INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Suffolk (Mauritius) Limited, Mansfield (Mauritius) Limited and Silver Point Mauritius

v.

Portuguese Republic

(ICSID Case No. ARB/22/28)

PROCEDURAL ORDER NO. 3

Respondent's Request for Bifurcation

Members of the Tribunal
Mr. Jeremy K. Sharpe, President of the Tribunal
Prof. Dr. Stephan Schill, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Ella Rosenberg

---

1 March 2024

I. PROCEDURAL BACKGROUND

1. On 13 October 2022, Suffolk (Mauritius) Limited ("**Suffolk Mauritius**"), Mansfield (Mauritius) Limited ("**Mansfield**") and Silver Point Mauritius ("**Silverpoint**"; together the "**Claimants**") submitted to the International Centre for Settlement of Investment Disputes (the "**Centre**" or "**ICSID**") a Request for Arbitration instituting the present proceeding against the Portuguese Republic (the "**Respondent**"; together with the Claimants, the "**Parties**") under Article 9 of the Agreement between the Government of the Republic of Mauritius and the Government of the Portuguese Republic on the Mutual Promotion and Protection of Investments of 12 December 1997, which entered into force on 3 January 1999 (the "**Treaty**," "**BIT**" or "**Mauritius-Portugal BIT**").[1]

2. The Tribunal was constituted on 4 May 2023 and is composed of Prof. Dr. Stephan Schill (Claimants' appointee), Prof. Brigitte Stern (Respondent's appointee), and Mr. Jeremy K. Sharpe, President of the Tribunal (appointed by agreement of the Parties).

3. On 27 June 2023, the Tribunal and the Parties held a first session by videoconference.

4. On 13 July 2023, the Tribunal issued Procedural Orders No. 1 ("**PO1**") and No. 2 ("**PO2**").

5. On 17 October 2023, the Claimants filed their Memorial on the Merits.

6. On 5 December 2023, in accordance with PO1 and the procedural calendar of 13 July 2023, the Respondent filed a Request for Bifurcation and Summary of Jurisdictional Objections (the "**Request**").

7. On 23 January 2024, the Claimants filed their Response to the Respondent's Request (the "**Answer**").

8. On 20 February 2024, the Tribunal informed the Parties of its decision to bifurcate the proceeding and adjudicate the Respondent's six preliminary objections (the "**Objections**") before addressing the merits.

9. This Procedural Order No. 3 provides the Tribunal's decision and reasoning on the Request.

[1] Mauritius-Portugal BIT (**C-0001**).

II. THE PARTIES' POSITIONS

A. THE RESPONDENT'S POSITION

1) Introduction

10. The Respondent contends that the Tribunal lacks jurisdiction over the present dispute and requests that the Tribunal bifurcate the proceeding to adjudicate its six **Objections** before addressing the merits.[2] The Respondent submits that:

    a. the Tribunal lacks jurisdiction *ratione personae* because the Claimants are not covered investors under Article 1(3) of the BIT ("**First Objection**");

    b. the Tribunal lacks jurisdiction *ratione materiae* because the Claimants do not have a protected investment under Article 1(1) of the BIT and Article 25(1) of the ICSID Convention ("**Second Objection**");

    c. the Tribunal lacks jurisdiction *ratione materiae* because the Claimants acquired their purported investments in violation of the laws and regulations of Portugal ("**Third Objection**");

    d. the Tribunal lacks jurisdiction *ratione temporis* because the Claimants acquired their purported investments after the dispute had arisen ("**Fourth Objection**");

    e. the Tribunal lacks jurisdiction because the Claimants committed an abuse of process by acquiring their purported investments with the purpose of gaining access to the protections of the BIT after the dispute had arisen or was reasonably foreseeable ("**Fifth Objection**"); and

    f. the Tribunal lacks jurisdiction because the Claimants initiated proceedings before the Portuguese courts, thereby precluding its treaty claims under the BIT's fork-in-the-road provision ("**Sixth Objection**").

2) Legal Standard

11. The Respondent argues that the Tribunal's power to suspend the merits to address preliminary

[2] Request, paras. 6, 9, 108.

objections in a bifurcated phase derives from Article 41(2) of the ICSID Convention, as well as Rules 42(6) and 43(4) of the 2022 ICSID Arbitration Rules (the "**Rules**").[3]

12. According to the Respondent, "[i]nternational investment tribunals routinely bifurcate proceedings to address jurisdictional and admissibility objections as preliminary matters."[4]

13. The Respondent submits that the Tribunal must evaluate all circumstances when determining whether to bifurcate the proceeding, particularly:

- whether bifurcating the proceeding will likely lead to savings of time, costs, and resources;
- whether the Objections, if successful, will dispose of all or a substantial part of the dispute, reducing or eliminating the merits phase; and
- whether the Objections are intertwined with the merits of the case, such that deciding the jurisdictional Objections would require examining the merits of the dispute.[5]

14. The Respondent considers that efficiency and justice are primary factors in determining whether a tribunal should bifurcate a proceeding between preliminary objections and merits.[6] The Respondent concludes that bifurcation is warranted here because its Objections (1) are substantial and not frivolous; (2) can be resolved independently of the merits; and (3) would dispose of Claimants' claims in their entirety.[7]

3) Bifurcation should be granted in the present dispute

1. The Respondent's six Objections

i. The First Objection

15. The Respondent argues that the Tribunal lacks jurisdiction *ratione personae* because the

[3] Request, paras. 109-110.

[4] Request, para. 111, referring to N. Blackaby et al, Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press, 2015, page 371, (**RL-0048**).

[5] Request, paras. 112-114.

[6] Request, para. 115.

[7] Request, para. 116.

