INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Portuguese Republic

(ICSID Case No. ARB/22/28)

PROCEDURAL ORDER NO. 4

Requests for Document Production

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

Secretary of the Tribunal
Ms. Ella Rosenberg

---

8 August 2024

I. PROCEDURAL BACKGROUND

1. In accordance with Procedural Order No. 1 ("PO1") and the procedural calendar established for the Bifurcation Scenario, the Parties exchanged their Document Production Requests ("Requests") on 25 June 2024 in the form of Redfern Schedules provided in Schedule C to PO1.

2. On 9 July 2024, the Parties exchanged their Objections to the Requests for Production of Documents ("Objections").

3. On 23 July 2024, the Parties submitted to the Tribunal their Responses to the Parties' Objections ("Responses"). The Parties also produced non-contested documents without submitting them to the Tribunal or Secretariat.

4. By cover email to the Tribunal dated 23 July 2024, the Claimants objected to the Respondent's purported introduction into the record of certain exhibits and legal authorities with its Objections without having sought leave of the Tribunal, contrary to paragraphs 15 and 16 of PO1. The Claimants sought direction from the Tribunal in this regard.

5. On 26 July 2024, the Tribunal invited the Claimants to indicate by 31 July 2024 whether they made a submission as to prejudice and what, if any, relief they sought from the Tribunal in respect of the exhibits and legal authorities submitted with the Respondent's Objections.

6. On 31 July 2024, the Claimants provided their answers to the Tribunal's email of 26 July 2024.

7. On 1 August 2024, the Tribunal invited the Respondent to make any observations on the Claimants' comments by 5 August 2024.

8. On 5 August 2024, the Respondent provided its observations on the Claimants' comments.

II. APPLICABLE STANDARDS

9. This arbitration is governed by the Mauritius-Portugal BIT,[1] the ICSID Convention, and the 2022 ICSID Arbitration Rules.

10. The ICSID Convention and the ICSID Arbitration Rules afford the Parties and the Tribunal significant discretion on issues of document production.

11. Article 43 of the ICSID Convention provides in part: "Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence…."

12. Rule 36(3) of the ICSID Arbitration Rules provides: "The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding."

13. Rule 37 of the ICSID Arbitration Rules provides:

> In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including:
>
> (a) the scope and timeliness of the request;
>
> (b) the relevance and materiality of the documents requested;
>
> (c) the burden of production; and
>
> (d) the basis of the objection.

14. PO1, issued in consultation with the Parties, contains further procedures for document production. Paragraph 15 provides:

> 15.1 The Tribunal shall be guided but not bound by the 2020 IBA Rules on the Taking of Evidence in International Arbitration.
>
> 15.2. Within the time limit set in Annex B, each party may request from the other party the production of documents or categories of documents within the other party's possession, custody or control. Such a request for production shall identify each document or narrow category of documents sought with precision, in the form of a Redfern Schedule as attached in Annex C hereto, in both Word and .pdf format, specifying why the document sought is relevant to the dispute and material to the outcome of the case. Such a request shall not be copied to the Tribunal or the

[1] The BIT is silent on issues of document production.

Secretary of the Tribunal.

15.3. Within the time limit set forth in Annex B, the other party shall, using the Redfern Schedule provided by the first party, submit its reasons for not producing responsive documents (objections), or its agreement to the request. It shall not be copied to the Tribunal or the Secretary of the Tribunal.

15.4. On the date provided in Annex B, the other party shall produce to the first party the requested documents to which it has not filed any objection.

15.5 Within the time limit set forth in Annex B, the requesting party may seek an order for production of documents sought and not produced, in which case it shall reply to the other party's objections in that same Redfern Schedule. At the same time, it shall submit the Word and .pdf copies of the Redfern Schedule to the Tribunal through the Secretary of the Tribunal.

15.6. On or around the date set forth in Annex B, the Tribunal will, at its discretion, rule upon the production of the documents or categories of documents, having regard to all relevant circumstances, including the legitimate interests of the parties and applicable privileges.

15.7. Documents which the Tribunal orders to be produced shall be communicated directly to the requesting party without copying the Tribunal or the Secretary of the Tribunal within the time limit set by the Tribunal. Documents so communicated shall not be deemed on record unless and until the requesting party subsequently files such documents as exhibits in accordance with §16 below.

15.8. The Tribunal may order a party to produce documents on its own initiative at any time. In that case, the documents shall be submitted to the other party and to the Tribunal in accordance with §16 below and shall be deemed on record.

15.9. If a party fails to comply with an order to produce a document or specific category of documents, the Tribunal may draw inferences deemed appropriate, taking into consideration all relevant circumstances.

15. Both Parties have taken guidance from the 2020 IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") in their respective Requests and Objections.

III. GENERAL AND RECURRING ISSUES

16. The Parties' Requests and Objections raise certain general and recurring issues.

A. Relevance and Materiality

17. The Claimants contend that the Respondent's objection to jurisdiction *ratione personae* is based on a "flawed interpretation" of the BIT under "prevailing jurisprudence."[2] The Claimants thus conclude that the Respondent's requests for documents relating to such objections are not relevant or material, "contrary to paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules."[3]

18. The Respondent disagrees, arguing that relevance and materiality "should be judged by reference to whether the requesting party can use the requested document to present its case," not based on the other party's unilateral interpretation of an "actively contested issue."[4]

19. In deciding the Parties' Requests, the Tribunal considers the *prima facie* relevance and materiality of the requested documents, having regard to each Party's allegations and arguments to date. At this stage of the proceeding, the Tribunal cannot exclude documents from production based on one Party's interpretation of contested legal issues.

B. Privilege

20. The Claimants argue that "a vast number of the documents requested are subject to attorney-client or litigation privilege under applicable legal rules," namely U.S. federal and state laws (including with respect to the transfer of the Oak Loan to Claimants), Portuguese law (including with respect to the treatment of the Claimants' investment in Portugal), and English law (including with respect to the initiation of this arbitral proceeding).[5] The Claimants further argue that many of the requested documents are subject to legal privilege of their

[2] Respondent's Requests, Annex B, paras. 22-23.

[3] Respondent's Requests, Annex B, para. 22.

[4] Respondent's Requests, Annex B, para. 28.

[5] Respondent's Requests, Annex B, para. 25(a).

parents and affiliates, which are third parties to this proceeding.[6]

21. The Respondent similarly objects to the production of certain documents on grounds of legal privilege. The Respondent argues that privilege must be applied in a "specific and targeted manner" and not to an "entire category" of documents.[7] The Respondent further argues that the Claimants have the burden of proving that such privilege applies to each document, which requires them to "identify such document and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified."[8] To that end, the Respondent asks the Tribunal to order the Claimants to prepare a privilege log, identifying particular documents deemed privileged, the basis for the privilege, and "adequate information that said document falls under legal privilege in the sense of Article 9.2 of the IBA Rules."[9]

22. The Tribunal recognizes that a Party may withhold from production documents subject to a valid legal impediment or privilege. If a Party withholds production of a document based on an assertion of privilege or other immunity from disclosure, it shall record the document in a privilege log, guided by Article 9.2 of the IBA Rules.

C. Confidential or Sensitive Information

23. The Respondent invokes non-waivable rules of legal secrecy under Portuguese and European Union law to exempt the production of several categories of documents. The disclosure of such information, the Respondent argues, could cause irreparable harm to itself, the Bank of Portugal, and the Liquidation Committee, as well as to private parties such as BES, Novo Banco, and PDVSA.[10] The Respondent further notes that "access to such confidential information/documentation would always require authorization from the relevant entities or a direct, personal, legitimate and constitutionally protected interest that is sufficiently relevant

[6] Respondent's Requests, Annex B, para. 25(c).

[7] Respondent's Requests, Annex B, para. 30.

[8] Respondent's Requests, Annex B, para. 30.

[9] Respondent's Requests, Annex B, para. 30.

[10] Claimants' Requests, Annex A, p. 14.

considering all the fundamental rights at stake."[11]

24. The Claimants reject the Respondent's invocation of "legal secrecy," "general secrecy," and "banking, professional and commercial secrecy" to "shield all responsive documents."[12] The Claimants cite the decisions of international investment tribunals confirming that secrecy laws in general do not prevent a tribunal from ordering the production of documents. In any event, the Claimants deem the Respondent's objections unsupported by Portuguese banking laws, professional secrecy laws, or European Union law. On the contrary, the Claimants consider their Requests positively supported by Portuguese law and the constitutional principle of open administration in Portugal.[13]

25. Further, the Claimants observe that the Tribunal already established detailed confidentiality rules for this proceeding in Procedural Order No. 2. The Claimants also refer to Article 9(5) of the IBA Rules, which permits a tribunal, "where appropriate, [to] make necessary arrangements to permit Documents to be produced, and evidence to be presented or considered subject to suitable confidentiality protection."[14] The Claimants and their counsel expressed their willingness to make "such reasonable arrangements as may be considered necessary by the Tribunal to facilitate Portugal's presentation of the evidence requested by the Claimants."[15]

26. The Tribunal invites the Parties to agree by 14 August 2024 to reasonable arrangements for the protection of confidential or sensitive information in documents ordered to be produced by the Tribunal. If the Parties cannot so agree, the requested Party shall produce documents with the confidential or sensitive information redacted, guided by the IBA Rules. The Parties may address the Tribunal on any points of disagreement on such redactions.

[11] Claimants' Requests, Annex A, p. 12.

[12] Claimants' Requests, Annex A, p. 17.

[13] Claimants' Requests, Annex A, pp. 18-25.

[14] Claimants' Requests, Annex A, p. 4.

[15] Claimants' Requests, Annex A, p. 4.

D. Related Parties

1. Claimants' Parents and Affiliates

27. The Claimants object to the Respondent's Requests for documents of "Claimants' non-Mauritian parents and affiliates." The Claimants argue that the Respondent has failed to establish that such documents are in the "possession, custody or control" of the Claimants, contrary to Article 3.3(c)(ii) of the IBA Rules.[16]

28. The Respondent replies:

> [I]t is accepted that a party's duty to disclose documents in the context of document production encompasses the duty to disclose documents held by its affiliates, assuming the requested party can reasonably access these materials. Tribunals have regularly ordered parties to produce documents that are in the possession of parent companies and affiliates in the same corporate group.[17]

29. The Respondent considers it reasonable to assume that the Claimants have, or could obtain, the requested documents, which relate to the Claimants' decision-making processes or concern the Claimants' acquisition of their purported investment. The Respondent further points to the "control and integration" between the Claimants and their non-Mauritian parents and affiliates, citing documents already produced in the arbitration by those entities.[18] The Respondent concludes that "to allow Claimants to produce such documents within the possession, custody and/or control of their affiliates, while denying Respondent the opportunity to make document production requests of Claimants' affiliates, would permit Claimants to cherry-pick what documents are introduced to the record from their affiliates, substantially prejudicing Respondent and its due process rights."[19]

30. The Tribunal cannot assume, at this stage of the proceeding, that the Claimants can compel their parents and affiliates to produce documents for this arbitration. Each Party, however, has a duty of good faith in procedural matters, including in helping ensure that the record contains sufficient evidence to permit issuance of a fair decision or award. Each Party thus

[16] Respondent's Requests, Annex B, para. 25(b).

