International Centre for Settlement of Investment Disputes

Case No. ARB/24/8

Ricardo Filomeno Duarte Ventura Leitão Machado (Portugal)

Claimant

c.

Republic of Angola

Respondent

CLAIMANT'S REJOINDER TO RULE 41 OBJECTION

27 March 2025

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List of defined terms

Aenergy	Aenergy, S.A.
Angola	The Republic of Angola
BIT	Bilateral investment treaty between the Republic of Portugal and the Republic of Angola, dated 22 February 2008, entered into force on 24 April 2020, and amended on 16 July 2021, with the amendment entering into force on 22 December 2021 (**Exhibit CLA-25**)
Claimant	Ricardo Filomeno Duarte Ventura Leitão Machado
Contracts	Thirteen contracts awarded by MINEA to Aenergy for the supply of power generation equipment, turbines, generators, transformers, rotors, other accessory equipment, consumables and spare parts for a total of USD 1,148,531,741
Credit Facility	Loan Agreement between Angola and GE Capital for the financing of the Contracts signed on 21 August 2017 (**Exhibit R-0001** [excerpt])
Four Turbines	Four GE TM2500 GEN8 turbines, with manufacturer codes MNG #7266027, #7267025, #7267575, and #7267577, and related equipment
FET	Fair and equitable treatment
FPS	Full protection and security
GE	General Electric Company
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965
IGAPE	*Instituto de Gestão de Activos e Participações do Estado* - Angola's Institute for the Management of the State's Assets and Shares

MINEA	Ministry of Energy and Water of Angola
Notice of Dispute	Notice of Dispute submitted by Mr Machado to Angola on 9 June 2022 (**Exhibit C-26**)
Parties	Claimant and Respondent
PRODEL	*Empresa Pública de Produção de Eletricidade*
Provincial Court of Luanda	Provincial Court of Luanda, Angola, Civil and Administrative Chamber, Second Division
Respondent	The Republic of Angola
Rule 41 Reply	Respondent's Reply on Manifest Lack of Legal Merit under Rule 41 submitted on 27 February 2025
Rule 41 Response	Claimant's Response to Rule 41 Objection submitted on 30 January 2024
Rule 41 Submission	Respondent's Submission on Manifest Lack of Legal Merit under Rule 41 submitted on 15 November 2024
VCLT	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969 (**Exhibit RL-0011**)

I. Introduction

1. Mr Machado has been clear from the beginning of these proceedings that this case is based on facts that occurred during 2022, *i.e.*, after the entry into force of the BIT[1] on 22 December 2021.[2]

2. Both Parties agree on the test and scope of the analysis to be applied by the Tribunal in Rule 41 proceedings: the Tribunal should focus on a legal analysis based on the facts *as alleged by the Claimant*, with the only exception of facts that are clearly unfounded, incredible, frivolous, vexatious, inaccurate, or made in bad faith.[3]

3. Angola criticises that Mr Machado "*is clearly trying to convert this Request into a factual discussion*".[4] However, Mr Machado agrees that there is no valid reason to introduce a factual discussion at this stage of the proceedings. It is Angola who introduced the factual discussion by maintaining that the Tribunal should disregard the Claimant's factual allegations made in these proceedings and replace them with different factual allegations made by the Respondent, on the grounds that the Respondent's version of the facts is allegedly more consistent with allegations made by Aenergy in different previous court proceedings.[5] The Respondent's self-contradictory position is well exemplified by the following statement, in which it first states that the discussion should be limited to legal aspects, only to immediately pivot and introduce a factual discussion:[6]

> *"A submission under Rule 41 is fundamentally a legal matter,* ***requiring the Tribunal to focus on legal issues*** *rather than on determining the facts. Therefore, the* ***Tribunal should not rely on the facts alleged by the Claimant*** *if they are clearly unfounded, incredible, frivolous, vexatious, inaccurate, or made in bad faith".*

4. Angola is well within its right to seek to introduce a factual discussion by disputing the facts alleged by Mr Machado but, to do so successfully in a Rule 41 objection, it bears the burden of showing that the facts alleged by the Claimant "*are clearly unfounded, incredible, frivolous, vexatious, inaccurate, or made in bad faith*". Specifically, Angola could have sought to persuade the Tribunal that it is manifest

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[1] The terms not defined herein shall have the meaning ascribed to them in the Claimant's Response to Rule 41 Objection submitted on 30 January 2024 (the "**Rule 41 Response**").

[2] **C-26**, Notification from Mr Machado to Angola for the amicable settlement of the dispute (with informal translation into English), 9 June 2022, pp. 44-45; Request for Arbitration, ¶¶39, 53-55; Claimant's Rule 41 Response, section III.B. All page references in this Rule 41 Rejoinder correspond to the pagination of the PDF file.

[3] Claimant's Rule 41 Response, ¶9; Respondent's Reply on Manifest Lack of Legal Merit under Rule 41 submitted on 27 February 2025 (the "**Rule 41 Reply**"), ¶20. Even the case law cited by Angola in its last submission confirms that this is the correct standard and approach: "[T]*he Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal*".

[4] Respondent's Rule 41 Reply, ¶17. *See also* Respondent's Rule 41 Reply, ¶¶74 and ff.

[5] Respondent's Rule 41 Reply, ¶22.

[6] Respondent's Rule 41 Reply, ¶75 (emphasis added).

that the Four Turbines were not installed in its power plants in 2022 but at some earlier point, thus showing that Mr Machado's allegation that this occurred in 2022 might be "*clearly unfounded, incredible, frivolous, vexatious, inaccurate, or made in bad faith*".

5. In contrast, Angola may *not* do either of the following:

   (i) Argue that the events of 2022, as alleged by the Claimant, do (manifestly) not constitute a breach of the BIT because some other prior or concurrent events speak against such finding. The assessment whether the facts alleged by the Claimant constitute a breach of the BIT is a merits question. But the Respondent has limited the scope of its Rule 41 objection to the Tribunal's *ratione temporis* jurisdiction.

   (ii) Redefine the subject-matter of the arbitration, *i.e.*, Angola may not ask the Tribunal to disregard the 2022 facts alleged by Mr Machado just because, in Angola's view, some other prior events are supposedly a better fit for the BIT breaches invoked by Mr Machado.

6. However, this is precisely what Angola has sought to do. At the same time, it has consistently failed to make even the slightest attempt to substantiate that the installation of the Four Turbines occurred before the entry into force of the BIT, although, if this were true, it is only Angola who could (easily) provide such information and evidence.

7. Worse still, it has become evident that Angola's vague allegations on the timing of the installation of the Four Turbines are not true. First, Angola asserted that "*the turbines were relocated to the sites where they were deployed, and commissioned in June 20th 2021*",[7] but now it asserts that "*Presidential Order No. 177/21, published on 26 October 2021* […], *authorized the initiation of a public procurement process for the '*(p)rovision of services for the dismantling, assembly, installation and commissioning of*' the Four Unsolicited Turbines in three different locations in Angola*",[8] that "*Presidential Order No. 177/21* […] *marks the moment when the decision to install the Turbines* […] *was made*",[9] and that "*without Presidential Order No. 177/21, the installation and deployment of the Four Unsolicited Turbines could never have taken place*".[10]

8. This of course begs the question: how could the Four Turbines have already been deployed and commissioned in June 2021, if, according to Angola, the decision to install the Four Turbines was only made in October 2021 and the procurement

[7] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶27, p. 13.
[8] Respondent's Rule 41 Reply, ¶57.
[9] Respondent's Rule 41 Reply, ¶13.
[10] Respondent's Rule 41 Reply, ¶58.

process for the provision of services for the deployment and installation of the Four Turbines followed thereafter? Indeed, the Respondent itself remarked on this incontestable logic in its Rule 41 Submission: "*the State's decision to install and use the Four Unsolicited Turbines must necessarily have taken place before* [the date at which installation and deployment took place]".[11]

9. Presidential Order No. 177/21 is not to be reconciled with Angola's vague accounts of the timing of the installation of the Four Turbines. However, it perfectly aligns with Mr Machado's allegation that the installation occurred around spring and summer of 2022, considering the steps necessary between initiation of the public procurement process for the installation services and the actual performance of those services.[12]

10. Instead of shedding some light on its inconsistent accounts, Angola has doubled down on (i) its conflation of two distinct situations (*i.e.*, the preventive seizure of the Four Turbines in 2019 and the removal of those turbines from judicial custody in 2022, by them being installed in Angola's power plants) and (ii) its use of incendiary language. The Respondent's tiresome inflationary use of value judgments fails to hide that they are utterly unfounded.

11. We will first set out that the Claimant's claims are not manifestly barred by article 2(1) of the BIT on the basis of the facts as alleged by the Claimant (Section II). Next, we shall show that there is no basis whatsoever for departing from the facts as alleged by the Claimant in the present proceedings or to replace those facts by different facts introduced by the Respondent. In particular, the Respondent may not reconfigure the Claimant's case by introducing supposedly contradictory factual allegations made in different proceedings (Section III). Then, we shall address the Respondent's belated argument that the Claimant manifestly lacks standing to bring some of his claims (Section IV). We are also compelled to address, again, certain factual issues that are irrelevant to this case but that the Claimant brings in an attempt to discredit the Claimant and to bolster its generic allegations of "bad faith" (Section V). Finally, we shall address the issue of the costs of the Rule 41 preliminary proceedings (Section VI).

[11] Respondent's Rule 41 Submission, ¶147.
[12] Claimant's Rule 41 Response, ¶42.

II. The Claimant's claims are not manifestly barred by article 2(1) of the BIT

A. Angola's attempt to unduly expand the effects of the principle of non-retroactivity must fail

1. Article 2(1) of the BIT simply restates the general principle of non-retroactivity

12. The general rule of interpretation set out in article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") provides that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[13] The ordinary meaning of the terms is key.

13. Article 2(1) of the BIT excludes from its scope "*disputes and/or claims arising from facts that occurred before its entry into force*". Nothing less, nothing more.[14]

14. Pursuant to article 28 of the VCLT on the non-retroactivity of treaties: "*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*".[15] Accordingly, unless the treaty provides otherwise, the Tribunal's jurisdiction is limited to acts or facts that occurred, or situations that continued to exist, after the BIT entered into force.