Claimants do not qualify as investors under Article 1(3) of the BIT.[8]

16. The Respondent underlines that the Claimants do not have their "main office" ("*sede*," in Portuguese) in the territory of Mauritius, as required by Article 1(3)(b) of the BIT. That provision defines "investors" as including legal persons that have a "main office in the territory of either Contracting Party" and that are incorporated or constituted in accordance with the laws of that State.[9]

17. The Respondent contends that the notion of a "main office" suggests something "over and above" the formal matter of the address of a registered office or statutory seat.[10] For the Respondent, this connotes a place of "effective management" and implies the existence of a "substantive connection" between the legal entity and the State in which the entity is incorporated. This requirement precludes mailbox or shell companies from claiming protection under the BIT.[11]

18. The Respondent argues that the Claimants are not "investors" under Article 1(3) of the BIT because they are mailbox or shell companies whose effective management is not in Mauritius.[12] In support, the Respondent contends that the Claimants' registered addresses are those of a corporate services provider in Mauritius; that they lack any assets other than their purported investments in this case; and that their boards of directors appear to exercise no real decision making and comprise the same individuals (at least half of whom are non-resident in Mauritius).[13]

19. According to the Respondent, Mauritius similarly accepts that mailbox companies are not entitled to BIT protection. In support, the Respondent cites a joint interpretative statement of Mauritius and India, which is said to exclude protection under the Mauritius-India BIT for a

[8] Request, para. 11.

[9] Request, paras. 11-12; Mauritius-Portugal BIT (**C-0001**).

[10] Request, para. 13.

[11] Request, paras. 14-17.

[12] Request, para. 18.

[13] Request, paras. 19-26.

legal person lacking "substantial business activity" in the investor's home State.[14]

ii. The Second Objection

20. The Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants do not have a protected investment.[15] The Respondent contends that the Claimants' purported investments—which it characterizes as an intragroup transfer of unpaid credits under a facility loan agreement granted to a Luxembourg branch of the Portuguese bank BES—do not meet the requirements of Article 1(1) of the BIT and Article 25(1) of the ICSID Convention.

21. Article (1) of the BIT defines investment as "every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter[.]"[16] The Respondent cites an "emerging consensus that for an asset to qualify for protection, there must be (at least) 'the existence of a contribution of a certain economic value and certain duration, entailing the taking of an economic risk.'"[17] The Respondent further argues that the notion of a "contribution of a certain economic value" implies an "active contribution" to an economic activity or venture in the host State.[18]

22. The Respondent denies that the Claimants' purported investments meet these requirements. It argues that there was no substantial or active contribution to any form of economic activity in Portugal.[19] Instead, the Claimants' investment consisted of a "purely intra-group transfer of unpaid credits under an ordinary facility loan agreement granted to a Luxembourg branch of BES, entered between private entities and for private purposes, for a lower consideration (if any) than the par value of such credits."[20]

23. The Respondent further denies that the Claimants assumed the required "investment risk"

[14] Request, para. 17.

[15] Request, paras. 27-28, 56.

[16] Request, para. 29.

[17] Request, para. 32 (citing cases).

[18] Request, para. 35.

[19] Request, paras. 39-55.

[20] Request, para. 46.

when making their purported investments in the Oak Loan.[21] The Claimants acquired their interests at a time when BES had already entered into resolution, the Oak Loan was already undergoing restructuring in Portuguese and English courts, and the debt under the Oak Loan had already been accelerated.[22]

iii. The Third Objection

24. The Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the alleged investments were not made "in accordance with the laws and regulations" of the host State, as required by Article 1(1) of the BIT and by a "general principle of international law."[23]

25. The Respondent points to Clause 16 of the Facility Agreement dated 30 June 2014 among BES (acting through its Luxembourg branch), Oak Finance Luxembourg (the original lender), and a New York bank (as agent), which required BES to give its consent to an assignment or transfer by the lenders, absent certain conditions such as an "Event of Default" by BES. The Respondent contends that the assignment of credits in February 2015 by Oak Finance Luxembourg to the Noteholders (Elliott International, The Liverpool Partnership, and Silver Point Luxembourg) lacked BES's consent, and thus was made in violation of Portuguese law.[24]

26. The Respondent denies the occurrence of an "Event of Default" negating the need for BES's consent to the transfer.[25] The Respondent argues that the Bank of Portugal had exempted BES from timely performance of previously contracted obligations, thereby precluding any contractual violation arising from BES's failure to pay under the Oak Loan.[26] Accordingly, there was no Event of Default and BES was required to give its consent to the assignment. The failure to have obtained such consent, the Respondent argues, renders the Claimants'

[21] Request, para. 48.

[22] Request, paras. 48-53.

[23] Request, paras. 57-58, 70.

[24] Request, paras. 59-70.

[25] Request, paras. 59-61.

[26] Request, paras. 62-68.

investments unlawful and hence outside the Tribunal's jurisdiction.[27]

iv. The Fourth Objection

27. The Respondent argues that the Tribunal lacks jurisdiction *ratione temporis* because the Claimants acquired their alleged investments after the dispute had already arisen.[28]

28. The Respondent observes that acts committed by a State preceding a claimant's investment cannot constitute a violation of the BIT.[29] The key measures taken by Portugal in the resolution process and liquidation proceeding (which the Claimants identify as the underlying causes of the present dispute) occurred in 2014 and 2015, before the Claimants acquired their rights and interests, in March and April 2016. Accordingly, the allegedly wrongful acts of the Respondent had already occurred, and the Parties' dispute had already arisen, before the Claimants made their investment. The Tribunal thus lacks jurisdiction *ratione temporis*.[30]

v. The Fifth Objection

29. The Respondent alleges that the Tribunal lacks jurisdiction because the Claimants committed an abuse of process by initiating a corporate restructuring with the aim of benefiting from BIT protection at a time when the dispute already existed or was reasonably foreseeable.[31]

30. The Respondent asserts that Claimants' alleged investments amount to a mere redistribution of assets within affiliated companies to manipulate corporate nationality "with the abusive intent of artificially pursuing international arbitration under the BIT."[32] According to the Respondent, the Claimants' "abuse of process" precludes the Tribunal from exercising jurisdiction over the dispute.[33]

---

[27] Request, paras. 65-68. For completeness, the Respondent adds that the Bank of Portugal has raised the illegality of the transfers made by Oak Finance in ongoing administrative proceedings in Portuguese courts. *See* Request, para. 69.

