Ukraine*, *İçkale İnşaat v. Turkmenistan*, and *Sergei Paushok v. Mongolia*.¹⁶⁸

224. Bahrain states that the relevance of events pre-dating the Treaty's entry into force is highly limited. Bahrain argues any act pre-dating the Treaty may, at best, be taken into account by the Tribunal only for factual context and cannot independently form the basis of any of NICO's Treaty claims. Contrary to NICO's "continuous nature" argument of acts and omissions prior to NICO's re-domiciliation to Labuan, Bahrain states that even if the alleged breach were "continuing", this would only mean the "non-retroactivity principle will not exclude the application of the obligations of the treaty to the acts and omissions that occur after its effective date".¹⁶⁹ Bahrain further asserts NICO may not re-package the continuing effects of the CBB Directive as a "continuous breach" occurring after January 4, 2012, and whether or not specific events occurring after January 4, 2012 such as the alleged Third Refusals are of "continuous nature" is beyond the scope of the bifurcated issues laid out in PO4. Bahrain notes that the "Third Refusals" in 2015 are not an independent breach, but at most the continuing effects of the CBB Directive and that NICO did not hold Malaysian nationality when the alleged "Third Refusals" took place.¹⁷⁰

225. In response to the Tribunal's second bifurcated question, Bahrain states NICO must be a Malaysian national at the time of the alleged breach of the Treaty. Bahrain explains a key

¹⁶⁷ Resp. Reply, ¶ 168.

¹⁶⁸ Resp. Reply, ¶ 169, citing RL-34, *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 96; Authority CL-62, *Generation Ukraine Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 11.3; RL-50, *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, March 8, 2016, ¶ 341; RL-37, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011, ¶¶ 467, 468.

¹⁶⁹ Resp. Reply, ¶ 172.

¹⁷⁰ Resp. Reply, ¶¶ 173, 174.

date for assessing jurisdiction *ratione temporis* is the date of the alleged breach and a claimant must hold the relevant nationality under the Treaty on this date to engage the Tribunal's jurisdiction. Bahrain argues the Treaty does not apply to events occurring when NICO did not hold Malaysian nationality. In that regard, Bahrain relies on Article 7(1) which provides for arbitration only of disputes which involve "an investment" in a Contracting Party by "an investor of the Other Contracting Party". Bahrain explains the Treaty's substantive obligations are not engaged unless a claimant is a qualifying "investor". Bahrain asserts the Preamble of the Treaty confirms the Contracting Parties' intention to protect only those investment made "by investors of both Contracting Parties".¹⁷¹

226. Bahrain asserts NICO concedes the Treaty does not extend to breaches that took place prior to an investor acquiring the requisite nationality. Bahrain asserts NICO suggests a novel interpretation of the Treaty's temporal jurisdiction: that its "protections should extend to breaches not yet known by the investor at the time of its investment and/or acquisition of nationality thereunder".¹⁷² Bahrain argues that the Tribunal's jurisdiction does not depend on NICO's subjective belief or knowledge that there were breaches of the Treaty at the time of its investment and/or the acquisition of its nationality. Bahrain explains the existence of a breach is an objective question and the occurrence and legality of an act must be established at the moment it occurs. Contrary to NICO's assertion that they were never able and remain unable to ascertain "exact timing, as well as the precise and full nature/extent of the actions/omissions of Bahrain's involved organs", Bahrain states NICO foresaw a dispute with Bahrain at least as of May 4, 2011, if not sooner.¹⁷³

b. NICO's Position

227. In response to the Tribunal's questions in PO4 arising from Bahrain's Preliminary Objection 2, NICO argues that Bahrain's *ratione temporis* objection does not stand because a large bulk of Bahrain's independent and standalone breaches occurred after January 4,

¹⁷¹ Resp. Reply, ¶ 177.

¹⁷² Resp. Reply, ¶ 179, citing Cl. C-Mem., ¶ 134.

¹⁷³ Resp. Reply, ¶¶ 180-181, referring to Cl. C-Mem., ¶ 135.

2012 at a time when the BIT was in force and NICO effectively re-domiciled in Malaysia, which are undisputedly within the Tribunal's *ratione temporis* jurisdiction.¹⁷⁴

228. On the Tribunal's first bifurcated question, NICO states the Parties agree that since at the time of the BIT's entry into force on January 28, 2011, NICO did not yet have the Malaysian nationality (which it acquired on January 4, 2012), the BIT's provisions do not apply to events that occurred prior to January 28, 2011. NICO argues, however, that even before NICO acquired Malaysian nationality and the BIT's entry into force, Bahrain had obligations under customary international law towards NICO.¹⁷⁵
229. NICO explains that extensive caselaw confirms breaches occurring prior to the entry into force of a BIT could be referred to arbitration under the BIT's dispute resolution clause to the extent they also constitute breaches of customary international law and, in this regard, relies on *Tekfen-TML*. According to NICO, the tribunal's analysis in *Tekfen-TML* stands and should guide the Tribunal regardless of Libya's position in the case. NICO asserts the *Tekfen-TML* tribunal engaged in detailed analysis before ultimately concluding it had jurisdiction over claims of customary international law breaches arising prior to the relevant BIT's entry into force. NICO also argues that Bahrain's attempts to distinguish the wording of the Turkey-Libya BIT's dispute resolution provision from that of the Malaysia-Bahrain BIT is unconvincing. NICO argues Bahrain's suggestion that Article 7 of the BIT has a "temporal limitation" and only applies to disputes "'arising' after the Treaty has entered into force is not supported by the plain language of the BIT." NICO further asserts that nothing in the text of Article 7 supports Bahrain's interpretation that only disputes involving obligations under an investment contract fall within this category and that obligations under customary international law are not included.¹⁷⁶
230. NICO further argues that the awards relied upon by Bahrain, *MCI v. Ecuador*, *Generation Ukraine v. Ukraine*, and *Ickale Insaat v. Turkmenistan*, are inapposite and irrelevant. According to NICO, the tribunal's "observation" relied upon by Bahrain in *MCI v. Ecuador*

¹⁷⁴ Cl. C-Mem., ¶ 135.

¹⁷⁵ Cl. Rej., ¶¶ 211, 212.

¹⁷⁶ Cl. Rej., ¶¶ 215, 216, citing Resp. Reply, ¶ 168(b)(i).

was merely an *obiter*, premised on the inapposite case of *Mondev*. NICO argues *Generation Ukraine v. Ukraine* is distinguishable from the present case because NICO requests the Tribunal apply customary international law, not BIT standards, to events occurring prior to the BIT's entry into force. NICO explains that in *Generation Ukraine* the claimant invoked the prohibition against expropriation standard found in the treaty in relation to a breach that occurred before the treaty's entry into force. NICO argues that in *Ickale* the tribunal was not confronted with the question of whether the respondent state breached its customary international law obligations. In *Ickale v. Turkmenistan*, the claimant argued as an alternative that it could invoke FET, FPS, non-discrimination and umbrella clauses on the ground that were part of Turkmenistan's alleged "international customary norm" because these protections were included in other BITs signed by Turkmenistan.¹⁷⁷

231. In any event, NICO argues that Bahrain's acts and omissions occurring prior to Claimant's January 2012 re-domiciliation in Malaysia, given their continuous nature within the meaning of Article 14 of the ILC Articles on State Responsibility, should be taken into account by the Tribunal "for purposes of understanding the background, the causes or scope of the violations of the BIT that occurred after [the entry into force]" because they are as put by the *Tecmed v. Mexico* tribunal, a "constituting part, concurrent factor or aggravating [...] element" of Bahrain's breaches which occurred after that date.¹⁷⁸ NICO asserts that there is ample case law showing that the prior events did inform and influence tribunals' finding of breach in relation to the acts and omissions occurring prior to the Treaty's entry into force.¹⁷⁹
232. NICO asserts that breaches of the BIT cannot be reduced to mere "continuing effects" of the CBB directive of 2010 but are separate and standalone breaches which were continuous

¹⁷⁷ Cl. Rej., ¶ 217, citing RL-50, *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, March 8, 2016, ¶ 338.

¹⁷⁸ Cl. Rej., ¶ 219, citing Authority CL-47, *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008, ¶ 87 and Authority CL-34, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 68; Cl. C-Mem, ¶ 133.

¹⁷⁹ Cl. Rej., ¶ 220.

in nature.¹⁸⁰ NICO argues Bahrain is mistaken in asserting that the Third Refusals in January 2015 are not “an independent breach, but at most the continuing effects of the CBB Directive.” NICO clarifies that the 2010 CBB Directive could not have been the basis of Bahrain’s actions and omissions in relation to the Third Refusals because it did not include any coercive language and simply advised Bahraini banks to not “fall afoul” of US sanctions against Iranian entities. According to NICO, this means that the First and Second Refusals must have been the result of other directives and interferences by Bahrain pursuant to political or other undisclosed agenda. NICO also asserts that they remained a Malaysian company from January 2012, as confirmed by the Labuan High Court’s 2018 decision and this time period includes Bahrain’s standalone breach as of 2015.¹⁸¹

233. On the Tribunal’s second bifurcated question, NICO states both Parties agree that the Bahrain-Malaysia BIT’s Contracting States would not have intended the BIT’s protections to extend to breaches which took place prior to an investor having acquired the nationality of a Contracting State under the BIT.¹⁸² Notwithstanding the above, NICO argues that the “Respondent’s *ratione temporis* objection based on the timing of NICO’s acquisition of Malaysian status is to a large extent moot because, as explained in NICO’s CMPO and above, Claimant was never able, and still to this date upon the evidence submitted by Respondent in this arbitration, remains unable to ascertain the exact timing, as well as the precise and full nature/extent of the actions/omissions of Bahrain’s involved organs leading to the independent breaches”. NICO alleges this is because Bahrain has refrained from producing any documents that would have enabled NICO, and by extension the Tribunal, to do so. NICO maintains that a large bulk of its claims relate to breaches that took place after the BIT’s entry into force and NICO’s re-domiciliation to Labuan in January 2012, which are undisputedly within the Tribunal’s *ratione temporis* jurisdiction.¹⁸³

¹⁸⁰ Cl. C-Mem., ¶ 133.