15. In its Rule 41 Submission, the Respondent admitted that "*Article 2(1) reflects the principle of the non-retroactivity of international treaties, a customary international rule*".[16] But it has failed to show why or how article 2(1) of the BIT

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[13] **RL-0011**, Vienna Convention on the Law of Treaties, 23 May 1969, article 31(1), p. 12.
[14] **CLA-25**, Consolidated text of the BIT (with informal translation into English), 22 December 2021, article 2(1), p. 17.
[15] **RL-0011**, Vienna Convention on the Law of Treaties, 23 May 1969, article 28, p. 11. ILC Draft Article 13 confirms a corollary of the same principle. Namely: "*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*". Moreover, non-retroactivity is qualified by the principle of good faith, which provides that States should not act in a way that defeats the object and purpose of a treaty after they have signed it, even if the treaty has not yet been ratified. To this end, it is worth noting that the BIT was signed on 16 July 2021. Thus, on 16 July 2021, Angola became bound by an obligation of good faith. *See* **RL-0012**, International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, article 13, p. 4. *See also* Claimant's Rule 41 Response, ¶¶203-204; **RL-0011**, Vienna Convention on the Law of Treaties, 23 May 1969, article 18, p. 8; **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶70, pp. 22-23; **CLA-3**, Revision of the Agreement between the Portuguese Republic and the Republic of Angola on the Promotion and Reciprocal Protection of Investments (with informal translation into English), 16 July 2021, p. 14.
[16] Respondent's Rule 41 Submission, ¶124.

would be any more restrictive than the general principle of non-retroactivity enshrined in article 28 of the VCLT.

16. Indeed, as the Claimant shall explain, the Respondent's strained interpretation of article 2(1) of the BIT is inconsistent with the ordinary meaning of the provision, defies common sense, and is contrary to the widely adopted approach taken by tribunals in relevant awards.

2. An interpretation of article 2(1) of the BIT, in accordance with the ordinary meaning of its terms, does not support the Respondent's expansive interpretation of non-retroactivity

a. The Respondent's "entanglement" argument seeks to artificially shift the focus away from the relevant criterion stipulated in article 2(1) of the BIT: the timing of the facts

17. Article 2(1) of the BIT specifically refers to disputes and claims "*arising from facts*" that pre-date the treaty's entry into force[17] ("*diferendos e/ou reclamações que resultem de factos ocorridos antes da sua entrada em vigor*"[18]). Thus, the restriction in article 2(1) of the BIT concerns the timing *of the facts* giving rise to the dispute or claims and is silent with regards to any previous disputes or claims involving the investment.

18. Despite the BIT's clear language, the Respondent maintains that, in order to interpret article 2(1) of the BIT, the reference object is the investment itself: investments that became "*tainted*" or "*entangled*" in disputes or in potential disputes are, in Angola's view, excluded from the BIT's protection.[19]

19. This is evidently not supported by the wording of the second sentence of article 2(1) of the BIT, which does not refer to the "*investment*", or still less, to investments that are somehow "*tainted*" or "*entangled*".

20. Angola's expansive interpretation also contradicts logic and common sense:

(i) The notion that a dispute may *arise from* (*resultar de*) facts that have not yet occurred makes no logical sense.

(ii) Moreover, the mere fact that an investment was, at a point in time before entry into force of the BIT, "*entangled*" in some dispute, cannot possibly render such investment forever excluded from protection from any future

[17] **CLA-25**, Consolidated text of the BIT (with informal translation into English), 22 December 2021, article 2(1), p. 17.
[18] **CLA-25**, Consolidated text of the BIT (with informal translation into English), 22 December 2021, article 2(1), p. 1.
[19] Respondent's Rule 41 Reply, ¶¶2, 26.

mistreatment by the State. Indeed, the tribunal in *Carrizosa v. Colombia* echoed this logic:[20]

> *"As an example, assume an ongoing dispute between State A and State B arising out of State A's pollution of a shared river. If the two States enter into a treaty that prohibits such environmental pollution, it would hardly be a valid defense for State A to argue that it should be allowed to continue polluting the river, because the dispute over the pollution arose prior to the treaty's entry into force".*

21. Thus, article 2(1) of the BIT is concerned with the timing of the facts giving rise to the dispute. The relevant facts, which the Claimant will further develop at a later stage of the proceedings, can be found in section III.B of the Claimant's Rule 41 Response and, with no exception, post-date the BIT's entry into force. As the Claimant explained in the Response,[21] and the Respondent chose to ignore in the Reply,[22] additional facts have been provided as background, or to refute specific allegations made by the Respondent, but such additional facts did not give rise to, nor do they constitute the basis of the Claimant's claims.[23]

b. The Respondent's "double exclusion" argument attempts to obscure the ordinary meaning of article 2(1) of the BIT

22. Similarly, the Respondent's contention that article 2(1) of the BIT "*establishes a reinforced criterion, namely a double-exclusion clause, which precludes the Tribunal's jurisdiction over both pre and post-Amended BIT disputes/claims based on pre-Amended BIT facts*" is not supported by the treaty language.[24] The BIT simply does not make qualifications regarding the timing of any disputes or claims involving the investment. It simply excludes disputes and claims arising from facts preceding its entry into force, without establishing any additional criteria.

23. On the basis of its "*double exclusion*" argument, the Respondent asserts that the legal authorities relied on by the Claimant should be distinguished from the present case. In particular, the Respondent points out that, "*while it is true that the BIT in* [*Carrizosa v. Colombia*] *also excludes any pre-treaty 'act or fact', it is silent on the exclusion of the pre-treaty disputes*".[25]

24. The argument is strange, considering that the Respondent was the one who introduced the *Carrizosa v. Colombia* case into the record, and relied on it in its Rule 41 Submission.[26] Be it as it may, the decision in *Carrizosa v. Colombia* does not bear the distinction the Respondent now seeks to establish. In that case, the

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[20] **RL-0013**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No ARB/18/5, Award, 19 April 2021, ¶137, p. 43.
[21] Claimant's Rule 41 Response, ¶26. *See* Request for Arbitration, ¶¶24-25.
[22] Respondent's Rule 41 Reply, ¶47.
[23] In this regard, see below, ¶¶62-63.
[24] Respondent's Rule 41 Reply, ¶28.
[25] Respondent's Rule 41 Reply, ¶28.
[26] Respondent's Rule 41 Submission, ¶126.

tribunal found that the relevant point in time was not the moment the *dispute* arose but the moment the *facts* giving rise to the dispute occurred:[27]

> *"The text of the TPA contains no temporal limitation with respect to disputes that may come under the Tribunal's jurisdiction. The language of Article 10.1.3 of the TPA, which reflects the customary international law principle of treaty non-retroactivity,* ***excludes any pre-treaty 'act or fact', but is silent on pre-treaty disputes****".*

25. On that point, the BIT is no different from the U.S.-Colombia TPA, as article 2(1) of the BIT is also silent on the timing of the dispute. Whilst article 2(1) of the BIT does exclude the application of the treaty to certain disputes, the timing of the emergence of the dispute itself is irrelevant. The only relevant criterion is the timing of the facts giving rise to the dispute, regardless of when the dispute itself emerged.

26. Moreover, the decision in *Carrizosa v. Colombia* makes clear, in no uncertain terms, that even a wide conception of the term "*dispute*" does not preclude claims grounded on post-treaty facts:[28]

> *"If, while the dispute is unfolding, a disputing State accedes to an international treaty, which prohibits a type of conduct that underlies the existing dispute, subsequent acts of the same type are not outside the treaty's scope of application simply because such acts may be deemed part of the existing dispute".*

27. As explained by the *Carrizosa* tribunal, the jurisdiction *ratione temporis* of the tribunal comes down to whether post-treaty facts "*give rise to a self-standing breach*" of the treaty.[29] This is precisely the Claimant's case, *i.e.*, that the facts constituting breaches of the BIT occurred after the treaty entered into force, and therefore, the Claimant's claims are not barred by the principle of non-retroactivity.[30]

28. It should be noted that the notion of a "*self-standing*" breach found in the *Carrizosa* award, and seconded by the Claimant, is very different from the Respondent's peculiar notion of a "*stand-alone*" breach,[31] as will be further explained below.[32]

29. The Respondent contends that the only case the Tribunal should take into consideration to determine whether it manifestly lacks jurisdiction under article 2(1) of the BIT is *Mabco Constructions SA v. Kosovo*.[33] According to the Respondent, article 2 of the Swiss-Kosovo BIT "*contains the exact same double*

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[27] **RL-0013**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No ARB/18/5, Award, 19 April 2021, ¶135, p. 43 (emphasis added).
[28] **RL-0013**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No ARB/18/5, Award, 19 April 2021, ¶136, p. 43.
[29] **RL-0013**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No ARB/18/5, Award, 19 April 2021, ¶138, p. 44.
[30] *See* Claimant's Rule 41 Response, ¶192.
[31] Respondent's Rule 41 Reply, section 3.2.
[32] *See* ¶41 below.
[33] Respondent's Rule 41 Reply, ¶¶31-32.

exclusion clause" as the BIT in the present dispute.[34] And the Respondent takes comfort in the fact that the arbitral tribunal made the observation that such clause is "*unlike most BIT provisions to this general effect*".[35]

30. However, the Respondent's quotation from *Mabco* is truncated. The complete quote reads as follows:[36]

> *"The Tribunal notes at the outset that, unlike most BIT provisions to this general effect, Article 2 excludes claims arising out of 'events' that occurred prior to the BIT's entry into force, rather than 'disputes' occurring prior to the BIT's entry into force.* ***This language suggests that the exclusion from coverage may start at an earlier point than the time at which the dispute as such emerged****".*

31. Precisely, the *Mabco* tribunal only pointed out that the timing of the *dispute* was irrelevant for determining jurisdiction, and that the issue boiled down to the timing of the *facts* that gave rise to the dispute. The point was that a dispute might emerge long *after* the facts giving rise to the dispute, and, thus, such dispute might be excluded from the scope of a treaty even if the dispute emerged *after* the treaty's entry into force. This is, of course, the opposite of –and in no way supports– the Respondent's theory that a vaguely and expansively framed "dispute" was already extant *before* the BIT entered into force and, thus, a claim that arose from, and is based exclusively on, post-BIT facts should nonetheless be excluded from the scope of the BIT just because such post-BIT facts occurred in a wider context that goes back to the period before the BIT entered into force.