[17] Respondent's Requests, Annex B, para. 32.

[18] Respondent's Requests, Annex B, paras. 37-38.

[19] Respondent's Requests, Annex B, para. 39.

must use its best efforts to obtain and produce responsive documents held by a relevant related entity.[20] The Claimants therefore must use their best efforts to produce responsive documents that may be in the possession, custody or control of their non-Mauritian parents and affiliates. In this respect, the Tribunal acknowledges and accepts the Claimants' undertaking to ask their non-Mauritian parents and affiliates to consent to provide any documents ordered by the Tribunal.[21]

2. Governmental Entities

31. The Respondent objects to the Claimants' Requests for documents of the Bank of Portugal and the Resolution Fund, "which are both third parties to the Respondent for purposes of this request."[22] The Respondent argues that the Claimants have failed to establish that such documents are in its "possession, custody or control," contrary to Article 3.3(c) of the IBA Rules.[23] In particular, the Respondent asserts that it "has absolutely no control over the Bank of Portugal," which is "functionally independent" of the Respondent, and that it has "no means to oblige the Bank of Portugal to produce such documents."[24] The Respondent similarly asserts that it "does not control the Resolution Fund," which is a legal person under public law with "administrative and financial autonomy," and that it has no means to oblige the Resolution Fund to produce documents in this proceeding.[25]

32. The Claimants disagree, arguing that the requested documents are "clearly within the possession, custody or control of the Respondent."[26] They argue:

> Portuguese State organs and other entities exercising governmental authority engage the Respondent's responsibility under the BIT as a matter of international

[20] *See, e.g., Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 4, 12 July 2013, para. 38 (citing authorities) ("While the Parties themselves are to produce all responsive documents that are in their possession, custody or control, they should also use their best efforts to produce responsive documents which may be in the possession, custody or control of third parties with which the disputing Parties have a relationship.").

[21] Respondent's Requests, Annex B, para. 25(b) n. 6.

[22] Claimants' Requests, Annex A, p. 9.

[23] Claimants' Requests, Annex A, p. 9.

[24] Claimants' Requests, Annex A, pp. 9-10.

[25] Claimants' Requests, Annex A, p. 10.

[26] Claimants' Requests, Annex A, p. 10.

> law. The Bank of Portugal and the Resolution Fund are both organs of the State and cannot by definition, for the purposes of this proceeding and these document requests, constitute "third parties". This conclusion is supported by investment treaty jurisprudence.[27]

33. As noted, the Parties have a duty of good faith in procedural matters, including in matters of document production. The Respondent must not only produce all responsive documents in its possession, custody, or control, but also use its best efforts to produce responsive documents in the possession, custody or control of relevant State entities, including the Bank of Portugal and the Resolution Fund.

E. Unauthorized Submission of Documents

34. The Respondent's Objections contained new exhibits numbered R-0072 to R-0083 and legal authorities numbered RL-0141 to RL-0145. The Respondent's Responses contained additional new authorities numbered RL-0146 to RL-0156. The Respondent did not seek leave of the Tribunal before submitting the documents.

35. In an email to the Tribunal dated 23 July 2024, the Claimants denied that the Respondent's new exhibits and authorities were properly submitted, arguing :

> The Claimants note that the Respondent's Objections were accompanied by "supporting documentation", which comprised new factual exhibits and legal authorities. The Respondent uploaded the new factual exhibits and legal authorities and revised factual and legal authority indices to ICSID's "BOX" platform a number of days after the filing of the Objections on 9 July 2024, but did not provide the indices to these documents alongside the email to the Tribunal Secretary attaching its Objections on 9 July 2024. Pursuant to paragraphs 15 and 16 of PO 1, and as the Claimants have already indicated in inter-partes correspondence with the Respondent, the Claimants do not consider that these factual exhibits and legal authorities can properly be submitted to the record of these proceedings without the permission of the Tribunal. The Claimants have, however, for the purposes of convenience and ease of reference only, used the same references (where applicable) in their Responses to the Respondent's Objections. This does not constitute any admission that they consider these documents formally to have been submitted to the record. The Claimants would be grateful for a direction from the Tribunal in this regard.

[27] Claimants' Requests, Annex A, p. 16 (citing authorities).

36. On 26 July 2024, the Tribunal invited the Claimants to indicate by 31 July 2024 whether they made a submission as to prejudice and what, if any, relief they sought from the Tribunal in respect of the exhibits and legal authorities submitted with the Respondent's Objections.

37. In an email dated 1 August 2024, the Claimants clarified their "interest in the rules of procedure being respected and upheld" and the general "risk of prejudice if they are not." The Claimants reiterated their position that the Respondent's introduction of evidence and legal authorities departed from PO1, but they declined to "make a submission of prejudice in relation to the Respondent's approach on this occasion." Instead, the Claimants asked the Tribunal to confirm:

> (i) that new factual exhibits and legal authorities may not be submitted with document production requests, objections, or responses; (ii) thus, that the Respondent's new Factual Exhibits and Legal authorities are not on the record; and (iii) the Respondent must seek permission to add any new exhibits and legal authorities other than alongside its written submissions. In relation to (iii), the Claimants confirm that they would not oppose an application to put the exhibits and legal authorities on the record with retrospective effect on this occasion.

38. In an email dated 5 August 2024, the Respondent noted its assumption that its Objections and Responses constituted "written submissions" within the meaning of PO1. As such, the Respondent could introduce new exhibits and authorities into the record with those submissions without seeking leave of the Tribunal. The Respondent further noted that it clearly identified the new exhibits and authorities in its Objections and Responses, and it subsequently provided an updated index, in accordance with the procedures set out in PO1. The Respondent concluded that its exhibits and authorities "should remain on the record," or should be "retroactively admitted on the record," citing the Claimants' non-objection to their admission.

39. The Tribunal acknowledges the Respondent's misunderstanding and appreciates the Claimants' understanding and accommodation. The Tribunal thus accepts into the record documents R-0072-0083 and RL-0141-0145, submitted with the Respondent's Request, and RL-0146-0156, submitted with the Respondent's Objections. The Tribunal reminds the Parties to comply with the terms of PO1 for the submission of documents into the record.

IV. ORDER

40. Without prejudice to requests for documents in any subsequent phase of the proceeding, and expressing no view on the merits of the jurisdictional arguments, the Tribunal rules as follows.

(1) The Tribunal's decisions on the Parties' document production Requests are set out in **Annex A** and **Annex B**, which form integral parts of this Order.

(2) Each Party shall produce by 20 August 2024 all documents ordered by the Tribunal.

(3) If a Party withholds production of a document based on an assertion of privilege, it shall record the document in a privilege log, guided by Article 9.2 of the IBA Rules. Any privilege logs shall be exchanged by 20 August 2024.

(4) The Tribunal invites the Parties to make reasonable arrangements for the production of documents containing confidential or sensitive information, guided by Article 9.2 of the IBA Rules. If the Parties fail to agree on such arrangements, the requested Party shall produce by 20 August 2024 such documents with the confidential or sensitive information redacted.

(5) The Tribunal accepts into the record the fact exhibits and legal authorities submitted with the Respondent's Objections and Responses.

On behalf of the Tribunal,

[signature]

Jeremy K. Sharpe
President of the Tribunal
Date: 8 August 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

(ICSID Case No. ARB/22/28)

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

CLAIMANTS

v.

PORTUGUESE REPUBLIC

RESPONDENT

CLAIMANTS' REQUEST TO PRODUCE DOCUMENTS ON JURISDICTION

---

25 June 2024

FIETTA LLP
INTERNATIONAL LAW
1 Fitzroy Square
London W1T 5HF
Telephone; +44 (0)20 3889 9800
Fax: +44 (0)20 7387 0011

PLMJ
Transformative Legal Experts

{INTENTIONAL BLANK PAGE}

I. INTRODUCTION

1. This request for the production of documents (the "**Request**") is made pursuant to paragraph 15.2 of Procedural Order No. 1 ("**PO 1**") dated 13 July 2023 and the 2020 IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"). By this Request, the Claimants seek voluntary production by the Respondent of certain documents, failing which the Claimants will request that the Tribunal order the Respondent to produce such documents.

2. The attached Schedule (the "Schedule") lists the documents that the Claimants request the Respondent to produce. For the purposes of this Request, all references to "Respondent" should be read to include all Portuguese State organs and institutions, including but not limited to the Portuguese Parliament (including all committees and sub-committees), State organs and institutions, including but not limited to the Bank of Portugal and the Resolution Fund.

3. The term "Document" as used in the Schedule means all writings of any kind, whether recorded on paper, electronic means, audio or visual recordings, or any other mechanical or electronic means of storing or recording information, including, but not limited to, all communications (including reports, memoranda, presentations, letters, and e-mail and facsimile correspondence), notes, minutes of meetings and/or conversations (by telephone or otherwise), transcripts, talking points, speeches, financial statements, proposals, and prospectuses. All other capitalised terms used in the Schedule are defined in the Parties' pleadings.

II. OVERVIEW OF THE CLAIMANTS' REQUESTS

4. The Claimants demonstrated in their Memorial that the Tribunal has jurisdiction over the claims. For its part, the Respondent raised in its Memorial on Jurisdiction several objections which are largely unsupported by contemporaneous documents. The Documents requested in the Schedule are principally those that are relevant and material to the Respondent's litany of unsupported allegations. These Documents

are, or logically should be, within the possession, custody or control of the Respondent (including its State organs).

5. For each Document or category of Documents requested, the Schedule further sets out the relevance and materiality to the outcome of this case of each request, in accordance with paragraph 15.2 of PO1. For each request set out in the Schedule, the Claimants certify that the requested Documents are not within the Claimants' possession, custody or control unless, and to the extent, otherwise specifically indicated in a given request.

[signature]

Respectfully submitted,

Fietta LLP

Counsel to the Claimants

25 June 2024

III. CLAIMANTS' RESPONSES DATED 23 JULY TO THE RESPONDENT'S OBJECTIONS TO PRODUCE DATED 9 JULY 2024

1. These Responses dated 23 July ("**Responses**") to the Respondent's Objections to Produce dated 9 July ("**Objections**") are submitted by the Claimants in accordance with paragraph 15.5 of PO 1. The Claimants have several overarching observations regarding the Respondent's Objections, which are set out in the following paragraphs.

2. It is clear from the Respondent's Objections that it has a significant number of documents that are responsive to the Claimants' Requests within its possession, custody or control. On the other hand, save in relation to Requests nos. 2 and 12,[1] the Respondent has not sought to argue that it would be unduly burdensome to produce responsive documents.

3. Instead, the Respondent relies variously on (in particular): (a) blanket (and flawed) claims to "confidentiality" or "secrecy" arising under domestic Portuguese law as a means to withhold relevant and material documents; (b) blanket (and implausible) claims that responsive documents are not within its custody, possession and control because it has no control over its State organs, like the Bank of Portugal, in whose possession such documents clearly lie. It has included in its Objections extensive (but highly selective) and repetitive citations to provisions of Portuguese law, which are misleading for the reasons set out in the Claimants' Responses.[2]

4. Even if there were grounds on which the Respondent could properly withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's Requests.[3] The Tribunal has already put in place

[1] In relation to Request no. 9, the Respondent has cited Article 9.2(c) IBA Rules in relation to its contention that "Claimants attempt to transfer the burden of searching these documents on the Respondent." It does not, however, contend directly that granting Request no. 9 would impose an "unreasonable burden" on it.