¹⁸¹ Cl. Rej., ¶ 221.

¹⁸² Cl. Rej., ¶ 223.

¹⁸³ Cl. Rej., ¶¶ 224, 225.

(2) The Tribunal's Analysis

234. Bahrain's second preliminary objection raises two distinct *ratione temporis* questions identified in Procedural Order No. 4: (i) the extent to which the Treaty applies to acts and omissions that occurred prior to its entry into force on January 28, 2011, and (ii) the extent to which Claimant must hold nationality under the Treaty at the time of the alleged breach.¹⁸⁴ The Tribunal addresses each in turn.
235. As to the first question, the Tribunal notes in the first place that the Parties' positions have evolved during the proceedings and now substantially converge. NICO has expressly conceded in its Rejoinder on Preliminary Objections that, since the Treaty entered into force on January 28, 2011 and NICO did not acquire Malaysian nationality until January 4, 2012, the Treaty's provisions do not apply to events that occurred prior to January 28, 2011.¹⁸⁵
236. The Tribunal agrees that the substantive protections of the Bahrain-Malaysia BIT do not apply to events that occurred prior to its entry into force. Pursuant to Article 28 of the Vienna Convention on the Law of Treaties, a treaty does not apply retroactively unless a different intention appears from the treaty or is otherwise established.¹⁸⁶ There is no such intention evidenced in the Bahrain-Malaysia BIT, and the Tribunal considers that Article 10 of the BIT does not displace this principle of non-retroactivity. Rather than giving substantive protections of the treaty retroactive effect, Article 10 of the BIT merely clarifies the temporal range of *investments* to which the Treaty's substantive protections apply from the date of entry into force onwards.¹⁸⁷ The Tribunal accepts that pre-treaty acts may be considered, where appropriate, as contextual background to acts post-dating the Treaty's entry into force, but they cannot themselves form the basis of any breach of the Treaty.
237. Whereas NICO concedes that the substantive protections of the BIT itself do not apply to events that occurred prior to January 28, 2011, NICO maintains that even before its

¹⁸⁴ Procedural Order No. 4, August 12, 2024, ¶ 58.

¹⁸⁵ Cl. Rej., ¶ 211.

¹⁸⁶ Authority CL-48, Vienna Convention on the Law of Treaties, 1969, Article 28.

¹⁸⁷ Exhibit C-1, Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, June 15, 1999, Article 10.

acquisition of Malaysian nationality and the BIT's entry into force, Bahrain owed obligations to NICO under customary international law, and submits that breaches of customary international law are actionable under Article 7 of the BIT, citing *Tekfen-TML v. Libya* as a supporting authority.¹⁸⁸ NICO accordingly requests "that the Tribunal apply customary international law – not BIT standards – to events occurring before the BIT's entry into force".¹⁸⁹ In the following paragraphs the Tribunal decides on this question.

238. For the avoidance of doubt, the Tribunal does not, at this stage, decide what specific customary international law obligations Bahrain may have owed to NICO at any given time. It only decides whether such obligations are actionable under the dispute resolution clause of the BIT.
239. Article 7(1) of the BIT confers jurisdiction over disputes that involve either an obligation entered into by a Contracting Party with the investor of the other Contracting Party regarding an investment, or an alleged breach of a right conferred or created by the Treaty:¹⁹⁰

Article 7(1)

Each Contracting Party consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on March 18, 1965 any dispute arising between that Contracting Party and an investor of the other Contracting Party which involves:

- (a) an obligation entered into by that Contracting Party with the investor of the other Contracting Party regarding an investment by such investor; or*

¹⁸⁸ Cl. Rej., ¶¶ 212-216

¹⁸⁹ Cl. Rej., ¶ 217.2

¹⁹⁰ Exhibit C-1, Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, June 15, 1999, Article 7(1).

(b) an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor

240. Applying the good faith, ordinary meaning of these terms in their context, and in light of the Treaty's object and purpose, as required by Article 31(1) of the VCLT,¹⁹¹ the Tribunal finds that an actionable "dispute" must involve either: (i) an obligation entered into between the Contracting Party with the investor regarding an investment by such investor (Article 7(1)(a)) or (ii) an alleged breach of a right conferred or created by the Treaty (Article 7(1)(b)). NICO's contention is that the customary international law obligations were the former: obligations "entered into" by Bahrain vis-à-vis NICO "regarding an investment by" NICO pursuant to Article 7(1)(a) of the BIT.¹⁹²
241. The Tribunal finds that customary international law obligations fall outside the scope of Article 7(1) of the BIT. Such obligations are not "entered into" by a Contracting Party with a particular investor: they bind States as a matter of general international law through State practice and *opinio juris*. The Tribunal likewise confirms for the sake of completeness that they are not rights "conferred or created" by the Treaty. The *Tekfen-TML* case cited by NICO is also, in the Tribunal's view, readily distinguishable from the present case. The dispute settlement provision (Article 8) of the Libya-Turkey BIT applicable in that case covered all "Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment".¹⁹³ None of the limitations contained in Article 7(1) of the Bahrain-Malaysia BIT were in play, and indeed the tribunal's jurisdiction in the *Tekfen-TML* case was not in dispute.
242. Furthermore, the Tribunal finds, consistent with the approach of the tribunals in *MCI v. Ecuador*, *Generation Ukraine v. Ukraine*, and *İçkale v. Turkmenistan* that it does not have

¹⁹¹ Authority CL-48, Vienna Convention on the Law of Treaties, 1969, Article 31(1).

¹⁹² Cl. Rej., ¶ 216.

¹⁹³ Authority CL-126, *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, February 11, 2020, ¶ 1.2.1

general jurisdiction over causes of action based on breaches of the obligations of states under customary international law.¹⁹⁴

243. NICO's claims of Bahrain's alleged breaches of customary international law are accordingly not actionable under Article 7 of the BIT and fall outside this Tribunal's jurisdiction.
244. Turning to the second question, the Tribunal considers it well-settled that a State's obligations under a treaty must be assessed at the time of the alleged breach. Article 13 of the ILC Articles on State Responsibility provides that an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs, and the ILC's Commentary confirms that the breach must occur at a time when the State is bound by the obligation.¹⁹⁵ As Judge Huber of the Permanent Court of Arbitration observed in the *Island of Palmas* case, "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".¹⁹⁶
245. Whether Bahrain is bound by its obligations under the BIT vis-à-vis NICO is dependent on whether NICO held the nationality of a Contracting Party thereunder. That assessment must be made contemporaneously – at the time of the alleged breach – not by reference to any later instance. If this were not the case, the State's obligations for one and the same act would vary over time, depending on when the dispute is brought or decided. The Tribunal in this regard reproduces and adopts the following reasoning from Prof. Douglas:¹⁹⁷

If the relevant nationality were not to be required at the time of the alleged breach of the obligation, then the legal entity or individual might acquire the

¹⁹⁴ Authority CL-62, *Generation Ukraine Inc v. Ukraine*, ICSID Case No ARB/00/9, Award, September 16, 2003, ¶ 11.3; Authority RL-34, *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No ARB/03/6, Award, July 31, 2007, ¶ 96.

¹⁹⁵ Authority CL-40, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, December 12, 2001, Article 13, ¶ (1).

¹⁹⁶ Authority RL-52, *The Island of Palmas (or Miangas) (United States of America v. The Netherlands)*, PCA Case No. 1925-01, Award of the Tribunal, April 4, 1928, p 18 ("a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled").

¹⁹⁷ Exhibit RL-19, Z Douglas, *The International Law of Investment Claims* 2009, pp 290-291, ¶ 542

relevant nationality thereafter in order to prosecute a claim under the corresponding treaty. That is clearly not permissible.

246. The Tribunal accordingly finds that NICO must have held Malaysian nationality at the time of each alleged breach to fall within the Tribunal's jurisdiction. Disputes relating to alleged breaches that occurred prior to January 4, 2012, when NICO was incorporated in Jersey and not Labuan, are outside the Tribunal's jurisdiction.
247. The Tribunal observes, however, that the requirement that nationality be assessed contemporaneously does not preclude the application of domestic law principles by which a State, in defined circumstances, may attribute nationality with *ex tunc* effect, for example through the reinstatement of a corporate registration or a judicial declaration of nationality. The interaction between such domestic law principles and the international law assessment of nationality at the time of the alleged breach is addressed in the following Section, where the Tribunal turns to the question of whether NICO held Malaysian nationality during the Absence Period from December 2014 to March 2018.