32. Hence, for the purposes of the Respondent's Rule 41 Submission, all that matters is that the Claimant has made substantiated allegations of specific facts which, *as per the Claimant's case*, and not the Respondent's warped retelling, occurred after the entry into force of the BIT.

3. All decisions that have dealt with the principle of non-retroactivity are relevant

33. According to the Respondent, "*it is evident that the Claimant employs broader standards than those applicable to the present case in a desperate attempt to persuade the Tribunal that it does not manifestly lack* ratione temporis *jurisdiction*".[37]

34. To support its lazy accusation, the Respondent presents a table of cases cited in the Claimant's Response.[38] However, this table does not even attempt to engage with

[34] Respondent's Rule 41 Reply, ¶31.
[35] Respondent's Rule 41 Reply, ¶32.
[36] **RL-0014**, *Mabco Constructions SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on jurisdiction, 30 October 2020, ¶460, p. 140 (emphasis added).
[37] Respondent's Rule 41 Reply, ¶30.
[38] Respondent's Rule 41 Reply, ¶27.

the relevant facts of each case, the reasoning of the tribunals, or the reasons why the Claimant cited them. The Respondent merely points out that they were not decided under the Angola-Portugal BIT or a carbon copy thereof. Surprisingly, the table includes one of the Respondent's own legal authorities, *Carrizosa v. Colombia*, which the Respondent now asserts is somehow inapplicable to the present dispute.[39]

35. In addition to *Carrizosa v. Colombia*, addressed above,[40] the Respondent refers to the following cases:[41]

(i) *Société Générale v. Dominican Republic*, in which the state objected to the tribunal's jurisdiction. Among other grounds, the state cited the non-retroactivity principle expressed in article 28 of the VCLT and ILC draft article 13, arguing that the relevant facts preceded the treaty's entry into force.[42] Faced with a very similar objection to that in the present case, the tribunal decided that the principle of non-retroactivity did not prevent it from upholding jurisdiction over events following the treaty's entry into force, or from considering prior acts for the purposes of "*understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force*".[43]

(ii) *Tecmed v. Mexico* is relevant, again, because it concerns the principle of non-retroactivity. The tribunal considered that, even though the provisions of the treaty could not be given retroactive application, "*it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point* after *its entry into force*".[44] This consideration also applies to the present case.

[39] Respondent's Rule 41 Reply, ¶28.
[40] *See* ¶¶23-27 above.
[41] Respondent's Rule 41 Reply, ¶27.
[42] **CLA-53(bis)**, *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections on Jurisdiction, 19 September 2008,¶68, p. 18.
[43] **CLA-53(bis)**, *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections on Jurisdiction, 19 September 2008, ¶¶87, 91-92, pp. 22-23.
[44] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶66, p. 21.

(iii) *Generation Ukraine v. Ukraine*,[45] *Azurix Corp. v. Argentina*,[46] *Hydro v. Albania*,[47] and *Vivendi v. Argentina*[48] discuss the concept of creeping expropriation.[49] Since creeping expropriations are composite acts, they are exceptions to the principle of non-retroactivity under customary international law,[50] and relevant to the case at hand.

In particular, in *Hydro v. Albania*, the state argued that the conduct challenged by the investors began before they acquired their investment in 2014 and, therefore, the tribunal lacked jurisdiction *ratione temporis*. However, the tribunal upheld jurisdiction over acts taking place after the claimant acquired its investment.[51] Likewise, even if some of the facts giving rise to the present dispute had occurred prior to the BIT's entry into force (*quod non*), this would not preclude a finding of jurisdiction over acts subsequent to the BIT's entry into force.

(iv) *Frontier v. Czech Republic*.[52] This case was cited by the Claimant in support of a merits argument, on the standard of full protection and security.[53] Any differences between article 2(1) of the BIT and the jurisdictional provisions in the Canada-Czech and Slovak Federal Republic BIT are immaterial to the Claimant's submissions on the standard of full protection and security. Therefore, the distinction that the Respondent seeks to make is irrelevant.

(v) *Biloune v. Ghana*.[54] The case was cited to explain that, when evaluating whether there has been an expropriation, it is not necessary to establish an intention to expropriate.[55] Rather, the effect and impact of the expropriatory

[45] **CLA-56**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.
[46] **CLA-46**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006.
[47] **CLA-57**, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (I)*, ICSID Case No. ARB/15/28, Award, 24 April 2019.
[48] **CLA-47**, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, 20 August 2007.
[49] Claimant's Rule 41 Response, ¶¶193-202, 205.
[50] As the Claimant explained in his Rule 41 Response, the principle of non-retroactivity is not absolute. For instance, under customary international law, non-retroactivity is qualified by the notion of composite acts. When a series of acts which straddle the treaty's entry into force result in an aggregate breach of its provisions, a tribunal has jurisdiction *ratione temporis* with respect to the acts taking place after the treaty's entry into force. Claimant's Rule 41 Response, ¶¶193-205; **RL-0012**, International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, article 15(2), p. 5; **CLA-57**, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (I)*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶558, p. 123.
[51] **CLA-57**, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (I)*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶¶557-558, p. 123.
[52] **CLA-41**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010.
[53] Claimant's Rule 41 Response, ¶¶129, 139.
[54] **CLA-50**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989.
[55] Claimant's Rule 41 Response, ¶146.

measures is the determinative factor.[56] Again, this conclusion on the merits does not hinge on the wording of any provisions on jurisdiction. Therefore, the distinction made by the Respondent is pointless.

(vi) *Rumeli v. Kazakhstan*. The tribunal decided that several actions and omissions by the state constituted a creeping expropriation. In discussing the moment at which the expropriation took place, the tribunal observed that such moment is "*not to be determined by any principle of international law, but is a question of fact to be determined by the Tribunal in the particular circumstances of the case*".[57] The Claimant concurs. As explained in the Response,[58] the timing of the expropriation is a fact-sensitive question (that should be reserved to a later stage of proceedings). This conclusion, which is relevant to the merits of the Claimant's expropriation claim, is not dependent on the wording of any provisions on jurisdiction.

(vii) *Santa Elena v. Costa Rica*. The main issue before the tribunal was the amount of compensation to be paid by Costa Rica for the expropriation of a property purchased for tourism development. As in *Rumeli v. Kazakhstan*, the tribunal commented on the moment of the expropriation and stated that this was a fact-sensitive inquiry: "*international law does not lay down any precise or automatic criterion, such as the date of the transfer of ownership* […]. *This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case*".[59] Here, the tribunal made a general statement on the timing of expropriation, which is relevant to the present case but unrelated to the wording of any jurisdictional limitations.[60]

(viii) *Stati v. Kazakhstan*.[61] The Claimant cited this case because it describes, in general terms, the concept of indirect expropriation that is routinely recognised by investment tribunals.[62] The *ratione temporis* criterion of the Kazakhstan-Turkey BIT, referred to by the Respondent, bears no relation thereto.

36. In sum, to the extent the cited decisions were referenced by the Claimant in support of the Tribunal's ratione temporis *jurisdiction*, they are very much relevant to the

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[56] **CLA-50**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, ¶81, p. 21 ("*The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case*").
[57] **CLA-51**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶788, p. 220.
[58] Claimant's Rule 41 Response, ¶150.
[59] **CLA-48**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶78, p. 27.
[60] *See* section II.B below.
[61] **CLA-55**, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2024.
[62] Claimant's Rule 41 Response, ¶194.

present case and they confirm, among other things, that (a) the principle of non-retroactivity does not prevent the Claimant from bringing a claim against the Respondent on the basis of facts that post-date the BIT's entry into force and (b) even if some of the relevant facts giving rise to the dispute had occurred prior to the BIT's entry into force (which is not the case here), the Claimant would still have a valid alternative claim of creeping expropriation. The Respondent has not addressed the notion of composite acts anywhere in its submissions.

4. The relevant test to determine whether a claim falls within the *ratione temporis* scope of the BIT is whether post-treaty facts constitute self-standing breaches

37. In contrast, none of the cases cited by Angola contradict the above conclusions. On the contrary, they support the Claimant's position, as they make clear that the relevant test to determine whether a claim falls within the *ratione temporis* scope of the BIT is whether post-treaty facts constitute self-standing breaches of the BIT.

38. Angola cites *Spence International Investments et al. v. Costa Rica* in support of its argument that any investments that were already "*entangled*" in disputes and/or pre-BIT facts that could later evolve into claims and/or disputes are excluded from the protection of the BIT.[63] Angola quotes the following snippet: "*it will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable*".[64]

39. Mr Machado concurs. However, it proves helpful to also quote the *Spence International Investments* tribunal's considerations that immediately follow:[65]

> *"*[I]*t will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable, even if it may be appropriate to have regard to pre-1 January 2009 conduct for purposes of determining whether there was a subsequent post-entry into force breach.* […] *The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above.* ***Such acts and facts cannot, however, form the foundation of a finding of liability*** *even in respect of a post-entry into force, or a post-critical limitation date, actionable breach.* ***To be justiciable, a breach that is alleged to have taken place within the permissible period****, from a limitation perspective,* ***must****, if it has deep roots in pre-entry into force or pre-critical limitation date conduct,* ***be*** **independently** ***actionable****".*

[63] Respondent's Rule 41 Reply, ¶26.
[64] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶222, p. 139.
[65] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶222, p. 139 (emphasis added).

40. Thus, the relevant test is whether post-BIT conduct is independently actionable. In other words, whether it can "*constitute a cause of action, a claim, in its own right*".[66]

41. This does not preclude, however, "*the possibility that a series of related events, each giving rise to a self-standing cause of action, may be separated into distinct components, some time-barred, some eligible for consideration on the merits*".[67] The Claimant does not need to prove, as the Respondent suggests, "*stand-alone*" breaches of the BIT that are entirely unrelated to previous disputes or facts.[68] On the contrary, as explained by the *Spence International Investments* tribunal, the post-treaty facts may even have "*deep roots in pre-entry into force or pre-critical limitation date conduct*".[69] As long as such pre-BIT facts do not "*form the foundation of a finding of liability*", they do not preclude a tribunal's *ratione temporis* jurisdiction.[70]

42. Hence, whether Mr Machado had a different cause of action based on facts that occurred before the BIT entered into force is immaterial to the present dispute. The real question is whether Mr Machado's claims brought specifically in the present proceedings are independently actionable. Or, in the context of Rule 41, whether Angola has shown that Mr Machado manifestly lacks independently actionable claims, on the basis of the facts presented by him.