[28] Request, paras. 71-84.

[29] Request, paras. 71-72.

[30] Request, paras. 74-84.

[31] Request, paras. 85-90.

[32] Request, para. 91.

[33] Request, paras. 91-96.

vi. The Sixth Objection

31. The Respondent argues that the fork-in-the-road provision in Article 9(2) of the BIT bars jurisdiction over the Claimants' claims.[34] The Respondent explains that this provision prevents a claimant that has sought recourse in domestic courts of the host State from raising the same claim in an ICSID arbitration. The Respondent urges the Tribunal to adopt the "fundamental basis" approach when analyzing whether the claims are barred as duplicative,[35] that is, if the facts and grounds of the claim in the ICSID proceeding are fundamentally the same as those in the domestic court proceeding, then the fork-in-the-road provision operates to deprive the Tribunal of jurisdiction.[36]

32. According to the Respondent, the primary factual and legal grounds of the ICSID dispute (the "no creditor worse off" payment obligations and BES's bankruptcy) are fundamentally the same as those in the courts in Portugal. Because the Claimants initially elected to bring their dispute to Portuguese courts, this Tribunal is precluded from exercising jurisdiction over the Claimants' claims.[37]

2. The Objections dispose of the Claimants' claims entirely

33. According to the Respondent, its six Objections are "substantial and far from frivolous,"[38] and each one, if successful, would lead to the dismissal of all the Claimants' BIT claims.[39]

34. The Respondent suggests that it would be unjust, inefficient, costly, and time-consuming to require a State to defend itself on the merits of claims in the face of such challenges to the Tribunal's jurisdiction.[40]

---

[34] Request, paras. 97-107.

[35] Request, paras. 98-101.

[36] Request, paras. 100-101, relying *inter alia* on *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Excerpts of the Award, 6 May 2014, para. 368, (**RL-0044**).

[37] Request, paras. 102-107.

[38] Request, para. 117.

[39] Request, paras. 118, 121.

[40] Request, paras. 119-122.

3. The Objections are not intertwined with the merits

35. The Respondent argues that bifurcation is warranted when a tribunal can examine preliminary objections to jurisdiction without having to enter into the merits of the case.[41] The Respondent asserts that its Objections are distinct from the merits and can be adjudicated without assessing substantive questions of merits.[42]

36. The Respondent argues that bifurcation is warranted even if there may be some degree of overlap of issues relating to jurisdiction and merits.[43] The key consideration, it contends, is whether resolving the preliminary objections requires a decision on the subject matter of the case, which the Respondent's Objections do not.[44]

4. Bifurcation promotes efficiency and justice

37. The Respondent argues that bifurcation, if granted, will promote procedural efficiency and significantly reduce the time and costs of the proceeding.[45] Bifurcation, it argues, will also protect the State's fundamental right to seek early dismissal of an abusive claim, deterring similar such claims.[46]

38. Bifurcation, the Respondent concludes, "represents the most equitable, efficient, and just way to proceed in this matter."[47]

B. THE CLAIMANTS' POSITION

1) Introduction

39. The Claimants ask the Tribunal to deny the Request because the Respondent failed to demonstrate that bifurcation would serve the overarching consideration of procedural

[41] Request, paras. 123-125.

[42] Request, para. 127.

[43] Request, para. 126.

[44] Request, paras. 126, 129.

[45] Request, paras. 131-133.

[46] Request, paras. 135-138.

[47] Request, para. 139.

efficiency.[48] The Claimants consider that granting bifurcation would result in "manifest inefficiencies, including unnecessary delays and additional costs, and cause unwarranted prejudice to the Claimants and the resolution of their claim."[49] They argue that the Respondent has failed to demonstrate that its Objections will dispose of all or a substantial portion of the dispute. And they stress that a number of the Respondent's Objections are factually and legally intertwined with the merits of the Claimants' claims.[50]

40. The Claimants take note of certain jurisprudence on bifurcation under the 2006 ICSID Rules, which considered whether a respondent's jurisdictional objections were *prima facie* "substantial."[51] The Claimants consider the Respondent's Objections legally and factually flawed.[52]

2) Legal standard and absence of presumption in favor of bifurcation

41. The Claimants observe that the Tribunal's power to bifurcate proceedings stems from Article 41(2) of the ICSID Convention and Rule 44 of the 2022 Rules.[53]

42. The Claimants agree on the three key considerations for deciding a request for bifurcation, namely whether (1) bifurcation would materially reduce the time and cost of the proceeding; (2) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and (3) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.[54]

43. The Claimants add that ICSID tribunals have discretion to bifurcate jurisdictional objections, but "there is no presumption in favour of bifurcation."[55] Rather, the Respondent, as the moving Party, the Claimants contend, "bears the burden of demonstrating that considerations of

[48] Answer, para. 3.

[49] Answer, paras. 4, 6.

[50] Answer, para. 7.

[51] Answer, paras. 35-36.

[52] Answer, para. 36.

[53] Answer, para. 8.

[54] Answer, para. 8.

[55] Answer, para. 9.

procedural efficiency override the Claimants' right to a timely resolution of their BIT claims[.]"[56]

44. For the Claimants, ICSID jurisprudence clearly establishes "procedural efficiency" as the overarching consideration in determining whether to bifurcate jurisdictional objections.[57] The Claimants state that "[t]he Respondent has failed to demonstrate any such efficiencies here, and has failed altogether to address the procedural *inefficiencies* that would more likely follow from any bifurcation."[58]

3) Bifurcation should not be granted in the present dispute

1. The Respondent's six Objections

45. The Claimants have responded in summary form to the Respondent's six Objections to jurisdiction, subject to elaboration in the Claimants' counter-memorial on jurisdiction.

i. The First Objection

46. The Claimants dispute that their "main office" is outside of Mauritius and, as such, are not covered "investors" under the BIT. The Claimants assert that the Respondent erroneously places Claimants' main office outside of Mauritius by applying the "effective management" test out of context and contrary to investment treaty jurisprudence.[59]

47. The Claimants dispute the need for a "substantive connection" between a legal entity and the State of its incorporation to qualify as an investor under the BIT.[60] The Respondent's attempt to read such a requirement into the BIT is contrary to the rules of treaty interpretation.