C. WHETHER NICO WAS INCORPORATED IN LABUAN DURING THE ABSENCE PERIOD

(1) The Parties' Positions

a. Bahrain's Position

248. In PO4, the Tribunal directed the Parties to address the following two *ratione personae* questions regarding NICO's nationality: (a) was NICO incorporated in Malaysia and hence did it benefit from protection under the Treaty from December 2014-March 2018; and (b) what effect, if any, does the 2018 Malaysian Court Decision have on NICO's standing and rights under the Treaty? In response to the Tribunal's questions, Bahrain asserts that because NICO left Labuan in December 2014, it does not benefit from protection under the Treaty during the Absence Period and that the 2018 Malaysian Court Decision does not have retroactive effect under Malaysian law, and even if it did, it could not remedy NICO's lack of standing and rights under the Treaty during the Absence Period.
249. In response to the Tribunal's first bifurcated question, Bahrain states NICO was not, and could not have been, Malaysian during the Absence Period. Bahrain explains it is common

ground that NICO must possess Malaysian nationality to satisfy the requirements under Article 1(1)(b) of the Treaty and Article 25(2) of the ICSID Convention. Bahrain asserts that NICO's attempt at satisfying its burden of proving Malaysian nationality during the Absence Period, is premised on a purported legal fiction that NICO never validly left Labuan and therefore, remained a Labuan company throughout the Absence Period. Bahrain argues NICO's position relies on a flawed interpretation of the Labuan Companies Act and ignores the contemporaneous facts, which show NICO was not continuously incorporated in Malaysia and NICO's shifting domiciles were not undertaken in good faith.¹⁹⁸

250. Bahrain emphasizes that NICO left Labuan in December 2014, and that once it left Labuan, and throughout the Absence Period, NICO did not carry on business in Labuan or comply with the mandatory requirements of the Labuan Companies Act. Bahrain points out the LFSA confirmed that “effective from December 9, 2014, [NICO] is now ceased to be a Labuan company under the LCA 1990 and its name is removed from the register of Labuan companies”.¹⁹⁹
251. Of note, Bahrain states NICO's assertion that they paid all required stamp duties and taxes for the 2014-2018 period upon discovery of the invalidity of their Gambian registration is incorrect. Bahrain clarifies that NICO's discovery of the invalidity of its Gambian registration was in February 2015, and NICO made retroactive payments over three years later in May 2018, after the 2018 Malaysian Court Decision. According to Bahrain, NICO ignores that it could not have continued in Labuan in the Absence Period, something NICO's own representative, [REDACTED] has recognized when applying to the LFSA in January 2017.²⁰⁰
252. Bahrain further argues that the legal basis on which NICO purports to deem itself a Malaysian company in the Absence Period is untenable. Bahrain argues NICO's claim that its transfer to The Gambia was invalid in the first place which results in NICO always

¹⁹⁸ Resp. Reply, ¶¶ 188-190.

¹⁹⁹ Resp. Reply, ¶ 191; Exhibit C-38, Letter from Labuan Financial Services Authority to [REDACTED] (NICO's legal representatives), dated December 19, 2014; see also Rep. Mem, ¶¶ 141-143; Abraham Reply Opinion ¶ 25.

²⁰⁰ Resp. Reply, ¶¶ 191-193.

remaining a Malaysian company is wrong as a matter of Malaysian law. In that regard, Bahrain relies on Tan Sri Dato' Cecil Abraham's Reply Opinion in which he rejects NICO's Malaysian experts' opinion that given the invalidity of NICO's transfer, section 133(5) of the LCA applies such that NICO at all times remained a Labuan company.²⁰¹ Moreover, Bahrain points out that NICO is asking the Tribunal to accord it Malaysian nationality based on an interpretation of Labuan law that even NICO itself did not adopt at the relevant time. Bahrain explains that during 2015-2016, NICO did not consider failure to validly domicile in The Gambia meant it remained a Labuan company and that even after learning of such failure, NICO remained in The Gambia without taking any curative action. Further, Bahrain emphasizes NICO failed to inform Labuan authorities in February 2015-2016 that its Gambian registration was invalid or that it considered itself to continue in Labuan.²⁰²

253. Bahrain asserts NICO was in fact registered in Nevis between 2016-2018 and that NICO actively represented to third parties, including the LFSA, that it was a Nevis company during the Absence Period. According to Bahrain, NICO knew that its Gambian registration was invalid before approaching Nevis authorities and that it was a conscious plan to procure an ostensibly 'valid' Nevis registration as a stepping stone to 're-domicile' to Jersey. In that regard, Bahrain relies on two documents disclosed by NICO: an email dated March 29, 2016, and an email dated March 31, 2016.²⁰³ According to Bahrain, documentation such as the certificate of good standing in Nevis and the Nevis Registrar of Corporations' refusal to remove NICO from its Register, demonstrate NICO as well as Nevis authorities considered that NICO domiciled in Nevis. Bahrain also states that the Nevis Court Order was obtained by manipulating the Malaysian and Nevis authorities, as NICO's directors informed the Labuan High Court that its Nevis registration was invalid to obtain the 2018 Decision which was later used to misinform the Nevis court.²⁰⁴

²⁰¹ Abraham Reply Opinion, ¶¶ 27-29.

²⁰² Resp. Reply, ¶¶ 194-199.

²⁰³ Resp. Reply, ¶ 200; Exhibit R-25, Email from [REDACTED] to NICO, dated March 29, 2016; Exhibit R-26, Email from [REDACTED] to NICO, dated March 31, 2016.

²⁰⁴ Resp. Reply, ¶¶ 200-202.

254. Bahrain states that the LFSA did not consider NICO to be a Labuan company during the Absence Period. Bahrain points out that when NICO approached the LFSA during the Absence Period requesting confirmation that it remained in or will be reinstated in Labuan, the LFSA rejected NICO's numerous requests. Contrary to NICO's submissions, Bahrain argues the LFSA letters do not indicate that the LFSA considered NICO to have been in Labuan continuously since 2012. Bahrain states the LFSA Standing Letter of March 13, 2018 does not state that NICO was reinstated retrospectively in Labuan and that the LFSA letter from January 2018 was of a time where the LFSA did not have sight of NICO's application or the 2018 Malaysian Court Decision. Bahrain states that NICO's assertion that "the Malaysian regulator itself suggested that NICO "apply to the High Court for a declaration and/or order to be recognized as a Labuan company" is wrong. The LFSA's 'suggestion', according to Bahrain, was in response to NICO's legal representatives submission to the LFSA that NICO would apply to the High Court of Labuan "[i]n the event the LFSA is not willing to reconsider its decision to reinstate".²⁰⁵
255. In response to the Tribunal's second bifurcated question, Bahrain asserts that the 2018 Malaysian Court Decision does not remedy NICO's lack of standing and rights during the Absence Period. According to Bahrain, the 2018 Malaysian Court Decision does not reinstate NICO retroactively and that even if the 2018 Malaysian Court Decision had retroactive effect domestically, NICO cannot be recognised as Malaysian for the purposes of the Treaty and the ICSID Convention in the Absence Period. According to Bahrain, NICO has failed to satisfy the nationality requirement as a matter of international law as: (a) the decision is tainted by material error or misrepresentation; and (b) the retroactive operation of NICO's nationality would contravene fundamental principles of international law and a good faith representation of the Treaty. To Bahrain either of these two reasons is sufficient to conclude the 2018 Malaysian Court Decision cannot remedy NICO's lack of standing and rights under the Treaty and the ICSID Convention in the Absence Period.
256. Bahrain explains that the 2018 Malaysian Court Decision reinstates NICO in the Labuan registry prospectively only and it does not rewrite history or make NICO a Labuan

²⁰⁵ Resp. Reply, ¶¶ 203-205; MEM 152

company during the Absence Period. Bahrain asserts NICO's characterization of the 2018 Malaysian Court Decision as "declaratory" with a "consequential order" that reinstated NICO retroactively as though it never left Labuan is wrong. In that regard, Bahrain relies on Tan Sri Dato' Cecil Abraham who explains in his Reply Opinion that the orders granted in the 2018 Malaysian Court Decision are specific and that the Labuan High Court simply ordered reinstatement of NICO into the registry, which takes effect prospectively. Bahrain also finds unconvincing NICO's assertion that the use of the term "reinstatement" instead of "registered afresh" means a retroactive reinstatement and that "interpreting the 2018 Decision any differently would in essence strip it of any effet utile".²⁰⁶

257. Under Bahrain's interpretation, a plain reading of the 2018 Malaysian Court Decision says NICO is reinstated into the registry and specific additional language would be required for this reinstatement to apply retroactively. Bahrain relies on Tan Sri Dato' Cecil Abraham who explains in his Reply Opinion that the Labuan High Court could not have granted or intended a retroactive reinstatement, because the LCA does not permit retroactive reinstatement. According to Bahrain, NICO's attempt to impose retroactive interpretation is undermined by the Decision's silence on issues of Nevis law.²⁰⁷ As explained by Tan Sri Dato' Cecil Abraham, if the Labuan High Court intended to reinstate NICO retroactively, then its Decision would have had to address NICO's Nevis registration not just the Gambian transfer. Moreover, the 2018 Decision does not contain directions or provisions "to place the company and other relevant persons in the same position as if the company had not been struck off or had never left". According to Bahrain, NICO's interpretation would require the Tribunal to expand substantially the 2018 Malaysian Court Decision in a manner contrary to Labuan law.²⁰⁸
258. Bahrain asserts that even if the 2018 Malaysian Court Decision granted NICO Malaysian nationality retroactively, this would not provide NICO with the required Malaysian nationality in the Absence Period as a matter of international law. Bahrain explains it is one thing for a state to confer citizenship based on the rules within its domestic legal

²⁰⁶ Resp. Reply, ¶¶ 206-209.

²⁰⁷ See Resp. PHB, ¶ 52.

²⁰⁸ Resp. Reply, ¶¶ 210-213.

regime, and an entirely different matter to impose onto another state the burdens of that conferral under international law and, in that regard, relies in the ad hoc committee in *Soufraki v. UAE*. Bahrain asserts that to determine whether NICO has a nationality that “can be opposed internationally to” Bahrain, decisions from Malaysian authorities on NICO’s nationality are a starting point or as the *Baghat v. Egypt* tribunal noted, “prima facie evidence” subject to rebuttal. Relying on Rule 34 of the ICSID Arbitration Rules, Bahrain states the Tribunal is entitled to scrutinize the meaning and consequence of a particular domestic decision. Ultimately, Bahrain states, it is the Tribunal who must determine whether NICO satisfies the nationality requirement under the Treaty and the ICSID Convention. Bahrain maintains that even if NICO has Malaysian nationality during the Absence Period under Malaysian law, it could not have obtained (and in this case did not obtain) a nationality opposable to Bahrain.²⁰⁹

259. Bahrain alleges the Tribunal may find NICO failed to satisfy the nationality requirement under international law because the 2018 Malaysian Court Decision is tainted by misrepresentations or material errors. For support, Bahrain relies on *Soufraki v. UAE* where the ad hoc committee stated that “mistake... can be a basis for disregarding a nationality at the international level” and the tribunal in *Michael Dagher v. Sudan*, who states a tribunal will not defer to a national authority’s determination where an “active misrepresentation” was made to acquire the nationality”.²¹⁰ Bahrain points out that there were, at the very least, misrepresentations or material errors in NICO’s submissions before the Labuan High Court. These submissions comprised three parts: (1) the Originating Summons; (2) [REDACTED] affidavit (the Affidavit); and (3) written submissions. Bahrain argues NICO misrepresented when it learnt of key events, the motivation behind its re-domiciliations and also omitted material information. Bahrain further asserts NICO subsequently reiterated many misrepresentations to the Nevis High

²⁰⁹ Resp. Reply, ¶¶ 214-218.