43. In its Rule 41 Submission, Angola also cites *Marvin Feldman v. Mexico* and *Mondev v. USA*, to argue that "*for a claim arising out of a post-treaty conduct to fall within a tribunal's jurisdiction, it must be capable of constituting a stand-alone breach of the BIT*".[71] Again, Mr Machado concurs. The main issue in these NAFTA cases, with respect to the tribunals' jurisdiction *ratione temporis*, was whether the states' conduct could be characterised as continuing in nature –having begun before the treaty entered into force and continued after the treaty entered into force. If the states' actions "*became breaches*" of NAFTA after its entry into force, part of the states' alleged activities would be subject to the tribunals' jurisdiction.[72]

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[66] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶210, p. 134.
[67] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶210, p. 134.
[68] Respondent's Rule 41 Submission, ¶128.
[69] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶222, p. 139.
[70] **RL-0015**, *Spence International Investments, LLC, Berkowitz, et. al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 11 October 2020, ¶222, p. 139.
[71] Respondent's Rule 41 Submission, ¶157.
[72] **RL-0017**, *Marvin Karpa v. United Mexican States*, ICSID Case No. ARB AF 991, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶62, p. 28. *See also* **RL-0016**, *Mondev International Ltd. v. United States of America*, ICSID Case No ARB (AF) 992, Award, 11 October 2002, ¶66, p. 23.

44. In this context, the *Marvin Feldman* tribunal held that "*only measures alleged to be taken by the Respondent after January 1, 1994, when NAFTA came into force*" were "*relevant for the support of the claim or claims under consideration*".[73]

45. Similarly, the *Mondev* tribunal observed that "*conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA*".[74] Nonetheless, "*it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force*".[75]

46. Accordingly, events prior to the entry into force of the BIT can provide useful background to assess whether Angola breached its obligations by conduct subsequent to the BIT's entry into force. Any previous wrongful conduct by the state, or previous disputes, do not exclude an investor's claims founded on post-treaty conduct. In fact, in *Mondev v. USA*, "[b]*oth parties accepted that the dispute as such arose before NAFTA's entry into force*".[76] Still, the tribunal would have upheld jurisdiction over the investor's claim, if it had been "*possible to point to conduct of the State after* [NAFTA's entry into force] *which* [was] *itself a breach*".[77]

47. Angola also invokes *Industria Nacional de Alimentos v. Peru* and *CMS v. Argentina* to argue that "[t]*he critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter*".[78]

48. Again, the Respondent's insistence on the concept and timing of the "dispute" is moot. The distinction of disputes, by ascertaining whether they have different subject matters, only became relevant in *Industria Nacional de Alimentos v. Peru* because article 2 of the Chile-Peru BIT provided that the treaty "*shall not, however, apply to differences or disputes that arose prior to its entry into force"*.[79]

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[73] **RL-0017**, *Marvin Karpa v. United Mexican States*, ICSID Case No. ARB AF 991, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶63, pp. 28-29.
[74] **RL-0016**, *Mondev International Ltd. v. United States of America*, ICSID Case No ARB (AF) 992, Award, 11 October 2002, ¶68, p. 24.
[75] **RL-0016**, *Mondev International Ltd. v. United States of America*, ICSID Case No ARB (AF) 992, Award, 11 October 2002, ¶69, p. 24.
[76] **RL-0016**, *Mondev International Ltd. v. United States of America*, ICSID Case No ARB (AF) 992, Award, 11 October 2002, ¶57, p. 21.
[77] **RL-0016**, *Mondev International Ltd. v. United States of America*, ICSID Case No ARB (AF) 992, Award, 11 October 2002, ¶70, p. 25.
[78] Respondent's Rule 41 Reply, ¶39; **RL-0019**, *Industria Nacional de Alimentos v. Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶50, pp. 20-21; **RL-0020**, *CMS Gas Transmission Co. v. Argentina*, Case No. ARB/ 01/ 8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶109, p. 32.
[79] **RL-0019**, *Industria Nacional de Alimentos v. Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶25, p. 10.

49. In contrast, the Tribunal's *ratione temporis* jurisdiction under article 2(1) of the BIT is not contingent upon the timing of the emergence of a *dispute* but on the timing of the *facts* giving rise to the dispute.

50. But even where the timing of the emergence of the dispute was relevant to the tribunal's *ratione temporis* jurisdiction, the *Industria Nacional de Alimentos v. Peru* tribunal pointed out that a dispute is to be considered different and separate from an earlier dispute if the *facts* that gave rise to the earlier dispute do not continue to be "*central*" to the later dispute:[80]

> *"The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject matter', it will in each instance have to determine* ***whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute****".*

51. The distinction whether facts relevant to the earlier dispute continue to be *central* to the later dispute goes to the same point as the distinction made by the *Spence International Investments* tribunal whether pre-treaty facts form the *foundation* of a finding of liability of a post-treaty claim.[81]

52. As for *CMS v. Argentina*, in that case the tribunal dealt with issues of admissibility that are not even remotely similar to the jurisdictional objections raised by Angola. In the paragraph cited by Angola in the Reply,[82] the tribunal analysed whether some of the claims raised by CMS were not registered in accordance with article 36(3) of the ICISD Convention and the six-month cooling-off period in the Argentina-U.S. BIT.

53. In conclusion, neither *Industria Nacional de Alimentos v. Peru* nor *CMS v. Argentina* contradict the "*self-standing breach*" test laid out in this subsection.

54. In the following subsections B and C we show that the claims brought by the Claimant in this arbitration are for self-standing breaches and, thus fall within –do not fall manifestly outside– the *ratione temporis* scope of the BIT.

55. The difference between the facts giving rise to the present dispute and those giving rise to previous disputes heard before U.S. courts has been explained in the Claimant's Rule 41 Response and is also addressed below.[83]

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[80] **RL-0019**, *Industria Nacional de Alimentos v. Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶50, p. 21 (emphasis added).
[81] *See* ¶¶39-41 above.
[82] **RL-0020**, *CMS Gas Transmission Co. v. Argentina*, Case No. ARB/ 01/ 8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶109, p. 32.
[83] *See* ¶¶88-89 below.

B. The Claimant's expropriation claim is based on a self-standing breach resulting from post-treaty acts and facts

56. The Claimant's expropriation claim is based on a self-standing breach, not relevantly "*tainted*" by, "*entangled*" with, "*rooted*" in, "*intrinsically linked*" with, or having its "*inaugural moment*" in any pre-treaty acts or facts.

1. The subject-matter of the Claimant's expropriation claim is straightforward

57. The Respondent asserts that, by 22 December 2021, Aenergy and the Respondent were already embroiled in a dispute concerning the "*title, possession, and access to the benefits and economic use*" of the Four Turbines.[84] The Respondent once again mischaracterises the nature of Mr Machado's claim in this arbitration, framing it as broadly as possible, in order to conflate it with the claims brought by Aenergy in the U.S. proceedings.

58. The Claimant has made clear that the subject-matter of this dispute is Angola's appropriation of the Four Turbines by installing and deploying them in state-owned power plants and thus illegally removing them from judicial custody.[85]

59. The Tribunal need not consider or analyse any act or fact predating the BIT's entry into force to determine whether these acts by Angola constitute an expropriation of Mr Machado's investment.

60. Thus, even if one could equate the non-retroactivity provision of article 2(1) of the BIT to that of article 2 of the Chile-Peru BIT examined by the *Industria Nacional de Alimentos v. Peru* tribunal (*quod non*),[86] the conclusion would still be that the subject matter of the dispute of the present arbitration is different from that of any previous disputes, as the facts relevant to any earlier disputes are not *central* to the current dispute and do not form the *foundation* of the finding of liability sought by the Claimant in this arbitration.

2. The Respondent incurs in gross fallacies and strawmen to distort the Claimant's case

61. Angola attempts to tie the Claimant's claims to pre-BIT facts by distorting and decontextualising the Claimant's submissions.[87] Here, we address the two most flagrant of those stratagems.

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[84] Respondent's Rule 41 Reply, ¶38.
[85] *See* Request for Arbitration, ¶53; Claimant's Rule 41 Response, ¶¶56, 85, 96.
[86] *See* ¶¶47-51 above.
[87] Respondent's Rule 41 Reply, ¶¶46-49, 68-69.

62. *First*, Angola asserts that, because the section of the Request for Arbitration that describes "*the facts from which the present dispute derives*" starts with a mention of the local proceedings in Angola, Mr Machado supposedly recognised that the preventive seizure of the turbines constitutes *the* event from which the present dispute arises.[88] This suggestion is preposterous:

(i) The preventive seizure of the Four Turbines was described in the Request for Arbitration in section IV.A. ("*Antecedentes*", *i.e.*, "Factual background"), subsection 2 ("*El embargo de las Cuatro Turbinas de Aenergy en diciembre de 2019*", *i.e.*, "The seizure of Aenergy's Four Turbines in December 2019").