48. The Claimants favor the "pragmatic and flexible" approach adopted by some tribunals when applying the "effective management" test to companies whose business activities are limited

[56] Answer, para. 9.

[57] Answer, paras. 12-14.

[58] Answer, paras. 10-11.

[59] Answer, paras. 37-38.

[60] Answer, para. 39.

to holding financial investments.[61]

49. The Claimants further reject the relevance of the joint interpretative statement of Mauritius and India concerning the Mauritius-India BIT. That statement, the Claimants argue, concerns a treaty to which Portugal is not a party and which defines "investor" without reference to the terms "main office" or "*sede*."[62]

50. Finally, the Claimants submit that the Respondent's application of the facts to the effective management test is erroneous and contradicted by the evidence.[63] The Claimants note that (1) their primary activity is owning financial investments, which does not involve physical operations or an extensive office or workforce; (2) they held board meetings at their registered offices in Mauritius (with some individuals attending in person and others joining by telephone); (3) they adopted necessary board resolutions approving the acquisition of their investments; and (4) they paid substantial cash consideration for their investments.[64] For the Claimants, their "effective management" clearly is in Mauritius, and no alternative place has been suggested by the Respondent.[65]

ii. The Second Objection

51. The Claimants reject the argument that they do not hold a protected investment under the BIT and the ICSID Convention for five principal reasons.[66]

52. First, the Respondent has improperly transformed the typical characteristics of an "investment" into a mandatory checklist of essential factors.[67]

53. Second, the Respondent misapplies a "substantial contribution requirement" for investments, including by erroneously assuming that capital contributed by an investor must flow directly

[61] Answer, para. 41.

[62] Answer, para. 40.

[63] Answer, paras 42-43.

[64] Answer, para. 42.

[65] Answer, para. 43.

[66] Answer, paras. 44-45.

[67] Answer, para. 46.

from the home State into the host State. According to the Claimants, tribunals have confirmed that the relevant inquiry for financial instruments is identifying who ultimately benefited from the invested funds.[68] To that end, the payment of a sum of money representing financial interests towards an investment, such as interests in the Oak Loan, would qualify as a protected investment even if the funds did not flow directly into the host State.[69]

54. Third, the Claimants' "intra-group transfers" are protected investments.[70] The Claimants contend that "an investor can acquire legitimately a protected investment for consideration via a legitimate intra-group transaction, at a time when the specific dispute under the BIT is not foreseeable."[71]

55. Fourth, financial transactions or instruments do not require a link between the investor's contribution and an "economic operation" in the host State in order to qualify as a protected investment under the BIT.[72]

56. Fifth, the BIT does not require an "active relationship" between the investment and the investor. The Respondent's claim to the contrary is not supported by the language of the BIT or relevant jurisprudence.[73]

57. The Claimants also deny the Respondent's factual allegations, explaining that each Claimant paid substantial cash consideration for their interests in the USD 834 million Oak Loan. The Claimants observe that the Oak Loan was given to a "systemically important bank in Portugal," resulting in "a substantial contribution to the Portuguese banking sector and economy."[74] The Claimants' interests in the Oak Loan thus constitute "contributions" in Portugal and qualify as "investments" under the BIT.[75]

[68] Answer, para. 47.

[69] Answer, para. 48.

[70] Answer, para. 49.

[71] Answer, para. 49.

[72] Answer, para. 50.

[73] Answer, para. 51.

[74] Answer, para. 54.

[75] Answer, paras. 52-54.

iii. The Third Objection

58. The Claimants reject the argument that their investments were not made in accordance with the laws and regulations of Portugal.[76] The Claimants make three legal arguments.

59. First, "legality" clauses such as Article 1(1) of the BIT "target only significant breaches of local law" that cause "particular detriment to the host State," which the Respondent has not alleged in the present dispute.[77]

60. Second, the Respondent failed to particularize any "general principle of international law" depriving the Claimants of BIT protection, or any illegality going to the "essence of the investment" warranting the loss of investment protection.[78]

61. Third, the Respondent "ignores the consistent line of jurisprudence confirming that a host State may be estopped from invoking illegality in an arbitration if the State has—as Portugal has here—failed to raise any objection regarding the investor's purported failure to comply with the local law for a period of time."[79]

62. The Claimants also dispute the facts underlying the Respondent's argument that the assignment agreement entered into by Oak Finance and the Noteholders without BES's consent did not comply with Portuguese law.[80]

63. In brief, the Claimants contend that the first installment payment under the Facility Agreement was not made on time, thus triggering an Event of Default and negating the agreement's consent requirement.[81] The Claimants reject the Respondent's argument that non-payment did not constitute an Event of Default by virtue of a decision of the Bank of Portugal issued after BES was placed in resolution. The Bank of Portugal's "moratorium" imposed a stay on BES's activities and exempted BES from the "timely fulfillment" of its "previously contracted

[76] Answer, paras. 55-56.

[77] Answer, para. 57.

[78] Answer, para. 58.

[79] Answer, para. 59.

[80] Answer, paras. 60-61.