²¹⁰ Authority CL-118, *Michael Dagher v. Republic of the Sudan*, ICSID Case No. ARB/14/2, Decision on Jurisdictional Objection No. 5, November 10, 2017, ¶ 193.

Court and falsely claimed that the 2018 Malaysian Court Decision invalidated NICO's corporate existence in Nevis in order to support its engineered Labuan nationality.²¹¹

260. Bahrain states that the 2018 Malaysian Court Decision cannot contravene the intertemporal principle or a good faith interpretation of the Treaty. Bahrain explains that given the “international effect” of a domestic determination on nationality is subject to “international law principles”, the Tribunal’s recognition of the 2018 Malaysian Court Decision must also conform to fundamental principles of international law and a good faith interpretation of the Treaty. Bahrain states that of particular relevance is the intertemporal principle which provides that an act by a State is not a breach under international law “unless the State is bound by the obligation in question at the time the act occurs”.²¹² Bahrain explains that the principle reflects “a guarantee against the retrospective application of international law in matters of State responsibility” and applies “to all international obligations... [and] is general in its application”.²¹³
261. Bahrain argues that a domestic decision purportedly granting nationality retroactively cannot be given international effect, as that would impose international obligations on another State retroactively, contravening the intertemporal principle and a good faith interpretation of the Treaty. Bahrain further notes that NICO has failed to refer the Tribunal to any precedent of a tribunal permitting a company to assert rights under an investment treaty through a retroactive acquisition of nationality yet that is what NICO is inviting the Tribunal to do by allowing NICO to assert claims as if it were a Malaysian national throughout the Absence Period.²¹⁴
262. In this context, Bahrain also emphasizes that NICO could not have remained in Labuan in the Absence Period due to international economic sanctions and transparency requirements intended to combat terrorism finance and financial crime. Bahrain explains sanctions and

²¹¹ Resp. Reply, ¶¶ 220-225.

²¹² Memorial, ¶¶ 115-116; Authority CL-40, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, December 12, 2001, Article 13, ¶ (1).

²¹³ Authority CL-40, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, December 12, 2001, Article 13, ¶¶ 1 and 6.

²¹⁴ Memorial, ¶¶ 159-160; Resp. Reply, ¶¶ 226-227.

transparency requirements seek to compel companies to either cease illegal activities or cease to exist altogether by limiting the jurisdictions in which they can operate. Bahrain notes that at the time of NICO's re-domiciliation from Labuan to the Gambia, [REDACTED] had noted that it was "becoming extremely difficult if not impossible to find a suitable jurisdiction that would permit its service providers to re-domicile [NICO] to that jurisdiction."²¹⁵ Bahrain also notes that NICO chose The Gambia as it was "the only jurisdiction that ... would allow a company like NICO to re-domicile ... and had a low/NIL tax regime".²¹⁶ Bahrain argues that it was clearly not the intention of Bahrain and Malaysia to confer Treaty protection on an investor that was being rejected by either state on account of international sanctions. Allowing NICO to retroactively domicile to Labuan would, according to Bahrain, amount to assisting it in avoiding the sanctions during the Absence Period, which would be contrary to a good faith interpretation of the Treaty.²¹⁷

b. NICO's Position

- (i) The 2018 Decision Confirms NICO's Malaysian Status From December 2014 to March 2018

263. To begin, NICO asserts that Bahrain's *ratione personae* objection in relation to the period of December 2014 to March 2018 is a non-starter because the Labuan High Court confirmed that NICO was at all times a Malaysian company since its incorporation in Labuan on January 4, 2012 as a matter of Malaysian law.²¹⁸ In this regard, NICO reminds the BIT itself expressly records that the nationality of a corporate entity such as NICO is to be determined by the law of the State where it is incorporated, and in this case, that State is Malaysia.²¹⁹ And further, NICO advances that "there exists a presumption in favour of the validity of a State's conferment of nationality."²²⁰

²¹⁵ C-32, Report from [REDACTED] dated October 13, 2014, ¶ 2.3.

²¹⁶ C-33, Report from [REDACTED] dated October 19, 2014, ¶¶ 1.1 and 2.1.

²¹⁷ Resp. Reply, ¶¶ 226-229.

²¹⁸ Cl. Rej., ¶ 155.

²¹⁹ Cl. C-Mem., ¶ 104 citing Exhibit C-1, Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, June 15, 1999, Article 1(1)(b)(ii).

²²⁰ Cl. C-Mem., ¶ 114, quoting Authority CL-111, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility dated September 24, 2008, ¶87.

264. Yet Bahrain continues to claim that the 2018 Decision merely “reinstates NICO in the Labuan registry prospectively only, i.e., from March 7, 2018 onwards” and that it does not “rewrite history or make NICO a Labuan company [between December 2014 and March 2018]”.²²¹ Bahrain contends that “[s]pecific additional language would be required for this reinstatement to apply retroactively.”²²² Yet, for NICO, Bahrain’s interpretation is unconvincing.
265. First, NICO points to the Second Yunus-Naban Expert Report, which it says demonstrates that when declaratory relief is ordered it is almost always associated with a consequential relief to execute the declaration sought.²²³ Here, that consequential relief is “to give effect to the declaration that NICO’s transfer to The Gambia is invalid.”²²⁴ The associated consequential order, NICO continues, is thus the confirmation of NICO’s status as a Malaysian company from January 2012. No “specific additional language” is required, NICO confirms.²²⁵
266. Second, NICO contends that both of its legal experts confirm that Malaysian court decisions do operate prospectively and retroactively. As to the matter at hand, NICO elucidates that the 2018 Decision is “a declaratory judgment [which] merely clarifies and declares the state of affairs as it rightfully is without altering or changing any right or obligation of any party.”²²⁶
267. NICO observes that Bahrain also claims that its interpretation of the 2018 Decision is flawed given its silence on issues of Nevis law. For Bahrain, if the Decision had applied

²²¹ Cl. Rej., ¶ 158, quoting Resp. Reply, ¶ 206.

²²² Cl. Rej., ¶ 159, quoting Resp. Reply, ¶ 210.

²²³ Cl. Rej., ¶ 160, quoting the Second Expert Report of Dato' Seri Mohd Hishamudin Yunus and Datuk D.P. Naban, May 27, 2025, ¶¶ 6 (b), 65.

²²⁴ Cl. Rej., ¶ 160, quoting the Second Expert Report of Dato' Seri Mohd Hishamudin Yunus and Datuk D.P. Naban, May 27, 2025, ¶ 6 (b).

²²⁵ Cl. Rej., ¶ 160.

²²⁶ Cl. Rej., ¶ 161 quoting the Expert Report of Dato' Seri Mohd Hishamudin Yunus and Datuk D.P. Naban, December 2, 2024, ¶ 69.

retroactively, then it would have had to address NICO's Nevis registration and not just the Gambian transfer.²²⁷

268. In response, NICO states that the alleged silence regarding the Nevis registration cannot question the validity of the decision rendered by the competent court—a decision that NICO stresses was not challenged by any of the relevant stakeholders. This is all the more so, NICO continues, because no separate determination was needed in relation to NICO's August 2016 Nevis re-domiciliation, as it was tainted by the invalidity of NICO's December 2014 The Gambia re-domiciliation that was already declared invalid by the 2018 Decision.²²⁸

(ii) NICO Has Standing Under the BIT as a Malaysian Investor Since January 2012

269. NICO next attacks Bahrain's position that even if the Tribunal considers that the 2018 Decision established NICO's Malaysian company status from January 2012 onwards, it "would not provide NICO with the required Malaysian nationality in the Absence Period as a matter of international law for the purposes of the Treaty and the ICSID Convention"²²⁹ because the 2018 Decision was "tainted by material error or misrepresentation" and would therefore "contravene fundamental principles of international law and a good faith interpretation of the Treaty."²³⁰
270. NICO fundamentally disagrees. First, and preliminarily, NICO observes that it is undisputed by Bahrain that the 2018 Decision was never challenged and, thus, the 2018 Decision is final. NICO further observes that Bahrain did not even raise allegations of misrepresentation or material error with regard to the 2018 Decision until its April 8, 2025 Reply on Preliminary Objections, foregoing any objection in this regard in its Memorial.

²²⁷ Cl. Rej., ¶ 162.

²²⁸ Cl. Rej., ¶ 163.

²²⁹ Cl. Rej., ¶ 165 quoting Resp. Reply, ¶ 214.

²³⁰ Cl. Rej., ¶ 166 quoting Resp. Reply, ¶ 219.