[2] The Claimants reserve their right to seek costs in relation to having to respond to such spurious Objections.

[3] See, for example, *Mason Capital v. Republic of Korea*, Procedural Order no. 5, where the tribunal found that: "to the extent that Respondent intends to have classified or politically sensitive documents excluded from production, it will have to identify such documents and provide sufficient detail for Claimants and the Tribunal to assess whether the exemption is justified. The Tribunal agrees with Claimants' argument that the reliance on Article 9.2(b) IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and their status", Procedural Order no. 5, 15 January 2021, para. 21, available at https://pcacases.com/web/sendAttach/26156. The tribunal in *Pope & Talbot v. Government of*

detailed confidentiality rules for this proceeding in Procedural Order no. 2. The Tribunal has the power to put in place additional confidentiality measures, if required. Specifically, Article 9(5) of the IBA Rules confirms that the Tribunal "may, where appropriate, make necessary arrangements to permit Documents to be produced, and evidence to be presented or considered subject to suitable confidentiality protection." The Claimants and their counsel are prepared to enter such reasonable arrangements as may be considered necessary by the Tribunal to facilitate Portugal's presentation of the evidence requested by the Claimants. Therefore, "secrecy" cannot be a reason for a blanket refusal to disclose.

5. The Respondent has also sought in several of its Objections to rely on general (or, in some cases, more particularised) claims of legal "privilege". The Claimants have also explained the likely privileged nature of many of the documents sought in the Respondent's Requests for Production. Accordingly, the Parties agree that documents which are protected by legal privilege should not be produced in this arbitration. Save where specifically indicated below, the Claimants consider that the necessity or appropriateness of either Party producing a "privilege log" should be addressed upon their receipt of the Tribunal's ruling on the production of the documents or categories of documents. However, to the extent that the Tribunal considers it appropriate to grant, at the same time as its order on production, the Respondent's Request (at paragraph 17 of the introductory paragraphs to its Request for Production of Documents dated 25 June 2024) that the Claimants provide a "privilege log" in relation to any responsive Documents located and withheld by the Claimants on account of such privilege, the Claimants request the Tribunal to order the Respondent to produce a privilege log on the same terms.

6. Finally, the Respondent has also relied on supporting material to which it has assigned new Factual Exhibit and Legal Authority references, and uploaded to BOX

Canada found that "[i]t is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of state secrets. But any reasonable evaluation of the quality of that justification must depend in large part on having some idea of what those documents are. A determination by a Tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without any identification, that they deserve protection." See also *Pope & Talbot v. Government of Canada*, Decision on Official Secrecy and Professional Privilege, 6 September 2000, para. 1.4, available at https://www.italaw.com/sites/default/files/case-documents/ita0676.pdf.

consolidated indices of its existing and these new Exhibits and Authorities. Pursuant to paragraphs 15 and 16 of PO 1, and as the Claimants have already indicated in *inter-partes* correspondence with the Respondent, the Claimants do not consider that these Factual Exhibits and Legal Authorities can properly be submitted to the record of these proceedings without the permission of the Tribunal. The Claimants have, however, for the purposes of convenience and ease of reference only, used the same references (where applicable) in their Responses to the Respondent's Objections. This does not constitute any admission that they consider these documents formally to have been submitted to the record. The Claimants would be grateful for a direction from the Tribunal in this regard.

Claimants' Requests for Production of Documents

Document Request Number	**1.**
Documents or Category of Documents Requested	All Documents relating to the negotiation and conclusion of the Mauritius-Portugal BIT, including its *travaux prèparatoires*, as well as any Documents setting out the benefits Portugal expected to derive from concluding the BIT.
Relevance and Materiality according to the Requesting Party	In its Memorial on Jurisdiction, the Respondent argues that: "[f]or there to be jurisdiction *ratione personae*, Claimants must qualify as 'investors' under the Portugal-Mauritius BIT. Article 3(1)(b) of the BIT defines 'investors,' *inter alia*, as '[l]egal persons, including corporations, commercial companies or other companies or associations which have a main office in the territory of either Contracting Party and are incorporated or constituted in accordance with the law of that Contracting Party.' The equally authentic Portuguese version of the Treaty uses the term 'sede' for 'main office.' This important requirement is a mainstay in many of Portugal's BITs in order to avoid the (ab)use of the Treaty's rights and benefits by 'mailbox' companies." (Memorial on Jurisdiction, para. 85). The Respondent has not produced any contemporaneous documents to support its allegation that the Portugal-Mauritius BIT incorporates (what it calls) this "important requirement" in order to deny treaty protection to so-called "mailbox" companies. The requested Documents will shed light on the question of how "investor" should be interpreted in the BIT (including as a means of supplementary means of interpretation, pursuant to Article 32 of the VCLT). As such, they are relevant and material to the Respondent's objection to jurisdiction *ratione personae*. The requested Documents are not publicly available. They are or logically should be in the possession, custody and control of the Respondent given that they would have been generated in the course of preparing for, and participating in, negotiations at the inter-governmental level between Portugal and Mauritius, as well as in the lead up to Portugal's signature of the BIT.
Objections to Document Request	Respondent will produce all non-privileged documents responsive to this request that are in its possession, custody and control.
Reply to Objections to	To the extent that the Respondent has withheld Documents responsive to this Request on the basis of a claim to privilege, the Claimants request that the Respondent identify the document and specify the basis for claiming privilege. The Claimants are of the

Document Request	view that the Documents requested would not ordinarily include documents that are privileged.
Decision of the Tribunal	The Respondent's undertaking is noted. The Respondent shall provide a privilege log for documents withheld on grounds of privilege.

Document Request Number	**2.**
Documents or Category of Documents Requested	All Documents sent between 1 February 2014 and 4 July 2016 (i.e., the date Deloitte completed its report) between (a) the Bank of Portugal and/or the Resolution Fund, and (b) BES, or the Liquidation Committee, or Novo Banco, relating to the Oak Loan or to the letters of credit issued by BES on behalf of PDVSA.
Relevance and Materiality according to the Requesting Party	In its Memorial on Jurisdiction, the Respondent attempts to paint a picture that the Oak Loan had no connection with Portugal, and that it was used as a means for Goldman Sachs to finance a project in Venezuela (Memorial on Jurisdiction, paras. 16-20, 160-167). On this, among other bases, the Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants have not shown that their interests in the Oak Loan qualify as an "investment" under the ICSID Convention or the Mauritius-Portugal BIT (see for example Memorial on Jurisdiction, para. 126). In particular, Portugal argues that the Claimants "cannot establish that their purported interests in the Oak Loan are characterized by (i) a 'contribution' of any sort, let alone one on Portugal's territory" (Memorial on Jurisdiction, para. 126). These Documents are relevant and material to the contribution of the Oak Loan to BES, and more widely to the Respondent's economy (see generally, Counter-Memorial on Jurisdiction, Section IV.A). These Documents are therefore relevant and material to the Respondent's allegation that the Claimants do not have protected "investments" under the BIT and the ICSID Convention (i.e., one of the Respondent's objections to jurisdiction *ratione materiae*). The Documents should be in the possession or control of the Respondent (in particular, that of the Bank of Portugal and/or the Resolution Fund) as authors of any such Documents falling within the parameters of the request.
Objections to Document Request	Respondent objects to this request. First, the request does not fulfil the requirements of Article 3.3(a)(ii) of the IBA Rules, according to which a document request must contain "a description in sufficient detail (including subject matter)" and refer to a "narrow and specific requested category of Documents that are reasonably believed to exist." The purpose of this requirement is to avoid "fishing expeditions" where one party demands a large volume of documents in the hope of finding something advantageous and not because it has a specific reason to believe that any particular documents will be relevant and material to the case. Claimants' request for all documents sent between 1 February 2014 to 4 July 2016 between the Bank of Portugal and/or the Resolution Fund and BES, the Liquidation Committee, or Novo Banco, relating to the Oak Loan or to the letters of credit issued by BES on behalf of PDVSA encompasses an excessively broad and undefined range of documents of various categories and topics related to the Oak Loan and the letters of credit issued by BES on behalf of PDVSA, exchanged between several entities (Bank of Portugal and/or the Resolution Fund and BES, the

	Liquidation Committee, or Novo Banco), for a period of more than two years. Claimants do not provide a detailed description of the documents, nor do they narrow down the category of documents to a specific and identifiable set. Thus, it is impossible for the Respondent to identify documents matching this request without being subject to an undue burden. As a result, the request must be also denied pursuant to Article 9.2 (c) of the IBA Rules. Second, documents relating to the letters of credit issued by BES on behalf of PDVSA are neither relevant nor material to the outcome of the case, specifically in the context of Respondent's objection to the Tribunal's jurisdiction *ratione materiae*, as required by para. 15.2. of PO1 and articles 3.3(b) and 9.2 (a) of the IBA Rules. Although the purpose of the Oak Loan was for "trade finance and financing discounting arrangements" in relation to such letters of credit[4], Claimants' purported investments are its purported interests in the Oak Loan[5], not in the aforementioned letters of credit, in which Claimants had no role at all. Indeed, these letters of credit were issued at the request, and for the account, of third parties not involved in this arbitration (notably PDVSA Services BV (Netherlands and Wison Engineering Ltd. (China)). Consequently, insofar as the request seeks documents concerning the letters of credit issued by BES on behalf of PDVSA, it must be denied pursuant to Article 3.3(b) of the IBA Rules. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules because the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents are in the possession, custody or control of the Bank of Portugal and/or the Resolution Fund, which are both third parties to the Respondent for the purposes of this request. Respondent has absolutely no control over the Bank of Portugal. Respondent has no means to oblige the Bank of Portugal to produce such documents[6]. If this request

[4] Facility Agreement between Banco Espírito Santo, S.A., acting through its Luxembourg branch, Oak Finance Luxembourg SA and the Bank of New York Mellon, 30 June 2014, (**Exhibit C-0044**), Clause 3.1.

[5] Claimants' Memorial on the Merits, 17 October 2023 ("**Claimants' Memorial on the Merits**"), para. 2 ("The Claimants' investments comprise their respective interests in a senior unsubordinated Loan (the "**Oak Loan**") in the amount of USD 834,642,768 extended to Banco Espírito Santo ("BES") in mid-July 2014, which the Claimants acquired from their respective group entities between March and April 2016.")