(ii) This was followed by section IV.B. ("*Los hechos de los que deriva la presente controversia*", *i.e.*, "The facts from which the present controversy derives"). Angola omits from its quote, of what is supposedly the beginning of this section, the very first paragraph of the section, which reads as follows:[89]

> *"A continuación, resumimos los hechos en los que, específicamente, se basa la presente reclamación del Inversor frente a Angola,* ***que comienzan a principios de 2022****".*

(iii) The sentences selectively quoted by Angola simply seek to inform the reader of *the situation* of (a) the proceedings before the Provincial Court of Luanda and (b) the status of the Four Turbines being held in judicial custody, *at that moment in time* (*i.e.*, "*at the beginning of 2022*" as explicitly and specifically indicated therein).[90]

63. There is no room for a good faith misunderstanding of the Claimant's case. The Respondent's deliberate distortion of the Claimant's straightforward words to represent precisely the opposite of what they evidently mean is unacceptable.[91]

64. *Second*, the Respondent asserts that Mr Machado "*conceded*" that neither Presidential Order No. 60/22 nor MINEA's press release of 18 March 2022 "*can* per se *constitute a stand-alone expropriation*".[92] On this basis, Angola claims that Mr Machado is left with no other post-BIT event that could amount to a stand-alone expropriation claim.[93] Again, the Respondent's contrived argument is evidently baseless. The Claimant has consistently and repeatedly identified the post-BIT events that, in his view, constitute a self-standing expropriation: Angola's appropriation of the Four Turbines by installing and deploying them in state-owned power plants and thus illegally removing them from judicial custody. The

[88] Respondent's Rule 41 Reply, ¶¶47-48.
[89] Request for Arbitration, ¶39 ("*Below, we summarise the events on which the Investor's present claim against Angola is specifically based,* ***which begin in early 2022***") (empashis added).
[90] Request for Arbitration, ¶40. *See also* ¶¶53-54, where Mr Machado explained clearly that this dispute arises from the installation of the Four Turbines by Angola in its power plants.
[91] We fail to understand the point of the Respondent's innuendo at ¶46 of its Rule 41 Reply, which seems to be related.
[92] Respondent's Rule 41 Reply, ¶68.
[93] Respondent's Rule 41 Reply, ¶69.

Respondent has clearly understood this.[94] Neither Presidential Order No. 60/22 nor MINEA's press release of 18 March 2022 were put forward by the Claimant as events that themselves could constitute the expropriation but simply as evidence for the timing of the installation and deployment of the Four Turbines, as already explained in the Claimant's Rule 41 Response.[95]

3. Presidential Order 177/21 can be considered, at most, a preparatory act for the later expropriation

65. Angola now puts Presidential Order 177/21 in the spotlight and claims that this is the "*but for*" event of the investment's expropriation.[96] The Respondent asserts that "*without Presidential Order No. 177/21, the installation and deployment of the Four Unsolicited Turbines could never have taken place*".[97] In the same vein, it contends: "*This official decision manifestly constitutes the very foundation that allowed the so-called 2022 relevant facts (as alleged by the Claimant) to come to existence*".[98]

66. At the outset, it should be mentioned that the fact that any given event might be found within the causal chain of an expropriation is utterly irrelevant. There is a myriad of circumstances that constitute "but for" events (*conditiones sine quibus non*) for the installation of the Four Turbines in Angola's power plants. This does not render them relevant to the expropriation claim.

67. In actuality, the Respondent is simply rehashing its contention that the relevant moment of expropriation is marked by the moment the decision to expropriate was taken, which was already refuted in the Claimant's Rule 41 Response.[99] Indeed, once again, the Respondent invokes the *Mabco Constructions SA v. Kosovo* decision, where the tribunal found that the relevant time of expropriation was the date of an official decision to order the execution of a withdrawal of shares.[100]

68. However, Presidential Order No. 177/21 is a far cry from an official decision to expropriate. First, it is not expressly or impliedly aimed at expropriating any turbines. It only mentions services to be provided in different power plants. Second, it refers to several turbines generically, not specifically to the Four Turbines. Third, it is not directed at, nor was it notified to, Aenergy, making it impossible to determine with certainty whether the order refers to its Four Turbines. The

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[94] *See* Respondent's Rule 41 Reply, ¶56.
[95] Claimant's Rule 41 Response, ¶¶158-160.
[96] Respondent's Rule 41 Reply, ¶67.
[97] Respondent's Rule 41 Reply, ¶58.
[98] Respondent's Rule 41 Reply, ¶59.
[99] Claimant's Rule 41 Response, ¶¶145-157.
[100] Claimant's Rule 41 Response, ¶155 ("*In that case, the tribunal found that* 'it is uncontested that on 31 May 2012 the [*Kosovo Privatisation Agency*] took the **official decision** to order execution of the withdrawal of shares', *and it decided that the relevant time of expropriation was that date of that official decision which it deemed to be* '**sufficiently definitive** '"); **RL-0014**, *Mabco Constructions SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on jurisdiction, 30 October 2020, ¶467, p. 142.

information contained in Presidential Order No. 177/21 only led Mr Machado to merely *suspect* that, by October 2021, Angola was preparing to install and deploy turbines which could, *likely*, include the Four Turbines.[101] Angola later confirmed that Mr Machado's suspicions were correct.

69. In the *Mabco* case, the tribunal found that the date of an official decision to order the execution of a withdrawal of specific shares was "*sufficiently definitive*".[102] However, in the present dispute, Presidential Order No. 177/21 cannot be deemed "*sufficiently definitive*". It only authorised certain expenditures and formalised the opening of an emergency contracting procedure for works involving some unspecified turbines.[103] Moreover, after this order was published, MINEA still had to initiate the corresponding procurement processes, receive the proposals from the bidders, award and sign the public contracts, before any potential contractor could begin the execution of the services corresponding to the installation and deployment of the turbines.[104] Considering that the Four Turbines were in judicial custody, Angola would also have needed an authorisation by the Provincial Court of Luanda, who had granted the preventive seizure of the Four Turbines, in order to execute its alleged decision to install them in its power plants.

70. It is worth noting that Angola avoided mentioning another preparatory act that was carried out when the BIT had already entered into force: Presidential Order No. 60/22, dated 16 March 2022, which amended Presidential Order No. 177/21.[105] This latter order amended the former, thus rendering the two an inseparable set of orders.

71. It is clear from the above that Presidential Order No. 177/21 can be considered, at most, a preparatory act for the later expropriation but is not, in and of itself, tantamount to an expropriation.

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[101] Claimant's Rule 41 Response, ¶¶42(i)-(ii), 45, 48. Angola fails to quote the Claimant's complete allegation (including "*likely*") at Respondent's Rule 41 Reply, ¶64.b.i. in an attempt to establish that the "decision" was already made, as allegedly proven by Mr Machado's "knowledge" of the "expropriation decision". At the Claimant's Rule 41 Response, ¶48, the Claimant stated that "*Aenergy, who only became aware of their **likely** use by Angola through **these** presidential orders (which by their nature are not specifically directed at Aenergy)*".

[102] **RL-0014**, *Mabco Constructions SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on jurisdiction, 30 October 2020, ¶467, p. 142.

[103] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021, ¶1, pp. 3-4.

[104] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021, ¶2, p. 4.

[105] **C-22**, Presidential Order No. 60/22 for the execution of projects with ordinary resources of the Angolan State and their inclusion in the Public Investment Program "PIP" (with informal translation into English), 16 March 2022.

4. In any case, whether the post-treaty acts on which the expropriation claim is based in fact constitute self-standing breaches pertains to the merits, not to jurisdiction

72. The question of whether the post-BIT facts alleged by the Claimant (not any other facts) constitute self-standing breaches of the BIT pertains to the merits of the case. The Respondent's Rule 41 objection is based solely on the Tribunal's alleged lack of jurisdiction *ratione temporis*. Accordingly, this analysis is irrelevant to the current phase of the proceedings. To avoid unnecessary repetition, the Claimant refers to its previous pleading on this matter.[106]

C. The Claimant's FET and FPS claims also fall within the *ratione temporis* scope of the BIT

73. In its Rule 41 Reply, the Respondent alleges that the Claimant's FET and FPS claims are "*non-starters*" because the Claimant "*does not even try to place the alleged facts that would constitute FET and FPS violations as post-Amended BIT events*" and that "*there's a deafening silence regarding the day, month and year of each of Angola's impugned conducts*".[107]

74. This is simply incorrect. The Claimant has clearly stated in his Request for Arbitration and in his Rule 41 Response that his FET claim is based on the following post-treaty facts: (i) the installation and connection of the Four Turbines to the Angolan power grid in 2022,[108] (ii) the failure of IGAPE and the Provincial Court of Luanda's to keep custody of the Four Turbines, and their turning a blind eye on their installation and connection to the power grid in 2022,[109] and (iii) the failure of IGAPE and the Provincial Court of Luanda to respond to Aenergy's repeated requests for information regarding the whereabouts of the Four Turbines.[110] The Claimant's FPS claim is based on those same facts.[111]

75. The Claimant has also been transparent and forthcoming in stating that he does not know –and cannot know– the exact moment at which the Four Turbines were installed and connected to the power grid due to the recalcitrant refusal by the Angolan authorities to provide this information, which is exclusively within their control.[112] However, with the limited information he has available, the Claimant has sufficiently substantiated his allegation that these acts took place during the spring and summer of 2022.[113]

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[106] Claimant's Rule 41 Response, section VI.
[107] Respondent's Rule 41 Reply, ¶70.
[108] Request for Arbitration, ¶71; Claimant's Rule 41 Response, ¶¶105, 111, 117.
[109] Request for Arbitration, ¶70; Claimant's Rule 41 Response, ¶¶104, 111, 117-118.
[110] Request for Arbitration, ¶70; Claimant's Rule 41 Response, ¶¶106, 111, 119.
[111] *See* Claimant's Rule 41 Response, ¶¶134-140.
[112] Claimant's Rule 41 Response, ¶4.
[113] *See* Claimant's Rule 41 Response, ¶42.

76. It is astonishing that the Respondent would complain about the Claimant having kept a "*deafening silence regarding the day, month and year of each of Angola's impugned conducts*" when the Claimant has openly explained why he does not have this information and repeatedly requested that Angola provide it.[114] The Respondent, who obviously has detailed knowledge of all particulars, has refused to answer any of the Claimant's questions raised in Aenergy's requests for information of April and May 2022,[115] in Mr Machado's Notice of Dispute,[116] in the Request for Arbitration[117] and in Mr Machado's Rule 41 Response.[118] It is the Respondent's silence –after two rounds of pleadings– that is truly deafening.

III. The Respondent has not provided any reasons that might justify departing from the facts as alleged by the Claimant in the present proceedings

77. Angola posits that Mr Machado is acting in bad faith[119] by bringing claims and allegations that are "*crafted with the intent to abuse rights, specifically constituting abuse of process*"[120] and employing "*procedural instruments for purposes that deviate from the legitimate objectives for which those procedural rights were created*".[121]

78. Two arguments can be identified under this veneer of innuendo. We address them in the following subsections.

A. The claims brought in these proceedings are different from Aenergy's claims before the U.S. courts

79. Angola insists on its contention that Aenergy's dispute before the U.S. courts and the current dispute filed by Mr Machado before ICSID are the same, the only difference being a "*strategic*" one.[122]

80. Angola does not seem to be invoking *res iudicata*. Rather it appears to argue that the claims brought by Aenergy before the U.S. courts somehow prevent Mr Machado from bringing the present arbitration in good faith.