For NICO, these are independent reasons upon which Bahrain’s preliminary objection must fail.²³¹

271. Second, Bahrain has not met its burden to demonstrate that the high standard for disregarding the decision of local authorities over matters of nationality—a standard that requires a showing of fraud or material error—has been met in this case.²³²

272. NICO says that Bahrain does not dispute that a decision of national authorities granting nationality may be disregarded if it was fraudulent or resulted from a material error. Instead, NICO says that Bahrain attempts to broaden the number of exceptions and lower the threshold by arguing that a mere “mistake” or “misrepresentation” will suffice, relying on *Soufraki v. United Arab Emirates*, which for NICO is a case that bears little analogical similarity to this one.²³³

1. The Unchallenged 2018 Decision Is Not Tainted by any
Misrepresentation or Material Error and Opposable Under
International Law

273. Observing that Bahrain cannot seriously argue that the 2018 Decision should be disregarded because of a mistake, Bahrain instead seeks to establish that the 2018 Decision is instead tainted by a “material error”, a requirement that must be established by “clear and convincing evidence”, says NICO in reliance on the case law²³⁴ or by “active misrepresentation.” But for NICO, an “active misrepresentation” such as the Bahrain says was at issue in *Dagher v. Sudan* is not enough. In any event, NICO observes that in *Dagher v. Sudan*, the “active misrepresentation” was actually an aggravating factor to a previously

²³¹ Cl. Rej., ¶¶ 169-171.

²³² Cl. Rej., ¶ 172.

²³³ Cl. Rej., ¶¶ 173, 174; see also Cl. C-Mem., ¶ 106.

²³⁴ Cl. Rej., ¶ 175, citing Authority CL-111, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20,

Decision on Jurisdiction and Admissibility, September 24, 2008, ¶ 95; Authority CL-116, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 357; Authority CL-124, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Decision on Jurisdiction, November 30, 2017, ¶ 166; Authority CL-145, *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Award on Jurisdiction, June 18, 2020, ¶ 304; Authority CL-146, *Zaza Okuashvili v. Georgia*, SCC Case No. EA 2019/038, Partial Final Award on Jurisdiction and Admissibility, August 31, 2022, ¶ 124.

established “serious material error.”²³⁵ Thus, for NICO, this case does not dilute the standard, and any misrepresentation must have been “serious or material and have been decisive for the granting of nationality.”²³⁶

274. Third, although NICO is assured that Bahrain failed to provide any evidence, let alone convincing and decisive evidence, of a misrepresentation or error on the part of the Malaysian authorities in reaching the 2018 Decision, it responds to the seven alleged misrepresentations or material errors in NICO’s submission before the Labuan High Court, some of which Bahrain says “appear to have been fraudulent”.²³⁷

- a. Bahrain says it was not truthful when NICO said to the Labuan High Court in February and March 2018 that “[O]n or around April 2015, it was brought to [NICO’s] knowledge that the Gambian authorities at that material time [were] yet to officially recognize the iCommerce Registry.”²³⁸ Bahrain explained that this was because Gambian counsel had already concluded that NICO’s Certificate of Continuation was not valid under local laws and that the iCommerce Registry is not recognized in The Gambia.²³⁹

NICO explains in response that while it was informed by [REDACTED] in February 2015 of the possible invalidity of the iCommerce registry, it had no official confirmation from the Gambian authorities of the same.²⁴⁰ In any event, only the invalidity of the re-domiciliation to The Gambia mattered to the Labuan High Court—not the date when NICO would have first suspected the same. NICO further explains that the April 2015 date notified to the Labuan High Court corresponded to when NICO

²³⁵ Cl. Rej., ¶ 176, citing Authority CL-118, *Michael Dagher v. Republic of the Sudan*, ICSID Case No. ARB/14/2, Decision on

Jurisdictional Objection No. 5, November 10, 2017, ¶¶ 187-188, 192-193; see also Cl. C-Mem., ¶ 116.

²³⁶ Cl. Rej., ¶ 177.

²³⁷ Cl. Rej., ¶ 179.

²³⁸ Cl. Rej., ¶ 180.1 quoting TSDCA-26, Case file – March 2018 proceedings before the High Court of Sabah and Sarawak, February-March 2018, Originating Summons, p. 8, ¶ 4.

²³⁹ Cl. Rej., ¶ 180.1.

²⁴⁰ Cl. C-Mem., ¶ 111.2.

was understood to be bona fide from emails between [REDACTED] and NICO dated April 14, 2015.²⁴¹

- b. Bahrain casts doubt on NICO's indication to the Labuan High Court that it re-domiciled to Nevis as a Gambian company knowing that it was in fact not domiciled there at all. To this, NICO says that when it applied to re-domicile to Nevis, it had no confirmation of the invalidity of its Gambian registration. That official confirmation came from The Gambia in August 2016, which was after NICO applied to domicile in Nevis in June 2016.²⁴²
- c. Bahrain alleges that the representation to the Labuan High Court that it applied to domicile in Nevis before learning the Gambian registration was fraudulent. According to Bahrain, NICO knew this as early as January 2016, six months before seeking to domicile in Nevis. While NICO observes that the January 2016 date to which Bahrain refers corresponds to an email to NICO from [REDACTED] explaining that some persons had formed a website and issued fraudulent Gambian registration documents. Inquiries were made into February 2016, explains NICO. Thus, during this period, NICO only had suspicions of fraud. It lacked an official statement that the registry was fraudulent.²⁴³
- d. Bahrain criticizes NICO's submission to the Labuan High Court explaining that since its transfer to The Gambia was not valid, the requirements for de-registration in Labuan were not met and NICO should not have been removed from the registry of Labuan Companies in the first place. Bahrain says it was untruthful for NICO to have made this misrepresentation because when it learned that the Gambian registration was not valid, it did not inform the LFSA. It chose to remain in The Gambia for over a year. For NICO, this accusation is untenable because Bahrain cannot dispute that NICO's transfer to The Gambia was invalid, and therefore, it did not de-register from Labuan. This is what was represented to the Labuan High

²⁴¹ Cl. Rej., ¶ 180.1; see also Cl. C-Mem., ¶ 111.3.

²⁴² Cl. Rej., ¶ 180.2.

²⁴³ Cl. Rej., ¶ 180.3.

Court, and in any event according to NICO, this is irrelevant to the Labuan High Court's inquiry into whether NICO was validly re-domiciled in December 2014.²⁴⁴

- e. Bahrain says NICO lied to the Labuan High Court when it represented that it requested an order from the court pursuant to the LFSA's instructions because it refused to reinstate NICO. On this point, NICO says there is no error or misrepresentation. In a letter dated January 26, 2018, the LFSA advised NICO's counsel "that NICO should seek an Order from the Court pertaining to the application for a reinstatement to the register." NICO makes plain that there was no refusal by the LFSA; instead, the LFSA provided guidance on the way forward.²⁴⁵
 - f. NICO also represented to the Labuan High Court that it was not registered in Nevis, when it had no clarity from the Nevis authorities on its status, according to Bahrain. NICO confirms that there was no error or misrepresentation here either. The representation at issue is consistent with what NICO understood pursuant to its exchanges with [REDACTED] between August and October 2016—that legal status in Nevis could not be established for certain.²⁴⁶
 - g. Bahrain critiques NICO's representation to the Labuan High Court that it "has done no wrong" because by seeking retroactive reinstatement from the court, NICO was circumventing sanctions and transparency requirements. In response, NICO explains that there is no misrepresentation before the Labuan High Court in this regard. Instead, NICO says Bahrain adopts this line of argument to attach the 2018 Decision itself, which is irrelevant to this Tribunal.²⁴⁷
275. For the above seven reasons raised by Bahrain, NICO confirms that Bahrain has not demonstrated the required fraud or material error required under international law for this Tribunal to disregard the final and binding 2018 Decision.

²⁴⁴ Cl. Rej., ¶ 180.4.

²⁴⁵ Cl. Rej., ¶ 180.5.

²⁴⁶ Cl. Rej., ¶ 180.6.

²⁴⁷ Cl. Rej., ¶ 180.7.

2. Objections Based on the Intertemporal Principle and a Good Faith Interpretation of the Treaty Are Inapposite

276. Nor can Bahrain invoke the intertemporal principle to deprive the Tribunal from giving effect to the 2018 Decision. First, NICO posits that the principle does not even apply in these circumstances—an inquiry into jurisdiction *ratione personae*—having only been applied in the investment arbitration context as to jurisdiction *ratione temporis*. Further, the 2018 Decision is opposable to the present Tribunal as a matter of fact. NICO is not asking the Tribunal to apply the BIT retroactively, and in any event, Bahrain is not being asked to bear an obligation it would not have provided for already from 2014 to 2018 to NICO, given the applicability of the Iran-Bahrain BIT. Lastly, Bahrain’s views on international economic sanctions applicable to NICO and its affects on the present BIT are irrelevant here, says NICO.²⁴⁸

(iii) Bahrain’s Claims That NICO Was Not Malaysian From December 2014 to March 2018 Are Irrelevant and Flawed

277. NICO counters Bahrain’s several attempts to disqualify the 2018 Decision.

- a. NICO explains that Bahrain’s argument that NICO could not have been a Malaysian company from December 2014 to March 2018 because it left Labuan in December 2014 is flawed. The Malaysian law experts in their second opinion explained that NICO never re-domiciled out of Labuan because its re-domiciliation to The Gambia was invalid.²⁴⁹
- b. NICO also says that Bahrain’s allegation that NICO was not Malaysian during the absence period because it did not carry on business in Labuan or comply with the Labuan Companies Act during that period is of no moment given that the issue was never raised before Malaysian authorities. NICO further confirms that it paid all required stamp duties as required by the LCA, and even though this payment was made after the 2018 decision the payment was made without protest from the

²⁴⁸ Cl. Rej., ¶¶ 183-188.

²⁴⁹ Cl. Rej., ¶ 191, citing the Second Expert Report of Dato' Seri Mohd Hishamudin Yunus and Datuk D.P. Naban, May 27, 2025, ¶¶ 54, 141 (b).

Malaysian authorities who would have had standing to question NICO's compliance.²⁵⁰

- c. Though Bahrain points to an alleged admission by NICO that it “could not have continued in Labuan” during the absence period,²⁵¹ it is NICO's position that Bahrain cherry-picks and misrepresents the alleged admissions.