[6] Law no. 5/98, of 31 January, approving the organic law of the Bank of Portugal ("**Law 5/98**"), (**Exhibit R-0072**), Article 1 ("The Bank of Portugal, hereinafter referred to as the Bank, is a legal person governed by public law, with administrative and financial autonomy and its own assets") and Article 27(7) ("The Governor and the other members of the board of directors enjoy independence in accordance with the Statute of the European System of Central Banks and of the European Central Bank (ESCB/ECB) and may not seek or take instructions from Community institutions, sovereign bodies or any other institutions"). See also the Treaty on the Functioning of the European Union ("**TFEU**"), (**Exhibit R-0073**), Article 130 ("When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.") and the Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (**Exhibit R-0074**), Article 7 ("In accordance with Article 130 of the Treaty on the Functioning of the European Union, when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and this Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the

	were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[7], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[8], Respondent cannot force it to hand over such documents. Respondent also does not control the Resolution Fund and has no means to oblige it to disclose the requested documents. The Resolution Fund is a legal person governed by public law which acts alongside the Bank of Portugal, is supported by its services, and is instrumental from a functional point of view because it assists the Bank of Portugal in implementing resolution measures. The Resolution Fund is therefore a legal entity separate from the Respondent and has administrative and financial autonomy and its own assets[9]. The Portuguese State cannot issue specific orders to the Resolution Fund (including orders to produce documents) and therefore has no means to force it to produce the encompassed documents[10].

performance of their tasks."). The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 concerning primacy, annex to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of The European Union ("**Lisbon Treaty**") (**Exhibit R-0075**) ("The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.") and of the Constitution of the Portuguese Republic (**Exhibit R-0076**), Article 8 (2, 4) ("2. The rules contained in international conventions that have been duly ratified or approved are in force in Portuguese law after their official publication and for as long as they are internationally binding to the Portuguese state … 4. The provisions of the treaties governing the European Union and the rules emanating from its institutions, in the exercise of their respective competences, shall apply in the internal order, in the terms defined by Union law, with respect for the fundamental principles of the democratic rule of law.").

[7] Law 5/98 (**Exhibit R-0072**), Article 60 ("Members of the board of directors, the supervisory board, the consulting board, as well as all employees of the Bank, are subject, under the legal terms, to the secrecy duty") and Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 ("Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy") and Decree-Law 298/92, of 31 December, in its current wording (the "**Banking Law**") (**Exhibit R-0078**), Article 80 (1) ("The persons who exercise or have exercised offices in the Bank of Portugal, as well those who render or have rendered services, on a permanent or occasional title, are subject to a secrecy duty in respect of facts which knowledge has arisen exclusively of the exercise of those offices or the rendering of those services and may not disclose nor use the information obtained.").

[8] Law 5/98 (**Exhibit R-0072**), Article 27 (7). See also, TFEU (**Exhibit R-0073**), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (**Exhibit R-0074**), Article 7.

[9]Banking Law (**Exhibit R-0078**), Article 153-B (1) ("The Resolution Fund, hereinafter referred to as the Fund, is a legal person governed by public law, with administrative and financial autonomy and its own assets."), Article 153-C ("The Fund's purpose is to provide financial support for the application of resolution measures adopted by the Bank of Portugal, in accordance with the provisions of Article 145-AB, and to perform all other duties conferred on it by law within the scope of the implementation of such measures.") and Article 153-P ("The Bank of Portugal provides the technical and administrative services essential for the proper functioning of the Fund.").

[10] The Respondent is only empowered to influence, in general terms, the goals, operating strategies and objectives of the Resolution Fund and does not exercise any power of direction over the Resolution Fund. See Law no. 3/2004, of 15 January, in its current wording ("**Law 3/2004**") (**Exhibit R-0079**), Article 42 (1) ("The

	Furthermore, this request should in any case be rejected pursuant to Article 9.2[11] of the IBA Rules as the requested documents are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings. First and foremost, all documents exchanged between the Bank of Portugal and BES, the Liquidation Committee or Novo Banco in connection with the Oak Loan or to the letters of credit issued on behalf of PDVSA are protected from disclosure by operation of legal secrecy duties, notably pursuant to the terms of article 78 (1), article 79 (2), article 80 (1), article 81 (1) (f) and article 81 (5), all of Decree-Law 298/92, of 31 December, in its current wording (the "**Banking Law**"). There are no circumstances bringing this request within the scope of any exception to the rules against disclosure provided in article 79 and in article 81 of the Banking Law. The Bank of Portugal is subject to a general secrecy regarding information obtained within the performance of their powers, duties and functions. The legal basis of this prohibition is Article 60 of the Organic Law of the Bank of Portugal, approved by Law 5/98[12], Article 37.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank[13] and Article 80 (1) of the Banking Law[14] and is further safeguarded by Article 1 (4) (d) of Law 26/2016.[15]

responsible member of the Government may issue guidelines, issue instructions or request information from the governing bodies of public institutes on the objectives to achieve by management of the institute and on the priorities to be adopted in their pursuit") and article 42 (2) ("In addition to supervision by the responsible member of the Government, public institutes must observe the government guidelines established by the members of the Government responsible for the areas of finance and Public Administration, respectively in matters of finance and personnel."). See also D. Freitas do Amaral, Curso de Direito Administrativo, Vol. I (3th Ed., 2016), (**Exhibit RL-0141**), page 901 ("differs from the power of direction, typical of hierarchy, and is less strong that it, because the power of directions of hierarchical superior consists of the ability to give order or instructions, which correspondents to the duty of obedience of one and another, while purview is simply a power to issue guideline or recommendations.").

[11] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[12]Law 5/98 (**Exhibit R-0072**), Article 60.

[13] Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (**Exhibit R-0077**), Article 37.1.

[14] Banking Law (**Exhibit R-0078**), Article 80 (1).

[15] Law no. 26/2016, of 22 August, which approves the regime for access to administrative and environmental information and the re-use of administrative documents, transposing Directive 2003/4/EC of the European Parliament and of the Council of January 28 and Directive 2003/98/EC of the European Parliament and of the Council of November 17 ("**Law 26/2016**") (**Exhibit R-0080**), Article 1(4) (d) ("This statute is without prejudice to the application of the provisions of specific legislation, in particular with regard to: (...) d) Access to information and documents covered by the secrecy of justice, tax secrecy, statistical secrecy, banking secrecy, medical secrecy and other professional secrets, as well as documents held by inspectorates-general and other entities, when they relate to matters resulting in financial, disciplinary or merely administrative liability, provided that the procedure is subject to a secrecy regime, under the terms of the applicable law.").

	Indeed, commercial and banking secrets[16], for confidentiality reasons, are legal exceptions to the right of access to administrative information.[17] In fact, although under Portuguese law[18] there is a general right of access to administrative documents and information, it excludes the disclosure of documents protected by banking and commercial secrets, thereby ensuring the confidentiality of information covered by such secrecy duties. In any case, the access to such confidential information/documentation would always require authorization from the relevant entities or a direct, personal, legitimate and constitutionally protected interest that is sufficiently relevant considering all the fundamental rights at stake. Said requirements, for the reasons explained above on the lack of materiality/relevance of the request, are not met. Claimants' request to produce documents through this arbitration proceedings is an attempt to circumvent national rules on their access. Safeguarding the confidentiality of commercially sensitive documents held by the Bank of Portugal is particularly important because, in discharging its responsibility as the national central bank[19] for the supervision and resolution of banking institutions and their activity,[20] the Bank of Portugal relies on particularly sensitive

[16] The concept of commercial or industrial secrecy was interpreted by the Decision of the South Administrative Central Court, Case No. 13191/16, 16 June 2016 (**Exhibit RL-0143**), regarding Article 318 of Decree-Law no. 36/2003, of 5 March. A similar concept is now provided in Decree Law no. 110/2018, of 10 December, approving the new Industrial Property Code, Article 313 ("Trade secrets are understood to be, and are protected as such, information that meets all of the following requirements: a) It is secret in the sense that it is not generally known or readily accessible, in its entirety or in the exact configuration and connection of its constituent elements, to persons within the circles which normally deal with the type of information in question; b) Has a commercial value by virtue of being secret; c) Has been subject to reasonable efforts, having regard to the circumstances, by the person lawfully in control of the information to keep it secret.").

[17] Decree-Law no. 4/2015, of 7 January, approving the Portuguese Administrative Procedural Code ("**Decree-Law 4/2015**") (**Exhibit R-0081**), Article 83 (1) ("Interested parties have the right to consult the file that does not contain classified documents or documents that reveal commercial or industrial secrets or secrets relating to literary, artistic or scientific property."). See also Law 26/2016 (**Exhibit R-0080**), Article 1(4) (d) and Article 6 (6) ("A third party only has the right of access to administrative documents containing commercial or industrial secrets or secrets about the internal life of a company if they have written authorization from the company or can demonstrate that they have a direct, personal, legitimate and constitutionally protected interest that is sufficiently relevant after weighing up, in the context of the principle of proportionality, all the fundamental rights at stake and the principle of open administration, to justify access to the information."). See also the Decision of the Constitutional Court, Case No. 117/2015, 12 February 2015 (**Exhibit RL-00144**) and the Decision of the South Administrative Central Court, Case no. 12672/15, 24 February 2016 (**Exhibit RL-00145**).

[18] Law 26/2016 (**Exhibit R-0080**), Article 1(4) (d) and Article 6 (6).

[19] Constitution of the Portuguese Republic (**Exhibit R-0076**), Article 102 ("The Bank of Portugal is the national central bank and shall exercise its functions as laid down by law and in accordance with the international by which the Portuguese state is bound").

[20] The secrecy duty of the Bank of Portugal is inseparable from its supervisory role aiming at safeguarding collective interests such as the stability of the financial market and the trust in the participating institutions, as the inadequate or untimely disclosure of confidential information may impair the ability of the Bank of Portugal to act in an effective manner as a supervisory authority and ultimately disrupt the stability of the financial system, which is a legal asset with constitutional protection, pursuant to the Constitution of the Portuguese Republic (**Exhibit R-0076**), Article 101 ("The financial system shall be structured by law in such a way as to guarantee the accumulation, deposit and security of savings, as well as the application of the financial resources needed for economic and social development").

	data, which it collects, processes and analyses internally[21]. Pursuant in particular to Article 83 (1) of Decree Law 4/2015 and Article 6 (6) of Law 26/2016[22], it must maintain confidential the data that is a part of the "internal life" of all companies on which it receives information, such as BES, Novo Banco, PDVSA and Wison Engineering. The protection of the sensitive nature of the data with which the Bank of Portugal deals (a significant portion of which is encumbered with the banking secrecy, as explained below) is significantly enhanced in case of information exchanged or produced in the context of a banking resolution[23] and liquidation proceeding[24], which is the case hereunder, as evidenced in Article 80 (3) of the Banking Law[25]. Second, in respect of credit institutions[26] it should be referred that they are also subject to banking secrecy duties pursuant to article 78[27] of the Banking Law which

[21] See *Annett Altmann v. Bundesanstalt für Finanzdienstleistungsaufsicht*, Case No. C-140/13, Opinion of Advocate-General Jääskinen, 4 September 2014, (**Exhibit RL-0146**) para 38. As explained by the Advocate-General with regards to the concept of professional secrecy enshrined in Article 54 Directive 2004/39/EC, of the European Parliament and Council, of 21 April 2004, on markets and financial instruments, "there is information which is subject to a form of secrecy particular to supervising authorities, 'prudential secrecy', the corresponding obligation being imposed on authorities for the supervision of the financial sector and those working within them. This category includes, amongst other things, the methods of supervision adopted by the competent authorities, communications and transmissions of information between the various competent authorities, and between those authorities and the supervised entities, and all other non-public information as to the state of the supervised markets and the transactions made on those markets".