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[114] Respondent's Rule 41 Reply, ¶70.
[115] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022; **C-25**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.
[116] **C-26**, Notification from Mr Machado to Angola for the amicable settlement of the dispute (with informal translation into English), 9 June 2022, p. 44.
[117] Request for Arbitration, ¶¶49-52.
[118] Claimant's Rule 41 Response, ¶¶4, 71-72.
[119] Respondent's Rule 41 Reply, section 4.
[120] Respondent's Rule 41 Reply, ¶89.
[121] Respondent's Rule 41 Reply, ¶89.
[122] Respondent's Rule 41 Reply, ¶98.

81. In the following paragraphs, we address Angola's disjointed arguments that seek to blur the differences between the present claim and the claims brought before the U.S. courts.

82. *First*, Angola argues that Mr Machado is "*exploiting the legal distinction between himself and AEnergy, all to for the sake of, in manifest bad faith, creating the illusion of differing views between himself and the company he controls*".[123]

83. However, from the outset the Claimant has made no secret that that he "*es el único accionista y titular de todas las acciones de Aenergy*" and "[p]*or tanto, la inversión es de su propiedad directa y está controlada por él*".[124] The Claimant has not created any "*false illusions*".

84. And it is of course perfectly legitimate for Mr Machado to invoke Aenergy's separate legal entity. In fact, the Respondent has not put forward any grounds that might justify disregarding Aenergy's separate legal entity or piercing the corporate veil.

85. *Second*, Angola asserts that the cause of action in both disputes is identical.[125] However, the causes of action or *causae petendi* are clearly different: on the one hand, the court-ordered preventive seizure of December 2019, challenged by Aenergy before the U.S. courts (the "*judicial expropriation*") and, on the other hand, the installation of the Four Turbines in Angola's power plants in 2022, which Mr Machado challenges in the present proceedings (the "*de facto expropriation*"). This was already explained in the Claimant's Rule 41 Response.[126]

86. In connection with the foregoing, Angola argues that Aenergy, in one of its pleadings in the U.S. proceedings, referred to the 2019 preventive seizure as a "*de facto expropriation*".[127] However, this characterization is inconsequential. Here, we have used the terms "*judicial expropriation*" and "*de facto expropriation*" as shorthand to refer to two different factual complexes, occurring at different periods of time: the judicial preventive seizure of 2019 and the installation of the turbines in 2022, respectively.[128] The fact that Aenergy also used the term "*de facto expropriation*" to refer to the preventive seizure is a matter of semantics, but does in no way alter the fact that Anergy was referring to the preventive seizure of 2019 whereas Mr Machado now challenges the appropriation of the Four Turbines that occurred when they were installed in 2022.

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[123] Respondent's Rule 41 Reply, ¶91.
[124] Request for Arbitration, ¶23 ("*he is the sole shareholder and holder of all the shares in Aenergy. Therefore, the investment is directly owned and controlled by him*").
[125] Respondent's Rule 41 Reply, ¶99-100.
[126] *See* Claimant's Rule 41 Response, ¶¶170-171, 207-208.
[127] Respondent's Rule 41 Reply, ¶101.
[128] *See*, *e.g.*, Claimant's Rule 41 Response, ¶¶170-171.

87. Angola relies heavily on the *ST-AD GmbH v. Bulgaria*. However, in that case, both concurrent claims were based on exactly the same facts, as explained by Angola itself:[129]

> *"*[A]*ll the alleged BIT violations had occurred before the claimant acquired its investments. The claimant's attempt to manufacture a dispute after that date, by requesting a second decision from the Supreme Cassation Court* ***based on the same facts and the same submission previously presented by the local company****, was thus rejected".*

88. Indeed, the *ST-AD GmbH* tribunal failed to identify any facts that were different, as it pointed out in the paragraph immediately following the one referenced by Angola:[130]

> *"For the sake of exhaustivity, the Tribunal will summarise the centrally relevant decisions of the Bulgarian Supreme Cassation Court, in order to confirm* ***that nothing new happened*** *after the Claimant entered into the scene as a German investor.* […]
>
> *In sum,* ***the Tribunal cannot find any alleged violation that occurred after the Claimant acquired the status of a German investor protected by the BIT*** *and, therefore, concludes that it does not have jurisdiction ratione temporis over the claims presented by the Claimant".*

89. Crucially, and as correctly pointed by Angola, the key distinction between the U.S. cases and the present case "*pertains to the timing*" of the expropriation.[131] Indeed, that difference is key: Aenergy's claim was based on facts that occurred in 2019, namely the preventive seizure of the Four Turbines, whereas Mr Machado's claim is based on facts that occurred in 2022.[132] Angola simply cannot pretend that "*nothing new happened*" after the entry into force of the BIT.

90. For those same reasons, Angola's reliance on the following quote from Emmanuel Gaillard is misplaced:[133]

> *"*[A] *claimant's motivation for initiating arbitration may simply be to harass and exert pressure on another party. For instance, shareholders at various levels of the corporate chain might initiate multiple arbitrations* ***in respect of the same dispute*** *to exert maximum pressure on the host State and to exhaust its resources".*

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[129] Respondent's Rule 41 Reply, ¶93 (emphasis added).
[130] **RL-0026**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶¶318, 333, pp. 90, 94 (emphasis added).
[131] Respondent's Rule 41 Reply, ¶109.
[132] Respondent's Rule 41 Reply, ¶¶110-111.
[133] Respondent's Rule 41 Reply, ¶88, citing **RL-0021**, Emmanuel Gaillard, *Abuse of Process in International Arbitration*, in ICSID Review, Vol. 32, No. 1 (2017), 24 December 2016, p. 11 (emphasis added).

91. Gaillard refers to cases where "*the locally incorporated company, its direct foreign shareholder and its indirect foreign shareholder would each advance the **same claims, arising out of the same facts***".[134]

92. Since the causes of action of Aenergy's claims brought before the U.S. courts are distinct from Mr Machado's claims in this arbitration, the Claimant cannot be barred from pursuing this arbitration by any good faith requirements.

93. *Third*, Angola posits that both disputes are based on violations of international law.[135] However, the expropriation claims brought in the U.S. proceedings were made under the Foreign Sovereign Immunities Act, which is a U.S. domestic law primarily concerned with U.S. commercial interests, whereas the current dispute is made under the BIT. The fact that Aenergy made a passing reference to Angola's actions also constituting violations of international law, in no way allows the conclusion that its claims were *based* on violations of international law, as the Respondent suggests.[136]

94. *Fourth*, Angola contends that both "*claims in question ultimately pertain to AEnergy's rights over the Four Unsolicited Turbines*".[137] As already explained, such framing of the "*ultimate question*" or "*subject-matter*" is so broad that it is rendered devoid of any meaning.[138] The subject-matter of this dispute is the appropriation of the Four Turbines by installing and deploying them in state-owned power plants and thus illegally removing them from judicial custody.[139]

95. In conclusion, the U.S. proceedings and the present arbitration are distinct to such an extent than no conceivable good faith consideration can prevent Mr Machado from pursuing the present arbitration.

B. No allegations made by Aenergy before the U.S. courts prevent Mr Machado from presenting its claims and allegations before this Tribunal

96. Angola alleges that Aenergy and Mr Machado have done several "*somersaults*" to "*artificially secure jurisdiction*" in bad faith.[140]

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[134] **RL-0021**, Emmanuel Gaillard, *Abuse of Process in International Arbitration*, in ICSID Review, Vol. 32, No. 1 (2017), 24 December 2016, pp. 8-9 ("*In an ICSID arbitration, OI European Group BV prevailed in a claim against Venezuela, while the local company has initiated claims against Venezuela **on the same facts*** […]. *A further example is found in the two arbitrations brought against Egypt for the benefit of Mr Yosef Maiman, on the one hand* […] *by Ampal-American Israel Corporation (Ampal), a company controlled by Mr Maiman, and **on the same facts*** […] *in Mr Maiman's own name and in the name of other companies in the same chain of ownership* […]").
[135] Respondent's Rule 41 Reply, ¶102.
[136] Respondent's Rule 41 Reply, ¶102.
[137] Respondent's Rule 41 Reply, ¶103.
[138] *See* section II.B.1 above.
[139] *See* Request for Arbitration, ¶53; Claimant's Rule 41 Response, ¶¶56, 85, 96.
[140] Respondent's Rule 41 Reply, ¶¶129, 131-133, 137-138.

97. Angola has not even attempted to present a legal theory pursuant to which Aenergy's allegations before the U.S. courts might prevent Mr Machado from presenting its claims and allegations before the Arbitral Tribunal, even after the Claimant pointed at this shortcoming in his Rule 41 Response.[141]

98. Moreover, the Claimant already explained in his Rule 41 Response how the limited information available to Aenergy on the whereabouts of its turbines posed severe challenges in the U.S. proceedings and how it was compelled to adapt its allegations to Angola's shifting portrayal of facts.[142] Indeed, in the U.S. proceedings Aenergy made clear that its factual allegations were the result of an imperfect attempt to put together a puzzle from a few ever-changing pieces of information. For example, it had to explain:[143]

> *"**On information and belief**, PRODEL and ENDE will be the users and holders of title to the expropriated property given that they (and MINEA) have been in active discussions with GE about the installation of these very turbines".*

99. Thus, there is nothing unseemly about Aenergy's and Mr Machado's gradually evolving factual accounts across the different proceedings.

100. Nonetheless, we shall address in more detail the two supposed inconsistencies pointed at by Angola.

101. *First*, Angola refers to Aenergy's allegation before the U.S. courts that the Four Turbines were installed in June 2021. This statement is indeed inconsistent with Mr Machado's allegation that the installation occurred in 2022. The reasons for Aenergy's allegation back in the U.S. proceedings have already been explained in the Claimant's Rule 41 Response: Aenergy relied on certain satellite images which provided circumstantial evidence of the deployment of turbines in one of Angola's power plants; more importantly, Aenergy relied on Angola's own statement that the turbines had been installed in June 2021.[144] Angola's statement later turned out to be wrong and the Respondent has now admitted as much by alleging that the installation was only decided in October 2021.[145] There are no valid reasons to compel Mr Machado to adhere to a wrong factual conclusion briefly held by Aenergy in different proceedings.