[81] Answer, para. 62.

obligations."[82] But even if this moratorium exempted BES from its repayment obligations under the Facility Agreement, the bank's non-payment nonetheless triggered an Event of Default under the contract.[83]

64. The Claimants further observe that the Facility Agreement and assignments are governed by English law.[84] Thus, even assuming BES failed to give the required consent under the Facility Agreement, that could only show that Claimants acquired their investments in violation of a contractual provision governed by English law.[85]

65. In any event, the Claimants consider that the failure to obtain any required consent from BES would constitute a minor infraction for which the Respondent has claimed no prejudice.[86] Any such infraction is far from the "fundamental" or "significant" illegality that might be required to deny the Claimants protection under the BIT.[87]

66. Finally, the Claimants consider that BES's subsequent conduct vis-à-vis the Claimants constitutes consent to the assignments and relinquishment of any requirement of prior consent.[88] The Respondent is also estopped from asserting the invalidity of the assignments by virtue of the Bank of Portugal's apparent failure to raise any allegations regarding the invalidity of the assignments for over seven years, until after the Claimants had filed their Notice of Dispute in this arbitration.[89]

iv. The Fourth Objection

67. The Claimants reject the Respondent's argument that the Tribunal lacks jurisdiction *ratione temporis* because the Claimants acquired their investments after the dispute arose.[90]

[82] Answer, para. 61.

[83] Answer, para. 61.

[84] Answer, para. 64.

[85] Answer, para. 64.

[86] Answer, para. 65.

[87] Answer, para. 65.

[88] Answer, para. 66.

[89] Answer, para. 67.

[90] Answer, paras. 68-69.

68. According to the Claimants, the Tribunal needs to determine whether the "facts and considerations" that gave rise to a dispute between the Claimants' affiliated entities and Portugal prior to the Claimants' acquisition of their investments "continued to be central" to the Claimants' subsequent dispute under the BIT.[91]

69. For the Claimants, the present dispute concerns the Respondent's failure to afford the Claimants their valuable "no creditor worse off" (NCWO) rights following the Claimants' acquisition of their investments.[92] The Claimants stress that they "do not challenge or dispute in this arbitration Portugal's Resolution Measures" or its "decision to keep the Oak Loan in BES (i.e., in the bad bank)."[93] The Claimants thus conclude that "facts and considerations" from disputes predating their investments are not a part of, let alone central to, the present dispute.[94] Accordingly, the Respondent's Objection to jurisdiction *ratione temporis* must fail.

v. The Fifth Objection

70. The Claimants reject as "misleading and incomplete" the Respondent's argument that the Tribunal should decline jurisdiction because the Claimants committed an "abuse of process" through "manipulation of corporate nationality" at a time when the dispute already existed or was reasonably foreseeable.[95]

71. The Claimants make five points in support of their position: (1) the threshold for abuse of process is high;[96] (2) the restructuring of investments to gain access to ICSID arbitration through a BIT is "a perfectly legitimate goal as far as it concerned future disputes";[97] (3) tribunals typically seek to determine whether the dispute was foreseeable when the claimant acquired its investment; (4) the "specific dispute" under the BIT—not just any generic

[91] Answer, para. 70.

[92] Answer, paras. 71-72.

[93] Answer, para. 72.

[94] Answer, para. 71.

[95] Answer, paras. 74-75.

[96] Answer, para. 75.

[97] Answer, para. 75, relying on *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, 10 June 2010, para. 204, (**CL-0162**).

dispute—must be foreseeable;[98] and (5) the specific dispute must be foreseeable "with a degree of certainty in order to constitute an abusive restructuring."[99]

72. The Claimants consider that the "specific" dispute under the BIT concerns the Claimants' NCWO entitlements and rights. When the Claimants acquired their investments in 2016, they could not reasonably have known how the BES liquidation process and associated NCWO process would proceed.[100] The Claimants thus could not have foreseen the present dispute at the time of their investments and, accordingly, there has been no abuse of process.[101]

vi. The Sixth Objection

73. The Claimants reject the Respondent's argument that their claims are barred by the fork-in-the-road provision provided for in Article 9(2) of the BIT.[102] The Claimants urge the Tribunal to interpret the provision under the "triple identity test" rather than the "fundamental basis test" relied upon by the Respondent. Under the triple identity test, a fork-in-the-road provision will bar a treaty claim if the domestic and international proceedings are (1) between the same parties; (2) have the same cause of action; and (3) have the same object.[103]

74. The Claimants argue that the present dispute does not satisfy the triple identity test because there are no proceedings in Portuguese courts "between the Claimants and Portugal concerning Portugal's violations of the standards of protection under the BIT, for which the Claimants request compensation under the customary international law standard."[104]

75. The Claimants further argue that the Respondent's Objection would fail even if the Tribunal applied the fundamental basis test, given the important differences between the domestic court proceedings and the treaty arbitration. The domestic court proceedings "principally concern the Bank of Portugal's misconduct in connection with its decisions purporting to transfer the

[98] Answer, para. 75.

[99] Answer, para. 75.

[100] Answer, paras. 76-77.

[101] Answer, para. 78.

[102] Answer, para. 79.

[103] Answer, paras. 79-80.

[104] Answer, para. 81.

Oak Loan" to BES, whereas the treaty arbitration concerns Claimants' NCWO rights.[105]

2. Bifurcation would not "materially reduce the time and cost" of the proceedings and would cause substantial delays

76. The Claimants reject the Respondent's argument that bifurcation would materially reduce the time and cost of the proceedings. The Claimants observe that the procedural calendar in this case provides only a five-month difference between a hearing on the Respondent's jurisdictional Objections in a bifurcated scenario and a hearing on jurisdiction, merits, and quantum in a non-bifurcated scenario.[106] The proximity of these alternative hearing dates, coupled with the anticipated "limited witness and expert evidence involved in the merits phase," demonstrate that bifurcation would not materially reduce the time and cost of the arbitration in the present dispute.[107] The Claimants further observe that ICSID tribunals routinely decline to bifurcate proceedings where doing so would result in a limited time saving (between five and twelve months).

77. The Claimants also consider that bifurcation would inevitably increase the risk of a lengthy delay in completing the case over two phases, while imposing additional costs on the Parties.[108] That the case is not complex on the merits and compensation, with limited documentation and expert and witness evidence, further weighs against bifurcation.[109]

3. The Objections are intertwined with the merits of the case and render bifurcation impractical

78. The Claimants reject the Respondent's argument that its Objections are distinct from the merits.

79. The Claimants argue that a jurisdictional objection is not intertwined with the merits if it

[105] Answer, para. 82.