[22] Decree-Law 4/2015 (**Exhibit R-0081**), Article 83 (1). See also Law 26/2016 (**Exhibit R-0080**), Article 6 (6).

[23] In this regard, see Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**BRRD**") (**Exhibit R-0082**), Article 3 (1) ("Each Member State shall designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers") and Article 84 (1) ("The requirements of professional secrecy shall be binding in respect of the following persons: (a) resolution authorities").

[24] Taking into account that the fundamental interests underlying the taking of a resolution measure, and all decisions related therewith, pertain, inter alia, to the stability of the financial system and the continuity of provision of financial services which are essential to the economy.

[25] Whilst Article 80 (2) (**Exhibit R-0078**) sets out that the facts and elements covered by the secrecy duty may be only revealed provided that there is an authorisation of the interested party conveyed to the Bank of Portugal or otherwise in accordance with the terms foreseen in the criminal law and the criminal procedural law (which attributes to this secrecy duty an enhanced protection, as the criminal proceeding law sets out a complex authorisation system which may require, in case of information that must be disclosed at the expenses of breaching such duty, an authorisation by a higher court than the one before which the relevant incident was brough up), *ad continuum* Article 80 (3) caveats the disclosure of confidential information pertaining to the credit institutions in the context of the application of, inter alia, resolution measures or liquidation proceedings, except if the information pertains to persons who have participated in the recovery or financial restructuring of the institution.

[26] It is generally accepted that there are two orders of interests protected under the banking secrecy duty: on the one hand, the banking activity and its regular functioning (and therefore, indirectly, the good order of the economy) and, on the other hand, the interests of the banking clients.

[27] Banking Law (**Exhibit R-0078**), Article 78 (1), ("The members of the managing or supervisory bodies of the credit institutions, their employees, attorneys, commissioners and other persons who render services on a permanent or occasional title may not reveal or use information regarding facts or elements pertaining to the life of the institution or to the relations of the latter with its customers which knowledge exclusively arises from the exercise of their offices or the rendering of their services").

	cannot be waived in these proceedings[28]. Therefore, any information received by the Bank of Portugal from credit institutions such as BES and Novo Banco would be covered by another layer of confidentiality arising from this provision[29]. In light of the above, since the Documents exchanged between the Bank of Portugal and BES, the Liquidation Committee or Novo Banco in connection with the Oak Loan encompassed in this request relate to the business activity of BES and its commercial and financial data and also to the resolution measure of BES, they are protected by the above referenced legal secrecy rules and cannot be disclosed. With regard to Documents concerning the letters of credit issued by BES on behalf of PDVSA, since they constitute financial arrangements, which include several provisions describing the commercial and risk strategy of the contracting parties, they are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above. In fact, the protection of their confidentiality is of paramount importance as, unlike the Oak Loan, these duties benefit parties which are not involved in these proceedings (notably PDVSA Services BV (Netherlands) and Wison Engineering Ltd. (China)) and which have trusted that the respective commercial and legal terms would remain confidential. Overall, the production of these Documents raises issues of privilege and commercial sensitivity under Articles 9(2)(b) and 9(2)(e) of the IBA Rules and therefore its disclosure could cause irreparable harm to BES, Novo Banco, PDVSA, the Liquidation Committee, the Bank of Portugal and the Respondent. The prohibition on disclosing documents as a result of banking, professional and commercial secrecy also applies to any Documents exchanged between the Resolution Fund and BES, the Liquidation Committee or Novo Banco on the Oak Loan and the letters of credit issued on behalf of PDVSA. The Resolution Fund and the Liquidation Committee are prohibited from disclosing documentation pursuant to a secrecy duty that arises as a result of any information exchange with the Bank of

[28] Amongst the strict limited list of legal exceptions to the banking secrecy duty are, besides the authorisation of the client, conveyed to the institution (Banking Law (Exhibit R-0078), Article 79 (1) ("Facts or elements of the customer's relationship with the institution may be disclosed with the customer's authorization, transmitted to the institution")) those pertaining to the revealing of facts and elements covered by such duty to the Bank of Portugal (Banking Law (**Exhibit R-0078**), Article 79 (2) (a) ("Outside the case provided for in the previous paragraph, the facts and elements covered by the duty of secrecy can only be disclosed: a) To the Bank of Portugal, within the scope of its responsibilities")) and to the Resolution Fund (Banking Law (Exhibit R-0078) Article 79 (2) (d) ("Outside the case provided for in the previous paragraph, the facts and elements covered by the duty of secrecy can only be disclosed:… d) To the Deposit Guarantee Fund, the Investor Compensation Scheme, and the Resolution Fund, within the scope of their respective duties")), each in the context of its attributions, and to the judiciary authorities, in the context of a criminal proceeding (Banking Law (**Exhibit R-0078**), Article 79 (2) (e) ("Outside the case provided for in the previous paragraph, the facts and elements covered by the duty of secrecy can only be disclosed:… e) To the judicial authorities, within the scope of a criminal proceeding")). The complex legal framework regarding the authorisation in the context of a criminal proceeding previously mentioned in respect of the secrecy duty of the Bank of Portugal are also applicable herein, mutatis mutandis).

[29] The secrecy scope to which the Bank of Portugal is subject is broader than the secrecy scope to which credit institutions supervised by it are subject as the Bank of Portugal receives information not only from credit institutions but also from other entities, such as other European national banks and the ECB itself.

	Portugal which is deemed subject to secrecy.[30] Indeed, all authorities, organs and persons with which the Bank of Portugal may exchange information are subject to a secrecy duty[31]. Considering that the Resolution Fund acts alongside with the Bank of Portugal and receives information and documentation from the Bank of Portugal, namely in the context of application of resolution measures, as the entity responsible for providing financial support to the banks subject to resolution measures, the Resolution Fund is subject to the same secrecy duty applying to the Bank of Portugal[32]. As a result, the production of any Documents exchanged between the Resolution Fund and BES, the Liquidation Committee or Novo Banco on the Oak Loan and the letters of credit issued on behalf of PDVSA must be also denied pursuant to Article 9(2)(b) and 9(2)(e) of the IBA Rules. The objections raised above do not mean the implicit acceptance that the requested documents do exist.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The request is sufficiently narrow and specific in scope for the purposes of PO1 and the IBA Rules.** The Respondent's claim that the request "encompasses an excessively broad and undefined range of documents of various categories and topics related to the Oak Loan and the letters of credit issued by BES on behalf of PDVSA" is without basis. On the contrary, the Claimants' request is limited to Documents produced within a specified (and narrow) timeframe of just over 29 months. The Claimants have identified the relevant State organs (i.e., the Bank of Portugal and the Resolution Fund) that were directly involved in supervising BES and its resolution, who would be either the author or the recipient of the Documents requested. The Claimants have also identified specific other entities who would have been either the author or the recipient of the documents requested (i.e., BES, the Liquidation Committee, or Novo Banco). Finally, the Claimants have identified a subset of documents exchanged between these entities to which the request relates: namely, those "relating to the Oak Loan or to the letters of credit issued by BES on behalf of PDVSA." Accordingly, producing the requested evidence also would not, contrary to the Respondent's claim, place an undue burden on the Respondent under Article 9.2(c) of the IBA Rules.

[30]Based on a joint reading of Banking Law (Exhibit R-0078), Articles 79 (2) (d) ("Outside the case provided for in the previous paragraph, the facts and elements covered by the duty of secrecy can only be disclosed: … d) To the Deposit Guarantee Fund, the Investor Compensation Scheme, and the Resolution Fund, within the scope of their respective responsibilities"), Article 81 (1) (f) ("The Bank of Portugal may exchange information with the following authorities, bodies, and individuals, in Portugal or in another Member State of the European Union: ... f) Entities involved in the liquidation processes of credit institutions, financial companies, financial institutions, and authorities with supervisory competence over those entities") and Article 81 (1) (n) ("The Bank of Portugal may exchange information with the following authorities, bodies, and individuals, in Portugal or in another Member State of the European Union: ... n) Entities responsible for the implementation, monitoring, and financing of resolution and recapitalization measures") and Article 81 (5) ("All authorities, bodies, and individuals participating in the information exchanges referred to in the preceding paragraphs are subject to a duty of confidentiality.").

[31] Banking Law (**Exhibit R-0078**), Article 81 (5), of the Banking Law.

[32] BRRD, (**Exhibit R-0082**), Article 84 (1).

	(2) The requested Documents are relevant and material to the resolution of the dispute. The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. To be clear, Respondent does not appear to object to the relevance and materiality of the requested documents in so far as they relate to the Oak Loan itself. The Respondent's objection is limited to documents related to the letters of credit issued by BES on behalf of PDVSA. However, these documents are relevant and material to the outcome of the case. As part of its *ratione materiae* objection, the Respondent has argued that the Claimants' investment has not made "a 'contribution' of any sort, let alone one on Portugal's territory" (Memorial on Jurisdiction, para. 126). The requested documents will show that the arrangement of the Oak Loan was important to BES, and more widely made a significant contribution to Portugal's economy, including because of the bump in equity enjoyed by Novo Banco as a result of being assigned the receivables under the letters of credit linked to the Oak Loan. **(3) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are "in the possession, custody or control of the Bank of Portugal and/or the Resolution Fund, which are both third parties to the Respondent for the purposes of this request." The Respondent's response is clearly wrong as a matter of international law. As the Claimants established in their Memorial on the Merits (paras. 209-216) Portuguese State organs and other entities exercising governmental authority engage the Respondent's responsibility under the BIT as a matter of international law. The Bank of Portugal and the Resolution Fund are both organs of the State and cannot by definition, for the purposes of this proceeding and these document requests, constitute "third parties". This conclusion is supported by investment treaty jurisprudence.[33] Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal and/or the Resolution Fund, as Portuguese State organs, must be considered to be in the possession, custody or control of the Respondent.[34]

[33] In *Mason Capital v. Republic of Korea*, Procedural Order no. 5, the tribunal considered (para. 36) that "documents held by the Korean courts, the Prosecutor's Office or the office of the Special Prosecutor, to be in Respondent's possession, custody and control". The Tribunal added that (para. 37) "as regards Respondent's legal impediment argument, the Tribunal disagrees with Respondent that any alleged inability under domestic law for the Ministry of Justice or other parts of the executive branch to request documents from the Korean judiciary or prosecutors would amount to a legal impediment for the Republic of Korea in the sense of Article 9.2(b) IBA Rules. As stated before, it does not make any difference from the perspective of international law whether it is the Ministry of Justice, the Korean courts, prosecutors or any other State organ producing the requested documents. The mere fact that the main point of contact for this arbitration within the Republic of Korea is the Ministry of Justice does not imply that the Ministry's internal rights and powers under domestic law are determinative for the scope of Respondent's international legal obligations" (*Mason Capital L.P (U.S.A) and, Mason Management LLC (U.S.A) v. Republic of Korea*, PCA Case No. 2018-55, Procedural Order no. 5, 15 January 2021, available at https://pcacases.com/web/sendAttach/26156).