102. In this regard, we should also correct Angola's representation that Aenergy shifted the focus of its claims in the U.S. proceedings from the preventive seizure to the installation of the Four Turbines.[146] In actuality, Aenergy did no such thing. It

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[141] Claimant's Rule 41 Response, ¶163.
[142] Claimant's Rule 41 Response, ¶¶210-211.
[143] **R-0006**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case no. 20 cv 3569, 7 May 2020, ¶221, p. 69 (emphasis added).
[144] Claimant's Rule 41 Response, section VI.B.4.b.
[145] *See* ¶¶7-8, 65 above.
[146] Respondent's Rule 41 Reply, ¶132.

merely shared with the court the new information it had received, while showcasing the inconsistencies in Angola's allegations. Specifically, Aenergy explained to the court that "[d]*espite supposedly being in judicial custody, seized turbines were* […] *connected to the power grid*"[147] and, again, "*once physically seized, the turbines were supposed to go into judicial custody, but* went instead to state-owned power companies that have since deployed them".[148] All the while, the subject-matter and cause of action of Aenergy's claims remained unchanged, namely, a series of actions by Angola and GE companies, including GE's tortious interference in the termination of the Contracts by Angola and the preventive seizure of the Four Turbines.

103. *Second*, Angola contends that Mr Machado had a "*change of heart*" tantamount to bad faith.[149] Specifically, it argues that "*AEnergy acknowledge*[d] *that it was deprived of control, use, and economic value of the Four Unsolicited Turbines in December 2019*"[150] whereas, now, "*Mr. Machado argues that AEnergy was deprived of control, use, and economic value of the Four Unsolicited Turbines in 2022*".[151]

104. However, it was not Mr Machado or Aenergy but Angola who had a "*change of heart*": Angola had initially adopted the position that it had become the rightful owner of the Four Turbines, thus prompting Aenergy to the conclusion that Angola had expropriated the turbines in 2019.

105. In particular, Angola had alleged in the notice of termination of the Contracts that the "***four turbines*** [were] *paid for* […] *by the Angolan state, and as such already* ***acquired on behalf of MINEA, with the latter's inherent right to them***".[152] Indeed, Angola had adopted the position that it was the owner of the Four Turbines because it had ratified an unauthorised purchase by Aenergy in the name of Angola.[153] Angola also stated before the Provincial Court of Luanda that "*AENERGY's possession over* ***the four turbines*** […] *is a great inconvenience, for* ***they are goods which are of the Government's property***".[154]

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[147] **R-0018**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case No. 21-1510-CV and Case No. 21-1752-Cv, Brief on Appeal from the United States District Court for the Southern District of New York, 8 September 2021, p. 9.
[148] **R-0018**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case No. 21-1510-CV and Case No. 21-1752-Cv, Brief on Appeal from the United States District Court for the Southern District of New York, 8 September 2021, p. 44.
[149] Respondent's Rule 41 Reply, ¶¶112-113.
[150] Respondent's Rule 41 Reply, ¶110.
[151] Respondent's Rule 41 Reply, ¶111.
[152] **R-0013**, Termination letter, 2 September 2019, p. 14 (emphasis added).
[153] **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019; ¶¶41-45, pp. 27-28; **C-19**, Angola's lawsuit against Aenergy, filed in the Provincial Court of Luanda (with informal translation into English), 2 March 2020, ¶¶48-50, pp. 40-41. *See* Claimant's Rule 41 Response, ¶¶33, 210-211.
[154] **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019, ¶76, p. 32 (emphasis added).

106. Against this backdrop, it is staggering that Angola now asserts that it "*has never claimed that the Four Unsolicited Turbines* […] *were already its property*".[155] It had definitely claimed, in no uncertain terms, that the Four Turbines were already its property.

107. And this claim by Angola was crucial for Aenergy taking the position in the U.S. proceedings that its turbines had been expropriated.[156]

108. However, the Respondent later made a *volte-face*: it went on to challenge that the preventive seizure had been an expropriation by acknowledging that the title to the Four Turbines remained with Aenergy, pending the main proceedings before the Provincial Court of Luanda:[157]

> *"The court entered an order to sequester the turbines as authorized by Angolan law, and* ***temporarily*** *placed the disputed turbines and associated equipment in the control of a trustee appointed by the Angolan courts in order to secure and preserve the property* ***pending further and final adjudication of the parties' respective rights****. The order of the court in Luanda* ***did not transfer title to the property to the Angolan government****, as* ***title remains with Plaintiff****".*

109. In that situation, it was perfectly legitimate for Mr Machado to follow suit, *i.e.*, to take note of Angola's admission that the title to the Four Turbines remained with Aenergy and to assume that the turbines were taken into judicial custody legally, on a preventive and temporary basis, as explicitly stated in the Request for Arbitration.[158]

110. However, against all assurances given to the U.S. courts, Angola was not minded to wait for the outcome of the main proceedings before the Provincial Court of Luanda. Instead, it decided to take the Four Turbines: it illegally removed them from judicial custody by installing them in its power plants.

111. It is unfathomable why, in Angola's view, it might be bad faith for Mr Machado to challenge such illegal taking under the BIT.

112. In sum, there was no "*change of heart*" by Mr Machado but a perfectly legitimate reaction to Angola's *volte-face*. It is Angola who displays bad faith by first arguing before the U.S. courts that the preventive seizure in December 2019 did not deprive

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[155] Respondent's Rule 41 Reply, ¶119.

[156] *See*, *e.g.*, **R-0006**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case no. 20 cv 3569, 7 May 2020, ¶¶206, 214-215, pp. 66-68; **R-0017**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case no. 20 cv 3569, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, 2 November 2020, p. 41.

[157] **C-32**, Angola's Brief on Appeal from the United States District Court for the Southern District of New York, 13 October 2021, p. 15 (emphasis added). *See also* **R-0024**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, Supplemental Declaration of Henrique Abecasis in Support of the Angolan Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, 8 March 2023, ¶8, p. 2.

[158] Request for Arbitration, ¶54.

Aenergy of control, use, and economic value of the Four Turbines and now seeking to pin down the Claimant to the opposite.

113. In conclusion, under no conceivable legal theory on which Angola might have relied (it has invoked none), can any allegations made by Aenergy before the U.S. courts prevent Mr Machado from presenting its claims and allegations before this Tribunal.

IV. The Respondent's argument that the Claimant manifestly lacks standing to bring his FET and FPS claims is belated and, in any case, wrong

114. The Respondent alleges that it only became aware of the specific nature of Mr Machado's FET and FPS claims upon receiving the Claimant's Rule 41 Response.[159] And it argues that Mr Machado lacks legal standing to bring his FET and FPS claims because (i) these claims arise from ongoing legal proceedings involving Aenergy –rather than Mr Machado–,[160] (ii) the bulk of the Claimant's submissions allegedly regard the seizure of the Four Turbines from Aenergy's control, as well as IGAPE's actions as trustee,[161] and (iii) the BIT supposedly only allows shareholders to make claims on behalf of the local company in expropriation claims.[162]

115. Once again, the Respondent's arguments must fail for the following reasons.

116. *First*, the Respondent's objection is untimely. In his Request for Arbitration the Claimant laid out the facts on which he bases its FET and FPS claims.[163] The relevant factual account remained the same in the Claimant's Rule 41 Response.[164] Accordingly, since the Request for Arbitration, the Respondent was sufficiently on notice to raise an objection of manifest lack of legal standing but chose to limit its objection to the lack of *ratione temporis* jurisdiction. It may not now use its Reply to add a new objection as, under the ICSID Arbitration Rules, it was required to set out all the factual and legal arguments supporting its Rule 41 objection when it filed its Rule 41 Submission.[165]

117. *Second*, the Respondent's objection is premature. Angola states that Mr Machado has no legal standing to file his FET and FPS claims because they arise from actions involving Aenergy, not Mr Machado.[166] On this basis, the Respondent submits that

[159] Respondent's Rule 41 Reply, ¶139.
[160] Respondent's Rule 41 Reply, ¶143.
[161] Respondent's Rule 41 Reply, ¶143.
[162] Respondent's Rule 41 Reply, ¶144.
[163] *See* ¶74 above.
[164] Claimant's Rule 41 Response, ¶¶104-106, 111, 117-119, 134-140.
[165] Rule 41(2)(b) ICSID Arbitration Rules 2022.
[166] Respondent's Rule 41 Reply, ¶143.

Mr Machado's FET and FPS claims could only be filed if such breaches resulted in a loss of value of Mr Machado's shares in Aenergy.[167]

118. However, Mr Machado has not yet had the opportunity to present his full case. Indeed, the ICSID Convention states that a Request for Arbitration shall include "*information concerning the issues in dispute, the identity of the parties and their consent to arbitration*".[168] It is in the memorials on the merits that the parties shall submit the full relevant facts, law and arguments in support of their case.[169]

119. Mr Machado has filed only a Request for Arbitration –in which he briefly summarised the basis of his factual[170] and legal[171] claims– and his Rule 41 Response –which is limited to responding to the Respondent's *ratione temporis* objection raised in the Rule 41 Submission. Mr Machado specifically referred to article 7(3) and 7(4) of the BIT with regards to his right to be made whole for the expropriation of his investment and provisionally quantified this amount in 112,800,000 USD.[172] However, Mr Machado has not yet quantified his FET and FPS claims, which he has specifically reserved his right to develop at a later stage of the proceeding.[173]

120. Mr Machado has not yet defined –nor should he have– whether he is claiming damages for the loss of value of his shares in Aenergy, damages for the direct loss of the Four Turbines, or otherwise. But Mr Machado has every right to be allowed to do so when reaching the appropriate procedural stage, *i.e.* the Statement of Claim.

121. *Third*, the BIT does not preclude Mr Machado from filing FET and FPS claims for the loss of the value of Mr Machado's shares in Aenergy and/or the direct loss of the Four Turbines.