NICO explains that in a letter dated January 11, 2017, NICO's Malaysian counsel to the LFSA merely recorded the factual background:

*NICO took steps to migrate out of Labuan and into the Republic of the Gambia as a means of preserving its continued corporate operating status. Nico was facing challenges in procuring parties to act as NICO's Labuan trustee and Labuan secretary presumably arising from NICO's inclusion as a party in the Specially Designated Nationals list published by the United States Office of Foreign Assets Control, which, as a result, consequently led to NICO being advised that NICO will be struck off the register of companies in Labuan in case it fails to find an alternate trustee, which turned out to be the case. Therefore NICO opted to redomicile to another jurisdiction and was granted a time limit up to 21st December 2024 to re-domicile.*²⁵²

NICO confirms that this is precisely what happened, i.e., NICO was never struck off the registry. Instead, it was tentatively transferred to The Gambia in December 2014 within the time limit set by the LFSA.²⁵³

NICO also explains that the February 20, 2017 letter sent by NICO's Malaysian counsel to the LFSA did not say that NICO should be struck off the register. That letter merely stated,

LFSA could consider that although a transfer-out was legally invalid, as NICO was in position to procure a trustee, NICO should be or deemed to be struck off the register as of 9 December 2014,

²⁵⁰ Cl. Rej., ¶ 192.

²⁵¹ Cl. Rej., ¶ 194 quoting Resp. Reply, ¶ 193.

²⁵² Exhibit C-48, Letter from [REDACTED] to Labuan Financial Services Authority, January 11, 2017, p. 2 (*emphasis added*).

²⁵³ Cl. Rej., ¶ 195.

*and as such NICO's current application for re-instatement could be deemed to be an application to LFSA under section 151c(2)(a) if the LCA [is] to be 'registered afresh' in the Labuan register.*²⁵⁴

Thus, NICO never represented that it could not have continued in Labuan by way of this letter either.

In any event, NICO avers that these statements are not material to the 2018 Decision, which was based on the finding that NICO's transfer to The Gambia was invalid.²⁵⁵

- d. Although Bahrain points to an August 29, 2017 email from the [REDACTED] [REDACTED] to NICO informing it that it would "wind up [...] the company", NICO was never wound up, dissolved, or transferred out of Labuan. According to NICO, the Second Yunus-Naban opinion attests to this in light of the LCA.²⁵⁶
- e. Nor is NICO's position that it was at all times a Malaysian company since 2012 inconsistent with "interpretation of Labuan law that even NICO itself did not adopt at the relevant time."²⁵⁷ Bahrain explains that NICO "did not consider that its failure to validly domicile in The Gambia meant that it remained a Labuan company."²⁵⁸ But for NICO, this allegation lacks particularization and substantiation given that there are no documents that record such an understanding. Instead, NICO explains, Bahrain seeks to draw an inference from NICO's alleged inaction after discovering that the Gambian re-domiciliation was not valid given that NICO took steps to re-domicile in Nevis.²⁵⁹
- f. NICO disagrees with Bahrain that NICO could not be a Malaysian company because it was "in fact registered in Nevis between 2016 and 2018." Even though

²⁵⁴ Cl. Rej., ¶ 196 quoting, TSDCA-40, Letter from [REDACTED] to LFSA, February 20, 2017, Items (c) and (d).

²⁵⁵ Cl. Rej., ¶ 197.

²⁵⁶ Cl. Rej., ¶ 198, quoting Resp. Reply, ¶ 196 and R-30, Email from [REDACTED] to NICO, August 29, 2017.

²⁵⁷ Cl. Rej., ¶ 199, quoting Resp. Reply, ¶ 197.

²⁵⁸ Cl. Rej., ¶ 199, quoting Resp. Reply, ¶ 197.

²⁵⁹ Cl. Rej., ¶¶ 199, 200.

the Nevis Registrar of Corporations allegedly refused to remove NICO from the registry further to NICO's June 1, 2018 application, this does not mean that the Nevis authorities considered NICO to be domiciled there. This is particularly so given that they advised NICO to seek clarity with the High Court.²⁶⁰

- g. NICO makes plain that the evidence on the record belies Bahrain's position that the LFSA rejected NICO's requests for reinstatement. The LFSA standing letter of March 13, 2018 explicitly confirmed the order of the Labuan High Court of March 8, 2018—that NICO was incorporated in Labuan in 2012 and still on the register. Nor is Bahrain's concern regarding the LFSA's letter of January 18, 2018 valid. NICO explains that that letter, predating the 2018 Decision, merely informed NICO of the requirements with which it should comply if its application were granted pursuant to an eventual application to the Labuan High Court.²⁶¹ It is noteworthy, NICO says, that the LFSA never objected to the 2018 Decision, which underscores that the 2018 Decision merely confirmed in a binding and opposable manner under the BIT and international law that NICO had remained a Malaysian company since January 2012.²⁶²

(2) The Tribunal's Analysis

278. The third preliminary objection raises two questions identified in Procedural Order No. 4: (i) whether NICO was incorporated in Malaysia, and hence benefited from protection under the Treaty, from December 2014 to March 2018, and (ii) the effect, if any, of the 2018 Decision of the Labuan High Court on NICO's standing and rights under the Treaty. The Tribunal addresses these questions in turn, before turning to the international law objections raised by Bahrain in respect of the 2018 Decision.
279. It is common ground that, pursuant to Article 1(1)(b)(ii) of the Treaty and Article 25(2)(b) of the ICSID Convention, NICO must be incorporated or duly constituted in accordance

²⁶⁰ Cl. Rej., ¶¶ 201-204.

²⁶¹ Cl. Rej., ¶¶ 205-208.

²⁶² Cl. C-Mem., ¶ 123; see also Exhibit C-53, Letter from Labuan Financial Services Authority to NICO, March 13, 2018.

with the applicable laws of Malaysia in order to benefit from the protections of the Treaty. These provisions respectively provide as follows:²⁶³

Article 1(1)(b)(ii) states:

(b) “investor” means:

(ii) any corporation, partnership, trust, joint-venture, organisation, association or enterprise incorporated or duly constituted in accordance with applicable laws of that Contracting Party;

Article 25(2)(b) states:

(2) “National of another Contracting State” means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

280. In addition, as already determined in Section B(2), above, NICO must have held Malaysian nationality at the time of each alleged breach to fall within the Tribunal’s jurisdiction.
281. The question whether a corporation has been duly constituted under the laws of a particular State at any given time is, as a matter of principle, governed by the law of the State of incorporation. The International Court of Justice’s jurisprudence on this question, as referenced by NICO, is clear. In the 1955 *Nottenbohm* case, the Court held that “It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to

²⁶³ Exhibit C-1, Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, June 15, 1999, Article 1(1)(b)(ii); Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, Article 25(2)(b).

determine whether international law imposes any limitations on its freedom of decision in this domain.”²⁶⁴

282. The Tribunal further upholds the uncontroversial principle enunciated by the International Court of Justice in the 2007 Diallo case that “it is for each State, in the first instance, to interpret its own domestic law” and that “[t]he Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts”.²⁶⁵
283. The Tribunal will therefore look in the first instance to Malaysian law, and in particular to the Labuan Companies Act 1990 (“LCA”), as well as the decisions of the Malaysian Courts concerning that law, to determine whether NICO was incorporated in Labuan throughout the Absence Period.
284. The relevant facts are largely undisputed. NICO was re-domiciled from Jersey to Labuan on January 4, 2012.²⁶⁶ Faced with the resignation of its corporate secretary in Labuan and an inability to procure a replacement (a difficulty traceable to international sanctions targeting Iranian-owned entities), NICO sought to avoid being struck off the Labuan register and obtained, on 9 December 2014, a Certificate of Continuation in the Republic of The Gambia issued through the iCommerce Registry.²⁶⁷ By letter of 19 December 2014, the Labuan Financial Services Authority (“LFSA”) confirmed that NICO had ceased to be a Labuan company.²⁶⁸ The parties’ experts agree, however, that the Gambian registration was at no time valid, the iCommerce Registry not being a body recognised by the Gambian government. NICO was subsequently registered in Nevis on August 19, 2016, until the Eastern Caribbean Supreme Court declared, by Order of November 2, 2018, that NICO’s

²⁶⁴ Authority CL-114, *Nottebohm (Liechtenstein v. Guatemala)*, Judgment, Second Phase, International Court of Justice dated April 06, 1955, p.20

²⁶⁵ Authority CL-115, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment on Preliminary Objections dated May 24, 2007.

²⁶⁶ Cl. C-Mem., ¶ 51; Exhibit C-22 (NICO Certificate of Registration in Labuan).

²⁶⁷ Exhibit C-36, Certificate of Continuation of NICO in the Republic of the Gambia, December 9, 2014.

²⁶⁸ Exhibit C-38, Letter from Labuan Financial Services Authority to [REDACTED] December 19, 2014.

redomicile from The Gambia to Nevis was null and void.²⁶⁹ By the 2018 Decision of the Labuan High Court of March 7, 2018, NICO's transfer to The Gambia was declared invalid and NICO was reinstated to the Labuan register.²⁷⁰

285. On these undisputed facts, the Tribunal considers that NICO's transfer to The Gambia in December 2014 was either a valid transfer of the company to that jurisdiction, or it was not. Nonetheless, the parties agree that no valid transfer occurred: both the parties' experts and the Labuan High Court itself have so concluded, and the Eastern Caribbean Supreme Court has declared the subsequent transfer to Nevis null and void on the basis of the invalidity of the Gambian registration that necessarily preceded it.²⁷¹ The Tribunal accepts those conclusions.
286. There is, in the Tribunal's view, no third possibility under which NICO could have existed in a legal void without any nationality between December 9, 2014 and March 7, 2018: as a matter of general principle, a corporation must possess a nationality, and the integrity of the international system of corporate domicile rests on that proposition.
287. The Tribunal has carefully considered the contrary position advanced on behalf of Respondent that the question of NICO's nationality must be assessed by reference to the contemporaneous reality during the Absence Period – namely, that NICO was not listed in the Labuan register, was registered in Nevis from August 2016, and held itself out to third parties accordingly – and that the 2018 Decision should not be read as effecting a retrospective restoration of Labuan nationality. The Tribunal does not subscribe to that approach. The question of nationality is an objective legal question to be determined on the basis of the documents and the applicable Malaysian law, and not by reference to the parties' subjective perception or representations to third parties at the relevant time.