[34] The Respondent also argues that it has "no means to oblige the Bank of Portugal to produce such documents" by virtue of Article 130 of the TFEU. The Respondent misinterprets the scope and intention of Article 130 TFEU. Article 130 TFEU protects the central bank's independence in monetary policy-making from external political pressures but it does not imply any obligations regarding the provision of documents in legal proceedings, nor does it imply a total exemption from other legal or co-operation obligations, such as the disclosure of documents in litigation contexts. The independence granted under Article 130 focuses solely on ensuring unbiased monetary policy and does not extend to shielding the bank from all forms of responsibility,

	(4) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2(b) or (e) of the IBA Rules. The Respondent cites a plethora of further objections to disclosure, which are rooted in domestic Portuguese law. In particular, the Respondent attempts to invoke "legal secrecy", "general secrecy" and "banking, professional and commercial secrecy" under Portuguese law as a basis to shield all responsive documents to this request. As a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[35] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[36] The Respondent's objections are in any case not supported by Portuguese law. The Respondent raises three objections to the production of Documents held by the Bank of Portugal and the Resolution Fund[37]: (i) *"all documents exchanged between the Bank of Portugal and BES, the Liquidation Committee or Novo Banco in connection with the Oak Loan or to the letters of credit issued on behalf of PDVSA are protected from disclosure by operation of legal secrecy duties*" (ii) *"in respect of credit institutions[,] […] they are also subject to banking secrecy duties pursuant to article 78[] of the Banking Law which cannot be waived in these proceedings […. Thus] any information received by the Bank*

being administrative, judicial regulatory or other responsibilities. Therefore, the argument that Article 130 exempts the Bank of Portugal from providing necessary documents is baseless. In joined Cases C-202/18 and C-238/18, *Rimšēvičs v Latvia* and *ECB v Latvia*, 26 February 2019, (para. 41), the ECJ emphasised "the importance of the principle of the independence of the ESCB and of the ECB set out in Article 130 TFEU, which is intended to enable the ECB to carry out, free from political pressure, the tasks conferred on it by the Treaty on the Functioning of the European Union". The ECJ added that (para. 47) "those provisions are, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law", https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0202.

[35] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No 2, May 24, 2006 at p. 8 ("[t]his is an international tribunal, governed by an international convention, which is mandated to enquire into the conduct and responsibility of a State in light of its international treaty and customary international law obligations. It is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents.") (available at https://www.italaw.com/sites/default/files/case-documents/ita0088.pdf). Another tribunal has confirmed that, although "state practice does support the protection of information falling within deliberative and policy making processes at high levels of government", "those interests in general are subject to being outweighed by the competing interest in disclosure." *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege, 8 October 2004, para. 11, available at https://www.italaw.com/sites/default/files/casedocuments/italaw8434.pdf ; *Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22, PCA, Procedural Order No. 4, 23 February 2015, para. 3.5, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4277.pdf.

[36] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

[37] The arguments reproduced in the subsequent paragraphs relate to the Bank of Portugal, but Portugal subsequently adds that "the Resolution Fund is subject to the same secrecy duty applying to the Bank of Portugal".

	of Portugal from credit institutions such as BES and Novo Banco would be covered by another layer of confidentiality arising from this provision[].” (iii) “*With regard to Documents concerning the letters of credit issued by BES on behalf of PDVSA, since they constitute financial arrangements, which include several provisions describing the commercial and risk strategy of the contracting parties, they are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above.*” Each of these objections is ill-founded, for the following reasons. **(i) Disclosure is supported as a matter of Portuguese law by the principle of open administration.** Article 268 (2) of the Portuguese Constitution recognises the principle of the open administration.[38] This principle is applicable to the Bank of Portugal and the Resolution Fund, as public bodies of the Portuguese State. The Portuguese administrative legal system makes specific provision for access to administrative and environmental information under Law n. 26/2016, of 22 August (also known as “**LADA**”).[39] Article 5 LADA sets out the general principle regarding administrative documents, that is: “everyone, without the need to declare any interest, has the right of access to administrative documents, which includes the right to consult, reproduce and be informed about their existence and content”.[40] Contrary to the Respondent’s objections, the LADA does not support the use of a “general secrecy” argument. In fact, in an open and transparent public administration system such as that of Portugal, secrecy is the exception and not the rule. Any restrictions on access to administrative documents must fall within the exceptions contained in Article 6 LADA. Most importantly, even where a relevant exception may be invoked, the restriction is not absolute, and the administrative entity or a court will apply a proportionality test to determine whether the requested documents should be kept confidential: “a third party only has the right of access to administrative documents containing commercial or industrial secrets or secrets about the internal life of a company if they have written authorisation from the company or can demonstrate with good reason that they have a direct, personal, legitimate and constitutionally protected interest that is sufficiently relevant after balancing in the context of the principle of proportionality, all the fundamental rights at stake and the principle of open administration, to justify access to the information.”[41]

[38] Portuguese Constitution, Article 268 (2), “Without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy, citizens also have the right of access to administrative files and records.” See https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

[39] Law n. 26/2016, of 22 August transposed the Directive 2003/4/EC of the European Parliament and of the Council of 28 January and Directive 2003/98/EC of the European Parliament and of the Council of 17 November (see https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2591&tabela=leis).

[40] Law n. 26/2016, of 22 August, Article 5, available at https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2591&tabela=leis.

[41] Law n. 26/2016, of 22 August, Article 6 (6), **Exhibit R-0080**.

	In domestic Portuguese law, the Claimants are (in the words of Article 6(6) of LADA) the holder(s) of a "sufficiently relevant" "direct, personal, legitimate and constitutionally protected interest"[42] considering the fact that the requested documents are relevant to the jurisdiction *ratione materiae* of this Tribunal, and therefore to ensure the constitutional principles of "access to the courts" and "effective judicial remedy" contained in Article 20 (1) and (4) of the Portuguese Constitution, which apply *mutatis mutandis* to arbitral tribunals.[43] On the other hand, the Respondent has not explained why it considers that the requested documents contain "commercial, industrial or internal company secrets" within the meaning of Article 6(6) of the LADA[44] and why the principle of proportionality and the principle of open administration militate in favor of excluding production of the requested Documents. Notably, the Respondent attempts to argue that the requested Documents are "commercially sensitive", a concept that is not protected either by the IBA Rules or by Portuguese Law (no such "exception" is provided for in LADA). **(ii) Portuguese professional secrecy laws do not support the Respondent's objections.** Portugal also invokes the professional secrecy of the Bank of Portugal. Professional secrecy is addressed in the Banking Law, which provides that the persons who are or were officers, employees or service providers of the Bank of Portugal are subject to a secrecy duty in relation to the facts of which knowledge has arisen out of the exercise of their respective functions and may not disclose nor use the information obtained, on the basis of several legal provisions, including Article 80 of the Banking Law.[45] However, this professional secrecy (i) does not cover information that is not considered as arising out of the exercise of functions within the Bank of Portugal, (ii) may be lifted by authorisation of the interested person or by court order (Article 80 (2) of the Banking Law),[46] and (iii) is subject to exceptions, including in circumstances where information has been exchanged between the Bank of Portugal

[42] Law n. 26/2016, of 22 August, Article 6(6), **Exhibit R-0080**.

[43] Portuguese Constitution, Article 20 (1) ("Everyone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice may not be denied to anyone due to lack of sufficient financial means.") and (4): ("Everyone has the right to secure a decision in any suit in which he is intervening, within a reasonable time limit and by means of fair process.") https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf .

[44] Law n. 26/2016, of 22 August, Article 6(6), **Exhibit R-0080**. The same applies to Article 83 of the Portuguese Procedural Code which states that "interested parties have the right to consult files that do not contain classified documents or documents that reveal commercial or industrial secrets or secrets relating to literary, artistic or scientific property", available at https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1959&tabela=leis.

[45] Statute of the Bank of Portugal (Decree-Law No. 5/98, 31 January, as last amended by Law No. 73/2020, 17 November, **Exhibit C-0037**, Article 60; Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 37.1, and Decree-Law 298/92, of 31 December, in its current wording, **Exhibit R-0077**, (the "**Banking Law**"), Article 80 (1) **Exhibit R-0078**.

[46] Banking Law, Article 80 (2): "The facts and elements covered by the duty of secrecy can only be disclosed with the authorization of the interested party, communicated to the Bank of Portugal, or under the terms provided by criminal law and criminal procedure law." (Available at https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=948&tabela=leis&ficha=1).

	and entities that intervene in the liquidation of banking entities, as in the case of BES, the Liquidation Committee and Resolution Fund (Article 81 (1) (f) and (n) of the Banking Law).[47] The Portuguese courts, when faced with similar claims to those advanced by the Respondent here, that information could not be produced because it is covered by professional secrecy, order the Bank of Portugal to produce such information when the document request involves other constitutionally protected rights which must prevail in a balancing exercise of the rights at stake.[48] These rights include the right

[47] Banking Law, Article 81 (1), **Exhibit R-0078**.

[48] See for example Case n. 1858/16.7BELSB, where the plaintiffs requested the Court to order the Bank of Portugal to disclose extracts or certified reproductions of the entire administrative procedure leading to the issuance of the Deloitte Report, dated 4 July 2016. This proceeding is analysed in further detail in the Claimants' Reply to the Respondent's Objections to Request no. 3, see https://diariodarepublica.pt/dr/detalhe/acordao/1858-2019-191768275.

Another example is Case no. 532/16.9B ELSB, where the plaintiffs requested the Court to order the Bank of Portugal to provide document certificates or authenticated reproductions of the entire administrative procedure leading to the Bank of Portugal's decision of 29 December 2015. This proceeding is analysed in further detail in the Claimants' Reply to the Respondent's Objections to Request no. 4, see **Annex A**.

Also, Case n. 1352/17.9 BELSB (https://www.dgsi.pt/jtca.nsf/-/2081C82152F909D7802582B20048A55E), in which the plaintiffs requested the court to order the Bank of Portugal to provide document certificates or authenticated reproductions of the entire administrative procedure leading to the sale of Novo Banco, and the entire administrative procedure leading to the determination of the need for strengthening Novo Banco's own funds by EUR 500 million, a precondition for the sale to Lone Star. This proceeding is analysed in further detail in the Claimants' Response to the Respondent's Objections to Request no. 13.

	of access to justice and effective judicial protection[49], the right to private property[50], or the right of access to administrative information and the principle of transparency of public administration[51]. The Portuguese courts undertake a case-by-case analysis, considering the necessity of the requested information (including if it can be obtained by other means and if it is relevant for the outcome of the case), and are guided by the constitutional principle of proportionality.[52] When such production is ordered, the Bank of Portugal, as any public or private entity, is bound by the court's decision.[53] **(ii) Portuguese banking secrecy laws do not support the Respondent's objections.**

[49] Professional secrecy protects the public interest of the regular functioning of banking activity and private interest of privacy, see Portuguese Constitution, Article 26 (1) of the ("1. Everyone is accorded the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to their image, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination."). Access to justice and effective judicial protection are provided in Portuguese Constitution, Articles 20 (1) ("Everyone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice may not be denied to anyone due to lack of sufficient financial means.") and (5) ("For the purpose of defending the personal rights, freedoms and guarantees and in such a way as to secure effective and timely judicial protection against threats thereto or breaches thereof, the law shall ensure citizens judicial proceedings that are characterised by their swiftness and by the attachment of priority to them"), and also reflect the public interest of proper administration and realization of justice and the private interest of right to evidence, among others, see https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

See for example, Case No. 7677/15.0T8LRS-C.L1-7, rendered by the Court of Appeal of Lisbon on 2 February 2021. The plaintiffs were challenging a decision by Social Security to provide legal aid, and in order to ascertain the underlying economic situation of the defendant, requested that the Bank of Portugal to produce information relating to all accounts in Portugal that the defendant and their family members were holders or had powers to manage. The Bank of Portugal relied on Articles 80 and 81-A of the Banking Law to argue professional secrecy, arguing that no exception applied and it could only disclose under Article 80 (2) of the Banking Law, once properly authorised by the defendant or ordered by the court. The court found that Article 80 of the Banking Law was not absolute, and that it could order production of the requested documents, as the right of access to justice and effective judicial protection (including the public interest of cooperation with the administration and realization of justice, in the dimension of right to evidence) should prevail over the secrecy duty via balancing exercise operated through the principle of proportionality.