122. The Respondent objects to Mr Machado's FET and FPS claims on the basis that article 7(4) of the BIT allegedly contains an exception not contemplated in article 4(2) of the BIT, according to which the BIT only protects the assets of protected investments in expropriation claims, but not in FET and FPS claims.[174] However, this distinction is, quite simply, fabricated by the Respondent, as the express language of article 4(2) clearly provides that it protects "*investments made by investors*".[175]

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[167] Respondent's Rule 41 Reply, ¶¶144, 149.
[168] Article 36(2) of the ICSID Convention 2022.
[169] Rule 30 of the ICSID Arbitration Rules 2022.
[170] Request for Arbitration, ¶¶39-55.
[171] Request for Arbitration, ¶¶57-71.
[172] Request for Arbitration, ¶¶72-74.
[173] Request for Arbitration, ¶¶90-91(i).
[174] Respondent's Rule 41 Reply, ¶149.
[175] **CLA-25**, Consolidated text of the BIT (with informal translation into English), 22 December 2021, article 4(2), p. 19.

123. Since both Mr Machado's shares in Aenergy and the Four Turbines constitute valid investments under the BIT[176] –and the Respondent does not dispute this– Mr Machado can bring FET and FPS claims under the BIT for the loss in value of his shares in Aenergy and/or the direct loss of the Four Turbines. The textual reading of article 4(2) of the BIT does not preclude this.

124. Furthermore, investment tribunals have consistently found that claims over assets of the investment are permissible.[177] For instance, in *Mera Investment v. Serbia*, the tribunal decided that it had jurisdiction *ratione materiae* over the investor's claims, including "*claims that* [arose] *from the rights in assets held by the Claimant's subsidiary Mera Invest*".[178] The tribunal observed:[179]

> *"It is in fact not unusual that an investor, who wants to make an investment abroad, uses a company as a vehicle, thereby investing in the host country* […] [W]*here a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former. Accordingly, in situations* ***where a shareholder controls the company that owns the assets in issue, tribunals may consider those underlying assets to be the investments of the shareholder****".*

125. The Respondent refers to two cases –*Poštová banka* and *ST-AD GmbH*– in an attempt to argue that, under international law, claimants do not have standing to claim damages for the loss of assets of their investments.[180] However, neither case is applicable to the present situation because the claims in those cases referred to assets that were not, in themselves, protected investments under the applicable BITs. Both tribunals consequently held that the only available claims were those for the loss of share value in the respective companies –which constituted protected investments under the applicable BITs– resulting from the loss or damages of the assets.[181]

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[176] *See* Request for Arbitration, ¶¶65-66; **CLA-25**, Consolidated text of the BIT (with informal translation into English), 22 December 2021, articles 3(2)(a) and 3(2)(b), p. 18.

[177] *See* **CLA-58**, *von Pezold and others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2025, ¶¶320-327, pp. 111-114 ("*the Zimbabwean Companies, controlled by the von Pezold Claimants, are simply the subsidiary vehicles through which the von Pezold Claimants have made their investment. Any conduct by the Respondent targeted towards the Zimbabwean Companies thus was also conduct targeted towards the von Pezold Claimants*"); **CLA-59**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶108, p. 53 ("[it] *does not alter the legal nature of the investor's interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company* […] *it merely ensures that whatever interest* […] *the investor does have will be accorded certain protections*").

[178] **CLA-60**, *Mera Investment Fund Limited v. Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 20 November 2018**,** ¶¶112, 135, pp. 29, 35.

[179] **CLA-60**, *Mera Investment Fund Limited v. Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 20 November 2018, ¶¶129-130, pp. 33-34 (emphasis added).

[180] Respondent's Rule 41 Reply, ¶¶146-150.

[181] **RL-0028**, *Poštová banka, a.s., Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶246, p. 54 ("*In the present case, Istrokapital has not relied on its shareholding in Poštová banka as the basis of its claim* […] *Istrokapital thus has expressly sought to base the Tribunal's jurisdiction on its alleged 'indirect investment' in the GGBs held by Poštová banka. However, Istrokapital has failed to establish that it has any right to the assets of Poštová banka that qualifies for protection under the*

126. The *Poštová banka* and *ST-AD GmbH* cases are distinguishable from the present case because both Mr Machado's shares in Aenergy and the Four Turbines are protected investments under article 3(2)(a) of the Angola-Portugal BIT. Again, this is not disputed by the Respondent. Mr Machado therefore has every right to bring a claim for the direct loss of the Four Turbines and/or for the loss of value of his shares in Aenergy as a result of the loss of the Four Turbines.

V. The Respondent's remaining allegations are smoke and mirrors and factually wrong

127. The Respondent insists on making allegations which are irrelevant to the Rule 41 objection it chose to present.[182] For the sake of clarity, the Claimant will address them briefly.

128. *First*, Angola continues to accuse Mr Machado of using the Credit Facility to fund the Four Turbines, although Mr Machado is not even a party to the Credit Facility. Angola does not address the Claimant's explanation of the Credit Facility's payment system.[183] Evidently, Angola disregards it because it cannot effectively counter the Claimant's response.[184]

129. *Second*, Angola alleges that the jury in Mr da Costa's case concluded that Mr Machado made kick-back payments to Mr da Costa for his efforts in the falsification of Angolan letters of intent.[185] However, the jury in Mr da Costa's case did not reach any conclusions relevant to Mr Machado, as he has never been accused, indicted or convicted for any wrongdoing in connection with Mr da Costa's case. In fact, Mr Machado, Aenergy and several of its former employees provided key documentary evidence and witness testimony that supported the investigation, prosecution and ultimate conviction of Mr da Costa. This stands in stark contrast to Angola's behaviour, whose authorities have remained passive despite multiple criminal complaints and requests for investigation lodged by Mr Machado and Aenergy with the Angolan public prosecutor's office regarding Mr da Costa's forgeries. Furthermore, the Angolan Government has continued to conduct business with Mr da Costa.

130. In any event, this question does not pertain to Mr Machado and, as previously explained, is entirely unrelated to the present case.

Cyprus-Greece BIT. Therefore, this Tribunal has no jurisdiction over Istrokapital's claims in the present arbitration"); **RL-0026**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶¶278, 282, 284, 291, pp. 80-83.

[182] Respondent's Rule 41 Reply, ¶¶151-156.

[183] Respondent's Rule 41 Reply, ¶152.

[184] Claimant's Rule 41 Response, ¶¶219-223.

[185] Respondent's Rule 41 Reply, ¶155.

VI. Costs

131. In his Rule 41 Response, the Claimant requested that the Tribunal order the Respondent to bear all costs incurred by Mr Machado in these Rule 41 proceedings.[186] The Respondent has significantly delayed the arbitration by advancing an unmeritorious Rule 41 objection and misconstruing the Claimant's case to seek to justify it.[187] Therefore, Mr Machado should not bear the costs of defending against it.

132. By contrast, Angola requests that the Claimant bear all costs arising from these Rule 41 proceedings, arguing that the Claimant's claims amount to a "*blatant abuse of the ICSID dispute settlement system*".[188]

133. However, it is Angola –not Mr Machado– who is abusing the ICSID system. Angola has steadfastly refused to address Mr Machado's case and has again failed to produce any evidence that could cast doubt on the Claimant's factual allegations –evidence that, if Mr Machado's allegations were wrong, would be readily available to Angola.

134. In *Elsamex v. Honduras*, the sole arbitrator held that, because the respondent had "*litigated with a notorious lack of legal merit in all matters relating to the jurisdictional scope*" it was appropriate for the respondent to bear the claimant's legal costs.[189] The same principle applies here. The Respondent's failure to minimally substantiate a pre-BIT date for the installation of the Four Turbines seals its fate in this phase. Angola's *ratione temporis* objection lacks any merit, and the Claimant should not bear the consequences.

135. The Respondent also argues that automatically imposing costs on the respondents when a Rule 41 objection is dismissed would frustrate the purpose of the rule. According to Angola, it is the respondent's prerogative to decide whether to make use of it to defend against frivolous claims.[190] Pursuant to this logic, a respondent should never have to bear the full costs of a dismissed Rule 41 procedure, provided it describes the claimant's claims as "frivolous".[191]

136. However, the tribunal in *MOL v. Croatia* determined that "*a Respondent invoking the procedure under the Rule* [41] *takes on itself the risk of adverse cost*

[186] Claimant's Rule 41 Response, ¶¶232-237.
[187] Claimant's Rule 41 Response, ¶¶235-236.
[188] Respondent's Rule 41 Reply, ¶165.
[189] **CLA-61**, *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award (with informal translation into English), 16 November 2012, ¶871, p. 244.
[190] Respondent's Rule 41 Reply, ¶162.
[191] Respondent's Rule 41 Reply, ¶¶162-163.

consequences should its application fail".[192] Therefore, while it is true that the Respondent has the prerogative to exercise its right under Rule 41, it ought to face the economic consequences if the Tribunal does not grant the relief sought. Otherwise, respondents would be unduly incentivised to misuse the Rule 41 objection.

137. Consistent with prior ICSID tribunal decisions and in the interest of procedural fairness, the Respondent should bear the full costs incurred by Mr Machado in defending against this meritless jurisdictional challenge.

VII. The Claimant's request for relief

138. The Claimant requests that the Arbitral Tribunal issue a decision,

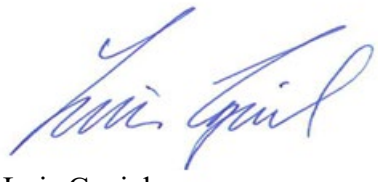
(i) rejecting the Respondent's objection that the Claimant's claims are manifestly without legal merit; and

(ii) ordering the continuation of the proceedings as per Procedural Order No. 1; and

issue an interim decision on costs,

(iii) ordering the Respondent to pay all costs of the special procedure under the Rule 41, including the legal fees and expenses of the Claimant's legal representation, the fees and expenses of the Tribunal, Tribunal assistants and Tribunal-appointed experts, and the administrative charges and direct costs of the Centre, plus pre-award and post-award interest thereon.

Respectfully submitted,



Luis Capiel
On behalf of Mr Ricardo Filomeno Duarte Ventura Leitão Machado

[192] **CLA-62**, *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014, ¶54, p. 24.