[106] Answer, para. 15.

[107] Answer, para. 16.

[108] Answer, paras. 19-20.

[109] Answer, paras. 21-23.

concerns a self-contained, limited set of facts different from those relating to the merits.[110] The Claimants reject the Respondent's argument that a jurisdictional objection is intertwined with the merits if it requires "an analysis and determination of the substantive merits of the case."[111]

80. For the Claimants, there is clearly overlap in the facts relevant to some of the Respondent's Objections to jurisdiction (namely those relating to jurisdiction *ratione materiae* and *ratione temporis*, and abuse of process) and the facts relevant to the merits of the case.[112] The Claimants explain that assessing the Objections would inevitably entail examining factual elements relating to the merits. This risks the duplication of arguments and evidence in both phases of the proceeding,[113] rendering bifurcation impractical.[114]

4. The Objections, if successful, would not dispose of all or a substantial portion of the dispute

81. The Claimants reject the Respondent's argument that bifurcating the Objections would largely or wholly dispose of the dispute. The Claimants observe that the Tribunal must determine its jurisdiction with respect to each Claimant independently, assessing each Claimant's unique facts and circumstances.[115] The Respondent thus wrongly assumes that each of its Objections, if successful, would result in the dismissal of all of the Claimants' BIT claims.[116]

[110] Answer, para. 29, relying on *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020, para. 43, (**CL-0151**).

[111] Answer, paras. 30-32.

[112] The Claimants consider that those Objections cannot be determined by the Tribunal without identifying the scope, nature and significance of the Claimants' NCWO and other rights as holders of interests in the Oak Loan, which are central issues for the merits phase. Answer, para. 33.

[113] Answer, para. 33.

[114] Answer, para. 34.

[115] Answer, paras. 24-27.

[116] Answer, para. 26.

III. ANALYSIS

82. The Respondent asks the Tribunal to bifurcate the proceeding and decide the Respondent's Objections as preliminary questions. The Respondent has submitted its Request in accordance with the procedure and timetable established by the Tribunal, in consultation with the Parties, in PO1.

83. The Tribunal has carefully reviewed and considered the Respondent's Request, and the Claimants' Answer, as summarized above. The Tribunal's decision is necessarily based on a preliminary assessment of the Parties' claims and Objections. The Tribunal's decision does not reflect its views on the merits of the Respondent's Objections or the merits of the Claimants' claims in this arbitration.

A. LEGAL STANDARD

84. The BIT is silent on the Tribunal's authority to bifurcate the proceeding or decide jurisdictional objections as preliminary questions. The Respondent's Request thus is governed only by the ICSID Convention and the current ICSID Arbitration Rules (2022).

85. Article 41(2) of the ICSID Convention provides:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

86. Rule 42 of the ICSID Arbitration Rules provides in part:

> (1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").
>
> (2) If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.

87. Rule 44 of the ICSID Arbitration Rules establishes the standard governing an ICSID tribunal's decision on a request for bifurcation relating to a preliminary objection. Rule 44(2) provides:

> In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

88. The Parties agree that the ICSID Convention and ICSID Arbitration Rules afford the Tribunal the authority to bifurcate the proceeding and to decide the Respondent's Objections as preliminary questions or to join them to the merits of the dispute.

89. The Tribunal accepts that there is no presumption in favor of bifurcation under the ICSID Convention and ICSID Arbitration Rules. Rather, the Tribunal's decision requires it to take into account all relevant circumstances in deciding whether to bifurcate the proceeding and to decide the Respondent's Objections as preliminary questions.

90. The Tribunal thus turns to the factors identified in ICSID Arbitration Rule 44, as addressed by the Parties.

B. APPLICATION OF THE CRITERIA IDENTIFIED IN RULE 44

1) Does bifurcation materially reduce the time and cost of the proceeding?

91. The Respondent argues that bifurcating the proceeding will promote efficiency, as litigating issues of merits and quantum necessarily will be expensive, burdensome, and time-consuming. The Claimants disagree, arguing that bifurcation would not save significant time under the existing procedural calendar, and, if the Request is unsuccessful, would cause additional delays and increase the cost of the proceeding.

92. The Tribunal accepts that the potential time and cost savings of bifurcation may be less significant in this case than in cases that are more complex in terms of submissions, documents, witness and expert testimony, and issues to be evaluated.

93. As the Tribunal recognizes below, however, each of the Respondent's jurisdictional Objections could eliminate the need for further proceedings relating to the merits, or at least narrow the scope of issues of merits and quantum requiring briefing and decision. This could, in the Tribunal's view, result in a material reduction in the time and cost of the proceeding.

2) Does bifurcation likely dispose of all or a substantial portion of the dispute?

94. According to the Respondent, each of its six Objections, if successful, "would result in the dismissal of all of Claimants' BIT claims."[117] It states:

> There is no doubt that Respondent's jurisdictional objections would dispose of the case in its entirety. Should the Tribunal find that it does not have jurisdiction *ratione personae*, *ratione materiae*, *or ratione temporis*, then all of Claimants' claims would have to be dismissed. Similarly, if the Tribunal finds that Claimants engaged in an abuse of process or triggered the fork-in-the-road provision, that would require it to reject all of Claimants' claims. There would be nothing left for the Tribunal to consider.[118]

95. The Claimants dispute that each of the Respondent's Objections, if successful, would result in the dismissal of all of the Claimants' claims. The Claimants suggest that the Respondent has failed to account for the possibility that one or more of its Objections may succeed with respect to one or more of the Claimants but fail for the others. The Claimants state, "it is entirely possible that the Tribunal will decide to exercise jurisdiction over some of the Claimants but not over others (for example, because the relevant facts may be different for the different Claimants), or one set of claims but not for others."[119]

96. The Tribunal considers below whether each of the Respondent's six jurisdictional Objections would likely dispose of all or a substantial portion of the dispute.