See, with similar reasoning in relation to Articles 78 and 79 of the Banking Law, and dealing with a request for information of the owner of a bank account in a bank (to which funds had been transferred erroneously), Case No. 19498/16.9T8LSB-A.L1-2, rendered by the Court of Appeals of Lisbon on 9 February 2017.

[50] Portuguese Constitution, Article 62 (1), "Everyone is guaranteed the right to private property and to the transmission thereof in life or upon death, in accordance with the Constitution." Available at: https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

[51] Portuguese Constitution, Article 268 (2), "Without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy, citizens also have the right of access to administrative files and records." https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

[52] Constitution of the Portuguese Republic (Seventh Revision, 2005), Articles 1, 18(2) and 266(2), **Exhibit C-0099** and available at: https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf. This is assessed by the courts at the level of appeal above the court where the procedural incident is raised.

[53] Portuguese Constitution, Article 205 (2), "Court decisions are binding on all public and private entities and prevail over the decisions of any other authorities." Available at https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

	The Respondent also invokes domestic law relating to the banking secrecy of credit institutions. The law provides that the persons who are or were officers, employees or service providers of credit institutions, such as BES and Novo Banco, are subject to a secrecy duty in relation to the information regarding facts pertaining to the life of the institution or to the relations of the latter with its customers which knowledge has arisen out of the exercise of the respective functions (Article 78 of the Banking Law). However, this banking secrecy (i) does not cover information that is not considered to be "concerning the life of the institution or the relations of the latter with its clients", (ii) may be lifted by authorisation of the institution itself or by the customer (respectively), or in both cases by court order (Article 79 (1) and (2) (e)),[54] and (iii) is subject to exceptions, including disclosure to the Bank of Portugal and Resolution Fund (Article 79 (2) (a) and (d) of the Banking Law).[55] Banking secrecy is, again, not an absolute right, and courts frequently order credit institutions to produce such information when other constitutionally protected rights must prevail over the claims to banking secrecy. In determining these issues, the courts will apply the same balancing analysis mentioned above (including an assessment of the necessity of the information and the proportionality of an order to produce, in the circumstances). The Respondent also refers to Article 80 (3)[56] of the Banking Law as a blanket reason for refusal to produce any documents "exchanged or produced [with credit institutions] in the context of a banking resolution [or] liquidation proceeding". Such documents, the Respondent argues, benefit from additional protection. This reasoning is flawed. On the one hand, Article 80 (3) of the Banking Law must be read as an exception to the Bank of Portugal's secrecy duty, based on a holistic interpretation of Article 80 (with other exceptions in paras. (4) and (5)), and because banking resolutions are the consequence of administrative procedures and liquidation proceedings are public court proceedings. On the other hand, the secrecy of the information exchanged between the Bank of Portugal and other institutions, including with the Resolution Fund and the Liquidation Committee under Articles 79 (2) (a) and (d) and 81 (1) (f) and (n) and 81 (5) of the Banking Law,[57] and Article 84 (1) of the BRRD, must be understood within

[54] Banking Law, Article 79 (1) ("The facts or elements of the client's relationship with the institution may be disclosed with the client's authorization, communicated to the institution.") and (2) ("2 - Apart from the case provided in the preceding paragraph, the facts and elements covered by the duty of secrecy may only be disclosed:") (e) ("To judicial authorities, within the scope of a criminal proceeding;"), **Exhibit R-0078**.

[55] Banking Law, Article 79(2)(a) and (d), **Exhibit R-0078**.

[56] Banking Law, Article 80 (3), "Disclosure of confidential information concerning credit institutions in the context of applying corrective intervention measures, resolution measures, the appointment of provisional administrations, or liquidation processes is permitted, except for information concerning individuals involved in the financial recovery or restructuring of the institution.", **Exhibit R-0078**.

[57] Banking Law, Articles 79 (2) (d) and 81 (1) (f) and 81 (5). Article 81(5) was translated by the Respondent as including the word "confidentiality", when in fact the law reads in Portuguese as "segredo", and thus, the most appropriate translation is "secrecy" (in the original "*5 - Ficam sujeitas a dever de segredo todas as autoridades, organismos e pessoas que participem nas trocas de informações referidas nos números anteriores*."), **Exhibit R-0078**.

	the same legal framework described above relating to professional and banking secrecy. In other words, the Resolution Fund and the Liquidation Committee are subject to professional and banking secrecy in similar terms as the Banking of Portugal, but subject to the following exceptions: (i) facts gathered outside the functions and roles of these institutions are excluded from professional and banking secrecy duties; (ii) interested parties or clients may authorise disclosure, and courts may order disclosure when more important legal principles and rights are at issue, through the application of the same balancing analysis mentioned above (including the necessity of information and proportionality), leading to disclosure; (iii) information exchanged between the Bank of Portugal and the Liquidation Committee and Resolution Fund protected by the former's professional secrecy under Articles 81 (1) (f) and (n) and 81 (5) of the Banking Law can be disclosed, pursuant to Article 81 (6) (d) of the same law, in the context of judicial actions that pertain to decisions made by the member of the Government dealing with finances or the Bank of Portugal in the exercise of its functions.[58] Any professional secrecy binding the Resolution Fund under the BRRD is without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.[59] **(iii) Portuguese law positively *supports* disclosure of the requested Documents.** As regards the request for production of Oak Loan-related documents, and even if there were any applicable secrecy duties, the Claimants are the holders of the rights arising from the Oak Loan, and therefore are interested parties before the Bank of Portugal / Resolution Fund for the purposes of Article 80 (2) of the Banking Law, which provides that the relevant applicable secrecy may be lifted. As regards the request for production of the letters of credit issued by BES on behalf of PDVSA documents, they are directly intertwined with the Oak Loan. The Oak Loan was designed to fund PDVSA's receivables. The Claimants are the holders of the rights arising from the Oak Loan, and thus their rights are directly tied to the mentioned letters of credit. Thus, even if there were any applicable secrecy duties, based on the facts related to these requests and because the secrecy duties are not absolute, they must yield before

[58] Banking Law, Article 81 (6): ("The information received by the Bank of Portugal under the provisions regarding the exchange of information may only be used:") (d) ("In the context of legal actions concerning decisions made by the member of the Government responsible for finance or by the Bank of Portugal in the exercise of their supervisory and regulatory functions.") (Portuguese version available at https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=948&tabela=leis&ficha=1).

[59] BRRD, Article 84 (6): "This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases", available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0059.

	other principles pursuant to Articles 80 (2) and 79 (2) (e) of the Banking Law, such as the Claimants' right of access to justice and effective judicial protection, right to private property and right to access to administrative information. **(iv) EU law does not support Portugal's objections.** The Respondent also invokes EU law in its Objections. This is also without basis. While the Respondent underscores the importance of safeguarding the confidentiality of documents held by the Bank of Portugal, citing their role in supervising and resolving banking activities and the Article 54 of Directive 2004/39/EC, the ECJ ruling in the *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister* clarifies a critical aspect: Directive 2004/39/EC does not inherently classify all information held by supervisory authorities as confidential.[60] This means that not all data is protected. The ECJ underlined the need for a case-by-case evaluation to determine whether specific data held by financial supervisory authorities like the Bank of Portugal indeed qualify as confidential under the Directive, thereby challenging broad assertions of confidentiality that may not align with the intended scope of the Directive. Moreover, Article 54(2) of Directive 2004/39/EC explicitly provides exceptions to the general rule of non-disclosure of confidential information.[61] These exceptions are relevant in the context of BES liquidation processes, where the resolution measures led to its compulsory liquidation. Therefore, these exceptions are applicable since the documents in question do not involve third-party information and are crucial for the progression of the arbitration, thereby meeting the Directive's criteria for disclosure. Furthermore, even if the Respondent could demonstrate that the information in question is confidential — an assertion that the Respondent has yet to substantiate — Directive 2004/39/EC, Article 54(1), still mandates that information held by authorities that could constitute business secrets but is at least five years old must

[60] According to the ECJ in Case No. C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister*, Judgment of the Court (Grand Chamber, 19 June 2018), para. 22, "it is clear that neither Article 54 of Directive 2004/39 nor any other provision of that directive states explicitly which information that is held by the competent authorities is to be classified as 'confidential' and subject, consequently, to the obligation of professional secrecy", https://curia.europa.eu/juris/document/document_print.jsf?pageIndex=0&docid=203107&doclang=EN&text=&cid=8359668. In addition, the Court states that (para. 34) "it cannot be inferred from the wording of Article 54 of Directive 2004/39, or from the context of that article, or from the objectives pursued by that directive, that it is mandatory that all information relating to the supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision file, including its correspondence with other bodies, be deemed to be confidential".

[61] Directive 2004/39/EC, Article 54(2): ("Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding."), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039.. In Case No. C-140/13, *Annett Altmann v. Bundesanstalt für Finanzdienstleistungsaufsicht*, Judgment of the Court, 12 November 2014, para. 34, the ECJ stated that "The specific cases in which the general prohibition on divulging confidential information covered by professional secrecy does not preclude their transmission or use are set out in detail in Article 54 of Directive 2004/39", https://curia.europa.eu/juris/document/document.jsf?text=&docid=159506&doclang=EN.

	generally be considered historical and no longer confidential.[62] Given that all the requested documents were exchanged between 1 February 2014 and 4 July 2016, this principle applies, meaning that the relevance of confidentiality claims diminishes with time and that the party being requested to provide the documents has the burden of demonstrating why each specific document, being historical, continue to merit protection. **(v) Portugal's claim that "Overall, the production of these Documents raises issues of privilege" has not been particularised.** It is notable that Portugal's claim to "privilege" over Documents requested pursuant to this Request no. 2, in contrast to its Responses to other Objections, has not been particularised. The Respondent simply states that "Overall, the production of these Documents raises issues of privilege". The Claimants have set out their position as regards Documents properly subject to legal privilege in paragraph 5 of the introduction to Claimants' Responses, set out at p. 4 above.
Decision of the Tribunal	Denied. The request for all documents exchanged among five entities over a 2.5-year period "relating" to the Oak Loan and letters of credits from BES to PVDSA is insufficiently narrow and specific.