²⁶⁹ Exhibit C-45, NICO's Certificate of Incorporation in Nevis, August 19, 2016; Exhibit C-46, NICO's Certificate of Transfer of Domicile to Nevis, August 19, 2016; Exhibit C-304, The Eastern Caribbean Supreme Court of Nevis Order, November 2, 2018.

²⁷⁰ Exhibit C-52, Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, March 7, 2018.

²⁷¹ Exhibit C-52, Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, March 7, 2018, p. 5; Exhibit C-304, The Eastern Caribbean Supreme Court of Nevis Order, November 2, 2018; Rejoinder Legal Opinion of Dato' Seri Mohd Hishamudin Yunus and Datuk Palpanaban Devarajoo, May 27, 2025, ¶¶ 54, 141(b); Reply Legal Opinion of Tan Sri Dato' Cecil Abraham, ¶ 27.

288. According to Respondent, NICO's removal from the Labuan register under section 133(4) of the LCA was itself sufficient to extinguish NICO's Malaysian nationality, irrespective of whether the transfer to The Gambia was valid. Section 133(4) provides as follows:²⁷²

Section 133

(4) Upon an instrument transferring the company to another country or jurisdiction being executed by the proper officer of that other country or jurisdiction, the company shall forthwith notify the Authority the details and the company shall be deemed to have ceased to be a company incorporated in Labuan from the date of its transfer to that other country or jurisdiction takes effect and the Authority shall remove its name from the register.

Provided that nothing in this subsection shall take away or affect the jurisdiction of any court to hear and determine any proceedings commenced therein by or against the company before it ceased to be a company incorporated in Labuan.

289. The Tribunal finds that the text of Section 133(4) of the LCA establishes that a Labuan company shall be deemed to have ceased to be incorporated in Labuan upon three cumulative conditions: (i) the existence of a valid instrument transferring the company to another country or jurisdiction; (ii) the execution of that instrument by the proper officer of the receiving jurisdiction; and (iii) notification of the transfer by the company to the LFSA.
290. On the facts, the first two conditions were never satisfied. It is common ground that the Gambian iCommerce Registry was not a legitimate body recognized by the Gambian government; accordingly, there was no valid instrument of transfer to The Gambia, and it was not executed by a "proper officer" of that jurisdiction. The Tribunal accordingly finds that Section 133(4) was not validly triggered, and the deeming provision on which the LFSA acted was, in law, never engaged.
291. In that context, Section 133(5) of the LCA addresses precisely the scenario in which a notification of transfer to another country or jurisdiction has not been executed by the

²⁷² Exhibit DSMHYDPN-0010, Section 133 of the Labuan Companies Act 1990; see also Exhibit TSDCA-0010, Labuan Companies Act 1990, p. 173.

proper officer of the receiving country or jurisdiction. Section 133(5) provides as follows:²⁷³

Section 133

(5) Where a Labuan company notifies the Authority under subsection (4) that an instrument transferring the company to another country or jurisdiction has been executed by the proper officer of that other country or jurisdiction and that notification is false, then, notwithstanding that the Authority has removed the name of the company from the register — (a) the liability (if any) of any officer or member of the company shall continue and may be enforced as if the company were still registered under this Act; and (b) the company shall be liable to be wound up pursuant to the provisions of this Act as if it were still registered under this Act.

292. The above text clarifies that, notwithstanding the removal of the company from the register, the liability of any officer or member of the company shall continue, and the company shall remain liable to be wound up, as if it were still registered in Labuan under the LCA. The Tribunal agrees with NICO’s experts that the language “as if the company were still registered” are significant to the present case: such language recognizes that in the event of an invalid transfer of a company out of Labuan, the legal personality of the company survives the administrative removal of its name from the register.²⁷⁴
293. The Tribunal does not accept Respondent’s alternative contention that Section 133(5) is exhaustive of the consequences of a false notification and excludes any further legal effect. Such a reading would render Section 133(5) largely otiose, since the entities to which it applies will, by definition, have failed to comply with the LCA’s continuing requirements once they have been removed from the register, and would deprive the 2018 Decision – which expressly ordered NICO’s reinstatement following a finding of invalidity – of meaningful effect.

²⁷³ Exhibit DSMHYDPN-0010, Section 133 of the Labuan Companies Act 1990; see also Exhibit TSDCA-0010, Labuan Companies Act 1990, p. 173.

²⁷⁴ Rejoinder Legal Opinion of Dato’ Seri Mohd Mishamudin Yunus and Datuk Palpanaban Devarajoo, ¶ 32.

294. In the Tribunal's view, Bahrain's reliance on the *Barcelona Traction* case does not displace this conclusion. As the International Court of Justice there made clear, a company's status in law is alone relevant to the question of whether it has ceased to exist, and on the facts of that case the company had not ceased to exist.²⁷⁵ The decision does not stand for the proposition that a company removed from a register following a false notification of transfer is thereby deprived of all corporate nationality, particularly where, as here, the law of the State of incorporation expressly provides for the continuation of the company's legal personality in such circumstances and where the competent national court has subsequently confirmed that the purported transfer was invalid.
295. The Tribunal is likewise unpersuaded that NICO's non-compliance with the various continuing obligations of the LCA during the Absence Period changes the analysis. Bahrain points to NICO's failure to have maintained a resident director and secretary, to maintain a registered office, to submit annual returns, and to pay statutory fees and taxes. Respondent's expert submitted that "NICO's non-compliance with Labuan law during the Disputed Period is clear evidence that NICO was not constituted or incorporated and did not operate as a Labuan company in the Disputed Period"; nonetheless, pursuant to Sections 142 and 142A of the LCA, the penalties for non-compliances with these provisions are financial in nature.²⁷⁶ The Tribunal agrees with NICO's experts that the only possible consequence would be pecuniary penalties, which would not affect NICO's status as a Labuan company during the Disputed Period.²⁷⁷
296. The relevant provisions for the striking-off of NICO under the LCA are its Sections 151 and 151BA.²⁷⁸ According to those provisions, if a Labuan company's name has been struck off the register under Section 151 or Section 151BA and remains struck off continuously for a period of one year and six months, the company "shall be deemed to have been

²⁷⁵ Authority RL-72, *Barcelona Traction*, ¶¶ 66-67.

²⁷⁶ Exhibit TSDCA-0010, Labuan Companies Act 1990, pp 181-182.

²⁷⁷ Counter-Memorial Legal Opinion of Dato' Seri Mohd Mishamudin Yunus and Datuk Palpanaban Devarajoo, ¶¶ 143-144.

²⁷⁸ Exhibit DSMHYDPN-0014, Section 151 of the Labuan Companies Act 1990; Exhibit DSMHYDPN-0016, Section 151BA of the Labuan Companies Act 1990.

dissolved." Nonetheless on the facts, the LFSA's striking-off powers concerning NICO under Sections 151 and 151BA were discretionary and not exercised in respect of NICO.

297. Moreover, following the 2018 Decision, NICO retroactively complied with all of its outstanding obligations, including by requiring the payment of fees due from 9 December 2014 onwards, and the LFSA has accepted that compliance.²⁷⁹ In the Tribunal's view, this treatment is consistent with an understanding that NICO had remained a Labuan company throughout the Absence Period and that the purported transfer to The Gambia was null and void. In the Tribunal's view, to treat the very non-compliance that follows from a wrongful removal as conclusive evidence that the company was no longer Labuan would, as NICO's experts rightly observe, render Section 133(5) illusory.
298. Bahrain further invokes NICO's contemporaneous representations to third parties – in particular to the Bahraini banks, to [REDACTED] to the [REDACTED] and to the Nevis authorities – to the effect that NICO was Gambian or Nevis. The Tribunal does not consider these representations decisive. As a matter of law, nationality cannot be modified by conduct or representation alone; it depends on the application of the law of the State of incorporation. The Tribunal has carefully reviewed the contemporaneous correspondence relied upon and is not persuaded that any deliberate misrepresentation has been established: NICO sought clarification from its advisors as soon as the validity of the Gambian registration was first questioned and acted in good faith on the information then available to it.
299. Turning to the Nevis registration, the Tribunal finds that, on the facts and the evidence before it, no valid transfer from The Gambia to Nevis could have occurred. In the majority's view, the validity of the Nevis registration was contingent upon the prior validity of the Gambian registration, which the Labuan High Court has confirmed never validly took effect. That conclusion was independently confirmed by the Order of the Eastern

²⁷⁹ Cl. Rej., ¶ 192; see also Exhibit C-53, Letter from Labuan Financial Services Authority to NICO, March 13, 2018

Caribbean Supreme Court of November 2, 2018, which expressly declared that NICO's redomicile from The Gambia to Nevis was "*null and void*".²⁸⁰

300. On this point, Bahrain points to evidence that the Nevis Financial Services (Regulation and Supervision) Department records from 2024 describe NICO as "not active" since it "was removed from the Registrar of Corporations on November 6, 2018".²⁸¹ Nonetheless, this circumstance has no bearing on the Eastern Caribbean Supreme Court's Order that the registration was null and void. The same is true of NICO's alleged awareness of the invalidity of its registration in The Gambia when seeking re-domiciliation in Nevis, which Bahrain likewise referred to in its submissions.²⁸²
301. In short, the Tribunal finds that no valid redomiciliation to Nevis ever occurred. It follows that NICO did not simultaneously hold Nevis and Malaysian nationality at any point during the Absence Period, and the question of dual corporate nationality does not arise.
302. The Tribunal now turns to the second, and related, bifurcated question concerning the Absence Period: the effect of the 2018 Decision.
303. Bahrain submits that the 2018 Decision was tainted by misrepresentation or material error, that – when properly construed – it operates only prospectively from 7 March 2018, and that to recognize the 2018 Decision as conferring Malaysian nationality with retroactive effect would contravene the intertemporal principle and a good faith interpretation of the Treaty.
304. On the first point, the Tribunal wishes to make clear that it accepts the standard articulated by various investment tribunals: an investment tribunal should not act as an extraordinary appellate body in respect of the decisions of national courts ruling on their own laws, and should generally accept the findings of local courts in the absence of gross deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such

²⁸⁰ Exhibit C-304, The Eastern Caribbean Supreme Court of Nevis Order dated November 02, 2018.