97. *First Objection*. The Respondent argues that the Claimants are not covered "investors" under Article 1(3) of the BIT. If the Respondent's Objection is accepted, the Tribunal would lack

[117] Request, para. 118.

[118] Request, para. 121.

[119] Answer, para. 27.

jurisdiction *ratione personae* over some or all of the Claimants. This would likely dispose of all or a substantial portion of the dispute.

98. *Second Objection*. The Respondent argues that the Claimants do not have a protected investment under Article 1(1) of the BIT and Article 25(1) of the ICSID Convention. If the Objection is accepted, the Tribunal would lack jurisdiction *ratione materiae* over some or all of the Claimants' claims. This would likely dispose of all or a substantial portion of the dispute.

99. *Third Objection*. The Respondent argues that the Claimants acquired their purported investments in violation of the laws and regulations of Portugal. If the Objection is accepted, the Tribunal would lack jurisdiction *ratione materiae* over some or all of the Claimants' claims. This would likely dispose of all or a substantial portion of the dispute.

100. *Fourth Objection*. The Respondent argues that the Claimants acquired their purported investments after the dispute had arisen. If the Objection is accepted, the Tribunal would lack jurisdiction *ratione temporis* over some or all of the Claimants' claims. This would likely dispose of all or a substantial portion of the dispute.

101. *Fifth Objection*. The Respondent argues that the Claimants committed an abuse of process by acquiring their purported investments with the purpose of gaining access to the protections of the BIT after the dispute had arisen or was reasonably foreseeable. If the Respondent's Objection is accepted, the Tribunal would lack jurisdiction over some or all of the Claimants' claims. This would likely dispose of all or a substantial portion of the dispute.

102. *Sixth Objection*. The Respondent argues that the Claimants initiated proceedings before the Portuguese courts, thereby precluding its Treaty claims under the BIT's fork-in-the-road provision. If the Objection is accepted, the Tribunal would lack jurisdiction over some or all of the Claimants' claims. This would likely dispose of all or a substantial portion of the dispute.

103. The Tribunal observes that the Respondent's Objections, as pleaded, are not frivolous. The Respondent offers factual and legal support for its Objections, with citations to awards and decisions it claims in support. Although the Claimants reject the Respondent's Objections as legally and factually flawed, the Claimants' Answer confirms that the Objections, although vigorously contested, are substantial and not frivolous.

104. The Tribunal thus accepts that each of the Respondent's Objections, if accepted, would likely dispose of all or a substantial portion of the dispute.

3) Is bifurcation impractical because the Objections are intertwined with the merits?

105. The Respondent argues that each of its Objections may be resolved independently from the merits, as each Objection concerns "factual issues that are simply not within the perimeter of Claimants' case."[120] The Respondent observes that if any Objection is joined to the merits, the "remaining objections, which are each independent, would continue to call for bifurcation on their own merits."[121]

106. The Claimants disagree, arguing:

> There is clearly overlap in the facts relevant to certain of the Respondent's objections to jurisdiction and the facts relevant to the merits of the case. This is most obvious in connection with the Respondent's *ratione temporis* and *ratione materiae* ("investment") objections and its objection based on allegations of "abuse of process". Those objections cannot be determined by the Tribunal without identifying the "scope, nature and significance" of the Claimants' NCWO and other rights as holders of interests in the Oak Loan, which will also be central issues for the merits phase. As a result, an assessment of those objections would entail an examination of factual elements relating to the merits, and the risk of duplication of arguments or evidence in both phases of the proceeding.[122]

107. The Tribunal considers below whether each of the Respondent's six Objections is intertwined with the merits so as to make bifurcation impractical.

108. *First Objection*. The Respondent argues that the Tribunal does not need to enter into the merits to decide whether the Claimants can be considered "investors" under the BIT. The Claimants do not expressly disagree with the Respondent's contention. Based on the evidence and arguments before it, the Tribunal does not see substantial overlap between the issue of whether the Claimants are protected investors and the merits of the case. All issues concerning the

[120] Request, para. 128.

[121] Request, para. 130.

[122] Answer, para. 33.

interpretation of Article 1(3)(b) of the BIT, in particular its requirement for a "main office" or "*sede*" in the state of nationality, and the application of this provision to the factual circumstances of each Claimant are *prima facie* unrelated to the legal and factual issues concerning the Claimants' claims on the merits. The Tribunal thus does not consider that the Respondent's First Objection is intertwined with the merits so as to make bifurcation impractical.

109. *Second Objection*. The Respondent argues that the Tribunal does not need to enter into the merits to decide whether the Claimants have made a protected investment. The Claimants disagree, arguing that that issue "cannot be determined by the Tribunal without identifying the 'scope, nature and significance' of the Claimants' NCWO and other rights as holders of interests in the Oak Loan, which will also be central issues for the merits phase."[123] The Claimants define their "investments" as their interests in the Oak Loan. The Claimants characterize the merits of their claims as follows:

> The dispute under the BIT concerns only what Portugal should have done (and what it manifestly failed to do) vis-à-vis the Claimants' rights to NCWO payments in the months and years that followed the Claimants' acquisition of their investments. The Claimants case on these issues will succeed or fail on questions of merits, not on questions of jurisdiction.[124]

110. Based on the evidence and arguments before it, the Tribunal does not see substantial overlap between the issue of whether the Claimants' debt interests constitute protected "investments" and the Respondent's alleged acts and omissions concerning NCWO payments. More specifically, all issues concerning whether the Claimants' claimed interests in the Oak Loan qualify as "investments" under Article 1(1) of the BIT and Article 25(1) of the ICSID Convention are *prima facie* unrelated to issues concerning the Respondent's alleged mistreatment of those interests, and hence to Claimants' claims on the merits. The Tribunal thus does not consider that the Respondent's Second Objection is intertwined with the merits so as to make bifurcation impractical.

[123] Answer, para. 33.

[124] Answer, para. 72.

111. *Third Objection*. The Respondent argues that the Tribunal does not need to enter into the merits to decide whether the Claimants acquired their alleged investments lawfully. The Claimants do not expressly disagree with the Respondent's contention. As noted, the Claimants stress that the present dispute concerns only the Respondent's acts and omissions vis-à-vis the Claimants' rights to NCWO payments. Based on the evidence and arguments before it, therefore, the Tribunal does not see substantial overlap between the issue of whether the Claimants acquired their investments lawfully in the sense of Article 1(1) of the BIT (specifically, whether the Facility Agreement required BES to consent to the assignment of any interest in the Oak Loan, and whether the lack of such consent resulted in a breach of the legality clause in Article 1(1) of the BIT) and the Respondent's subsequent acts and omissions concerning NCWO payments. The Tribunal thus does not consider that the Respondent's Third Objection is intertwined with the merits so as to make bifurcation impractical.

112. *Fourth Objection*. The Respondent argues that the Tribunal does not need to enter into the merits to decide whether the Claimants acquired their alleged investments after the Parties' dispute had already arisen. The Respondent considers that "the allegedly wrongful acts attributed by Claimants to Respondent in the present proceedings (including the application of the 2014 Banking Law) had already occurred and were disputed by Claimants' controlling entities long before their alleged acquisition of their purported investments in March and April 2016."[125] The Claimants disagree, arguing that the issue of whether their investments predate the dispute "cannot be determined by the Tribunal without identifying the 'scope, nature and significance' of the Claimants' NCWO and other rights as holders of interests in the Oak Loan, which will also be central issues for the merits phase."[126]

113. The Parties have a different understanding of their "dispute." The Claimants center the dispute on the Respondent's acts and omissions vis-à-vis the Claimants' rights to NCWO payments in the period following the Claimants' acquisition of their investments.[127] The Respondent, by contrast, finds the "underlying causes" of the dispute in a series of earlier measures adopted by

[125] Request, para. 81.

[126] Answer, para. 33.

[127] Answer, para. 72.

Portugal, principally including the "decision to enter BES into resolution," the "decision adopted by the Bank of Portugal regarding whether the Oak Loan would be transferred" to Novo Banco, S.A., and the "application of the 2014 Banking Law to the subsequent decisions of the Bank of Portugal and to the resolution process."[128]

114. The Tribunal is not convinced that its analysis of the Respondent's Fourth Objection necessarily would require it to determine Claimants' substantive claims concerning NCWO payments. In the Tribunal's view, it is *prima facie* possible to determine when the Respondent's allegedly wrongful acts occurred, and to relate those acts to the timing of the Claimants' acquisition of their alleged investments, independently of determining the content of the Claimants' alleged NCWO rights and their treatment by the Respondent. If the Parties' arguments and evidence subsequently reveal that the Tribunal, while addressing the legal significance of these issues, may have to address evidence concerning the substance of the Claimants' alleged NCWO rights, the Tribunal reserves the right to join this Objection to the merits. At present, however, the Tribunal does not consider that the Respondent's Fourth Objection is intertwined with the merits so as to make bifurcation impractical.

115. *Fifth Objection.* The Respondent argues that the Tribunal does not need to enter into the merits to decide whether the Claimants committed an abuse of process by manipulating their corporate nationality to pursue international arbitration under the BIT at a time when the dispute already existed or was reasonably foreseeable. The Claimants disagree, arguing that any alleged abuse of process "cannot be determined by the Tribunal without identifying the 'scope, nature and significance' of the Claimants' NCWO and other rights as holders of interests in the Oak Loan, which will also be central issues for the merits phase."[129] The Parties disagree on whether their dispute existed or was reasonably foreseeable when the Claimants acquired their interests in the Oak Loan to obtain the protections of the BIT and whether that acquisition hence constituted a mere redistribution of assets within affiliated companies to manipulate corporate nationality in an abusive manner. For the reasons set out above for the Fourth Objection, and with the same caveat, the Tribunal believes it can objectively determine

[128] Request, para. 76.

[129] Answer, para. 33.

whether the Parties' dispute predates the Claimants' acquisition of its interest in the Oak Loans, without having to address merits-related issues. If the Parties' arguments and evidence subsequently reveal the contrary, the Tribunal reserves the right to join this Objection to the merits. At present, however, the Tribunal does not consider that the Respondent's Fifth Objection is intertwined with the merits so as to make bifurcation impractical.

116. *Sixth Objection*. The Respondent argues that the Tribunal does not need to enter into the merits to decide its Objection that the Claimants' litigation in Portuguese courts triggered the BIT's fork-in-the road provision. The Claimants do not expressly allege that the Respondent's Sixth Objection is intertwined with the merits so as to make bifurcation impractical. On the contrary, the Claimants observe that "[n]one of these proceedings [in Portuguese courts] concerns the Claimants' NCWO rights."[130] Consequently, the interpretation of the fork-in-the-road provision in Article 9(2) of the BIT and its application to the facts of this case (namely to assess how the proceedings already brought in domestic courts relate to the dispute in the present arbitration proceeding) are *prima facie* unrelated to the Claimants' claims on the merits. The Tribunal thus does not consider that the Respondent's Sixth Objection is intertwined with the merits so as to make bifurcation impractical.

C. CONCLUSION

117. Considering all relevant factors, the Tribunal finds it appropriate to bifurcate the proceeding and decide the Respondent's Objections as preliminary questions.

118. This decision is subject to the Tribunal's discretion to join any of Respondent's Objections to the merits if deemed appropriate based on further arguments and evidence.

119. This decision is without prejudice to any later assessment of the merits of any Objection to the Tribunal's jurisdiction, the admissibility of the claims, or the claims themselves.

[130] Answer, para. 82.

IV. ORDER

120. For the reasons set out above, the Tribunal:

(1) Accepts the Respondent's Request for Bifurcation;

(2) Confirms that the Scenario with Bifurcation of the procedural calendar applies;

(3) Reserves for a later decision the costs associated with the Respondent's Request for Bifurcation.

On behalf of the Tribunal,

[Signature]

_____
Jeremy K. Sharpe
President of the Tribunal
Date: 1 March 2024