²⁸¹ Exhibit R-16, Letter from Nevis Island Administration, Financial Services (Regulation and Supervision) Department, dated May 8, 2024.

²⁸² Respondent's Post-Hearing Brief ¶¶14-15.

as in the case of a denial of justice. Disregarding a national court's determination of nationality therefore requires convincing and decisive evidence of gross deficiency. The *Soufraki* annulment decision relied upon by Bahrain, which concerned a determination by government officials rather than a court, does not warrant a different conclusion.²⁸³

305. On the evidence before it, the Tribunal finds that none of the alleged misrepresentations cited by Bahrain meets that high standard. Indeed, the Tribunal is unpersuaded that NICO made any misrepresentation before the Labuan High Court. In particular, Bahrain alleges that NICO misrepresented that it learned of its invalidity in The Gambia from the Gambian authorities in August 2016, claiming NICO was instead informed in January 2016. Nonetheless, Bahrain cited January 2016 correspondence between NICO and [REDACTED] [REDACTED] not any Gambian authority. Since NICO's representation concerned when it was informed by the Gambian Ministry of Justice, not a third party, Bahrain has failed to prove the misrepresentation.
306. Regardless, whereas Bahrain submits that the 2018 Decision is "tainted", Bahrain has not explained how the alleged misrepresentations would have affected the outcome. The tribunal in *Okuashvili v. Georgia* correctly identified that for an objection to be relevant, it would have to be the case that the "fraud or error, had it been known to the authorities of the State of nationality, would clearly have impeded the grant of nationality or led to its withdrawal".²⁸⁴ In the circumstances of this case, however, the Tribunal recalls that NICO's Gambian registration was undisputedly invalid. Accordingly, the Tribunal finds that Bahrain's objection that the 2018 Decision is tainted must be dismissed.
307. On the second point, the Tribunal finds that the 2018 Decision contains a clear and express declaration that NICO's transfer to The Gambia was "invalid", together with a consequential order that NICO be reinstated to the Labuan register.²⁸⁵

²⁸³ Authority CL-110, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, July 7, 2004, ¶¶ 63-68.

²⁸⁴ Authority CL-146, *Zaza Okuashvili v. Georgia*, SCC Case No. EA 2019/038, Partial Final Award on Jurisdiction and Admissibility, August 31, 2022, ¶ 124.

²⁸⁵ Exhibit C-52, Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, Malaysia, dated March 7, 2018, page 5.

308. A declaration of invalidity of a transfer logically operates *ex tunc*: it confirms that the transfer never validly took effect, and therefore that NICO never validly left Labuan. In this regard, [a majority of] the Tribunal finds support in the Order 42 Rule 7(2) of the Rules of Court 2012, which provides as follows:²⁸⁶

7. Date from which judgment or order takes effect (O. 42 r. 7)

(1) A judgment or order of the Court takes effect from the day of its date. (2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

309. The Tribunal disagrees with Bahrain’s contention that the words “takes effect” in Rule 7(1) signify that a judgment or order may not have retrospective effect under Malaysian law. Rather, the Federal Court of Malaysia in *Setiakon Engineering Sdn Bhd v. Mak Yan Tai* reached the opposite conclusion, noting that Rule 7(2) distinguishes between the date on which an order “takes effect” and the period to which its operation extends. The full relevant text of the judgment is as follows:²⁸⁷

[62] A plain reading of O 42 r 7(2) of the ROC will show that what it requires is for the judgment or order to be dated on the date the judgment or order is pronounced but the court can, for good reasons, order it to take effect on an earlier or later date. In the present case the court did not make either of the two orders that was open for it to make. The setting aside order therefore took effect on the date it was pronounced, i.e. on November 14, 2017 as required by r 7(1) but operated retrospectively as it was specifically directed at an earlier order which is the JID and not at any present or future order.

[63] More importantly, there can be no confusion as to which order was ordered by the High Court to be set aside. It will be stretching the language of O 42 r 7(2) to breaking point to argue that an order that is not antedated has no retrospective effect simply because no application was made for the order to take effect retrospectively.

²⁸⁶ Exhibit TSDCA-0007, Rules of Court 2012, Order 42, Rule 7, page 3.

²⁸⁷ Exhibit TSDCA-0023, *Setiakon Engineering Sdn Bhd v. Mak Yan Tai & Anor* [2024] 8 CLJ 190, pp. 47-48.

310. In light of the foregoing, the Tribunal is satisfied that, as a matter of Malaysian law, an order may take effect on its pronouncement date and yet operate retrospectively.
311. In short, the Tribunal concludes that the Decision had retrospective effect and confirmed that NICO had remained a Malaysian company throughout the Absence Period.
312. The Tribunal has given careful consideration to the contrary view, articulated by Respondent, that the 2018 Decision says no more on its face than that the transfer to The Gambia is invalid and that NICO is reinstated to the register, and that any further conclusion as to NICO's status during the Absence Period must be supplied by inference rather than by the Decision itself. The Tribunal, does not accept that reading. Read in light of Section 133(5) of the LCA, which itself recognises that the legal personality of a Labuan company is preserved notwithstanding a removal from the register on a false notification of transfer, the only coherent reading of the Decision is that the Labuan High Court treated the purported transfer as having been legally ineffective from the outset, with the consequence that NICO remained a Labuan company throughout. The reinstatement to the register simply gave administrative expression to that legal reality. To rely exclusively on NICO's absence from the Labuan register between December 9, 2014 and March 7, 2018 would deprive the 2018 Decision and the underlying provision of the LCA of meaningful effect.
313. On the third point, the Tribunal does not consider that recognising the 2018 Decision contravenes the intertemporal principle or a good faith interpretation of the Treaty.
314. The Tribunal is not asked to *impose* Malaysian nationality on NICO with retroactive effect, but to recognise that, as a matter of Malaysian law, NICO's nationality was never lost. As a matter of international law, nationality is in the first place a matter for the law of the State of incorporation: as the International Court of Justice observed in *Barcelona Traction* and *Diallo*, and as confirmed by tribunals such as *Tokios Tokelés v. Ukraine*, international law leaves to each State the determination of its own nationals, subject to a presumption of

validity.²⁸⁸ In the view of the Tribunal, the Labuan High Court has determined the question through the 2018 Decision, and that determination is opposable to Bahrain as a fact within the Malaysian legal order. There being no retrospective acquisition of nationality, there is no retrospective imposition of Treaty obligations on Bahrain, and the intertemporal principle is therefore not violated.

315. The Tribunal recognises that questions of corporate nationality engage important considerations of legal certainty and predictability for States in the conduct of their international affairs. The Tribunal's conclusion in this case rests, however, on the particular and unusual conjunction of features presented by the factual record of this case: a notification of transfer that was, on the unanimous evidence of the parties' experts, never executed by a proper officer of the purported receiving jurisdiction; a specific provision of the law of the State of incorporation expressly preserving the company's legal personality in precisely such circumstances; a final and unchallenged decision of the competent court of the State of incorporation declaring the transfer invalid and reinstating the company; and the corresponding administrative recognition of that status by the relevant regulator. The Tribunal's findings should not be read as endorsing any general proposition that domestic court decisions may freely confer nationality with retroactive international effect.
316. For all the reasons set out above, the Tribunal, concludes that NICO was, as a matter of Malaysian law and for the purposes of the Treaty, a Malaysian company throughout the Disputed Period from December 9, 2014 to March 7, 2018. Bahrain's third preliminary objection is accordingly dismissed.

²⁸⁸ Authority RL-72, *Barcelona Traction, Light and Power Co, Ltd (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, dated February 5, 1970, para. 70; Authority CL-115, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment on Preliminary Objections dated May 24, 2007, para 61; *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction April 39, 2004, as referenced in Authority RL-75, C. Schreuer, Schreuer's Commentary on the ICSID Convention (3rd edition 2022), Volume I, Article 25 – Jurisdiction, ¶¶ 1212-1215.

III. DECISION

317. For the foregoing reasons, the Tribunal, by majority:

- a. Dismisses the Respondent's preliminary objection on abuse of process;
- b. Finds that the Treaty does not apply to acts and omissions that occurred prior to its entry into force;
- c. Finds that NICO must have held Malaysian nationality at the time of the alleged breaches of the Treaty for the Tribunal to have jurisdiction *ratione temporis*;
- d. Finds that disputes relating to alleged breaches that occurred prior to January 4, 2012, when NICO was incorporated in Jersey and not Labuan, are outside the Tribunal's jurisdiction;
- e. Declares that NICO was, as a matter of Malaysian law and for the purposes of the Treaty, a Malaysian company throughout the Disputed Period from December 9, 2014 to March 7, 2018;
- f. Postpones its decision on the allocation of costs of this bifurcated phase of the arbitration, the fees and expenses of the Tribunal and the Parties' costs and expenses of legal representation; and
- g. Orders the continuation of the proceedings.

[Signed]

[Signed]

Prof. Maxi Scherer
Arbitrator

Dr. Eduardo Silva Romero
Arbitrator

[Signed]

Dr. Claus von Wobeser
President of the Tribunal