[62] This position was reaffirmed by the ECJ in Case No. C-15/16, the *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister*, Judgment of the Court (Grand Chamber, 19 June 2018), where the Court considered (para. 54) that "the Court's case-law indicates that where information that could constitute business secrets at a certain moment in time is at least five years old, that information must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties (see, to that effect, judgment of 14 March 2017, *Evonik Degussa v Commission*, C-162/15 P, EU:C:2017:205, paragraph 64)". In addition, the Court concludes (ruling 3) that "Article 54(1) of Directive 2004/39 must be interpreted as meaning that information held by the authorities established by the Member States to perform the functions laid down by that directive that could constitute business secrets, but is at least five years old, must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties. Such considerations have no bearing in relation to information held by those authorities the confidentiality of which might be justified for reasons other than the importance of that information with respect to the commercial position of the undertakings concerned", https://curia.europa.eu/juris/document/document_print.jsf?pageIndex=0&docid=203107&doclang=EN&text=&cid=8359668

Document Request Number	**3.**
Documents or Category of Documents Requested	All Documents created by the Bank of Portugal between 3 August 2014 and 4 July 2016, containing the Bank of Portugal's assessment of the expected duration of the BES liquidation, including any Documents setting out the Bank of Portugal's disagreement, if any, with Deloitte's analysis of the expected duration of the liquidation.
Relevance and Materiality according to the Requesting Party	The Respondent in its Memorial on Jurisdiction argued that: "all of Claimants' claims are based on two events that occurred prior to March 2016, namely: (1) the Bank of Portugal's Decision of 3 August 2014 in which the 2014 Banking Law was applied to the BES Resolution Measure;[] and (2) the Bank of Portugal's Decision of 22 December 2014 which ruled that the Oak Loan liabilities had never been transferred from BES to Novo Banco, […]. This is what Claimants are really complaining about. […] *the sole reason why NCWO payments have not yet been made to Claimants is that Claimants' NCWO rights arise from the BES Resolution Measure and are therefore governed by the 2014 Banking Law*." (Memorial on Jurisdiction, paras. 236 and 238). The Claimants established in the Counter-Memorial on Jurisdiction that the dispute concerns: "their rights and the Respondent's obligations under the BIT, assuming that the Oak Loan remains in BES and irrespective of which version of the banking law applies to the NCWO process and payment. The Claimants' claim is that irrespective of which version of the banking law applies, Claimants should have received their NCWO payments years ago. […] [T]he dispute before this Tribunal concerning Portugal's failure to make NCWO payments does not concern 'the same subject matter' as any dispute that arose prior to the Claimants' acquisition of their investments." (Counter-Memorial on Jurisdiction, paras. 252-253 and 256). If the Respondent shared Deloitte's views regarding the likely duration of the liquidation of BES, at the time of the Claimants' acquisition of their investments, even on the Respondent's own case – applying the strict terms of the 2014 Banking Law in isolation – it would reasonably have expected the NCWO payments to have been made by around 2019 (by when Deloitte estimated that 98% of the assets would have been realised) (Memorial, para. 145, and Deloitte Report, p. 98, **Exhibit C-0097**). If Respondent shared Deloitte's view (that the liquidation would have been completed around 2019), the Respondent cannot now reasonably argue that there existed, prior to Claimants acquiring their investments, a "dispute" about their

	NCWO entitlements. The requested Documents are therefore relevant and material to the Respondent's objections to jurisdiction *ratione temporis* and based on an alleged abuse of process. The requested Documents are in the possession, custody and control of the Respondent as they are internal Bank of Portugal documents. In particular, as Mr Sharma observed in his Expert Report, it is clear that the "Bank of Portugal had some engagement with Deloitte during the course of its work" in preparing an NCWO assessment (Sharma Expert Report, para. 4.3.5 and generally paras. 4.3.4-4.3.8).
Objections to Document Request	Respondent objects to this request. First, the requested category of documents is neither relevant not material to the outcome of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process, as required by para. 15.2. of Procedural Order no. 1 and articles 3.3(b) and 9.2 (a) of the IBA Rules. As Claimants acknowledge, Respondent's objections are based on the fact that the "dispute" under the BIT concerns the application of the 2014 Banking Law to the BES Resolution Measure and therefore, to the NCWO process and the measures taken in this regard by the Bank of Portugal during that year[63]. It is the Respondent's case that the basis of Claimants' claims for Respondent's alleged failure to make "prompt NCWO payments" under the BIT is about which version of the banking law governs the BES's NCWO process. Is it the 2014 Baking Law that applies to the BES Resolution or is it the 2015 Banking Law. This is because, according to the 2014 Banking law, NCWO payments are to be paid only "at the end of the liquidation", while pursuant to the 2015 Banking Law, NCWO payments are to be made promptly after the application of the Resolution Measure to BES[64.] Claimants attempts to artificially reframe the dispute post hoc as pertaining to the Respondents' alleged failure to make "prompt NCWO payments" in the years that followed the Claimants alleged investment, irrespective of the version of the banking law applicable to the NCWO process and payment. This attempt however does not change the nature of the dispute. In this context, documents showing that, pursuant to the 2014 Banking Law, the liquidation would have been completed around 2019 and therefore NCWO payments should have been made by that time are irrelevant and immaterial to assess whether, as the Respondent alleges, a dispute already existed between the Parties regarding which law should apply to BES Resolution and therefore to the NCWO process. In addition, Claimants' request does not encompass documents sent to Claimants or by Claimants. Therefore, those documents would not show that a dispute between the Parties existed before Claimants made their purported investment in the Oak Loan. Moreover, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such

[63] Decision of the Bank of Portugal, 3 August 2014, (Exhibit C-0052) and Decision of the Bank of Portugal, 22 December 2014, (**Exhibit C-0069**).

[64] *See* Respondent's Memorial on Jurisdiction, paras. 236-242 and paras. 245-249 and paras. 280-284 pertaining to the description of several court proceedings brought, *inter alia*, by Claimants' non-Mauritian affiliates in which Claimants contend that the 2015 Banking Law and not the 2014 Banking Law should apply to BES NCWO process.

	documents[65] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[66],as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[67], Respondent cannot force it to hand over such documents. Finally, this request should in any case be rejected pursuant to Article 9.2 (b) and (e) of the IBA Rules as the requested documents are protected from disclosure by operation of legal secrecy and commercial secrecy rules, which cannot be waived in these proceedings. Firstly, as explained in response to Request 2 above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[68] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal in the context of the resolution proceedings of a credit institution are also necessarily encompassed by legal secrecy[69] (to which commercial secrecy will most likely accrue). Secondly, it must be noted that any assessment by the Bank of Portugal on the expected duration of the BES liquidation was carried out in the context of the resolution of BES and of the elaboration of the Deloitte report and that any documentation elaborated by the Bank of Portugal and/or exchanged with Deloitte[70] in such context, including in respect of the duration, required the analysis and evaluation of highly sensitive information related with, *inter alia*, the assets and liabilities of BES and multiple scenarios on the recovery of credits. For the purposes of carrying out such analysis and evaluation it was therefore necessary to assess data referring not only to BES but to all of its clients, which is evidently subject to commercial and legal secrecy and therefore remain a legal exception to the right of access to administrative information.[71] As such, the disclosure of any of the

[65] Law 5/98, (**Exhibit R-0072**), Article 1 and Article 27(7). See also TFEU (**Exhibit R-0073**), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (**Exhibit R-0074**), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (**Exhibit R-0075**) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[66] Law 5/98 (**Exhibit R-0072**), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (**Exhibit R-0077**), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[67] Law 5/98, (**Exhibit R-0072**), Article 27 (7). See also TFEU (**Exhibit R-0073**), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (**Exhibit R-0074**), Article 7

[68] In particular, Banking Law (**Exhibit R-0078**), Article 80 (1).

[69] See, in particular, BRRD, (**Exhibit R-0082**), Article 84 (1).

[70] Which is also subject to a secrecy duty, as per, Article 84 (1) of the BRRD ("The requirements of professional secrecy shall be binding in respect of the following persons: (f) auditors, accountants, legal and professional advisers, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministers or by the potential acquirers referred to in point (e)").

[71] Law 26/2016 (**Exhibit R-0080**), Article 1 (4) (d) and Article 6 (6).

	Documents created by the Bank of Portugal on the assessment of the expected duration of the BES liquidation would entail a breach of said secrecy. The objections raised above do not mean the implicit acceptance that the requested documents do exist.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The request is relevant and material to central contested issues between the Parties, that is, whether the dispute had crystallised or was foreseeable when the Claimants acquired their investment (i.e., the Respondent's *ratione temporis* and abuse of process objections, respectively). The Respondent in its comments acknowledges the fact that this issue is contested. The requested documents will establish whether Respondent shared Deloitte's view that the liquidation would have been completed around 2019. If it did, the Respondent cannot now reasonably argue that there existed, prior to Claimants acquiring their investments, a "dispute" about their NCWO entitlements. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal, as a Portuguese State organ, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2(b) or (e) of the IBA Rules.** The Respondent cites the "operation of legal secrecy and commercial secrecy rules" of Portuguese domestic law in an attempt to shield all responsive Documents to this request. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[72] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[73] The Respondent's objections are in any case not supported by Portuguese law.

[72] See n. 35 above.

[73] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

(i) No "general secrecy" exception exists in the Portuguese legal system to protect Documents created by the Bank of Portugal.

The Respondent's first argument is that "the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions" and "any documents created by the Bank of Portugal in the context of the resolution proceedings of a credit institution are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue)". However, no general secrecy exception exists in the Portuguese legal system – at constitutional, administrative or banking law. In cases where the public entity has specifically identified the existence of a professional, banking or commercial secret, a proportionality test must be carried by the courts, balancing the interests protected by secrecy against the fundamental rights at stake and the principle of open administration, to justify access to the information (see Reply to Objections to Request no. 2).

(ii) The specific "secrecy" claimed in relation to the Bank of Portugal's assessment regarding the duration of the BES liquidation has already been dismissed by the Portuguese courts.

The Portuguese courts have already addressed (and dismissed) the Respondent's alleged "secrecy concerns" surrounding the preparation of the Deloitte Report. In Case n. 1858/16.7BELSB,[74] initiated before the Administrative Court of Lisbon, the plaintiffs requested the Court to order the Bank of Portugal to disclose: (i) the procedure for appointment of Deloitte Consultores, S.A. and its Engagement Letter, which sets out the assumptions for Deloitte's performance; (ii) the requests for information and clarifications made by Deloitte during the preparation of the Deloitte Report and the Bank of Portugal's replies; (iii) the preliminary report made by Deloitte and the Bank of Portugal's comments on it; and (iv) the final Deloitte Report, which at the time had not been released to BES' creditors.

The Bank of Portugal argued – as Respondent now does in this arbitration – that the Deloitte Report was protected and could not be disclosed, *in totum* or partially, and even in redacted versions. In particular, the Bank of Portugal argued the existence of (i) a professional secrecy under Articles 78 to 80 of the Banking Law; (ii) commercial, industrial or internal company secrets set forth in Article 6 (6) of the LADA; and (iii) trade secrets as per Article of the Intellectual Property Code.[75]

In this case, after considering the balance between such secrecies and the plaintiff's fundamental rights of access to the courts and to an effective judicial remedy, the court ruled in favor of the disclosure of the documents. The Court found that it was "not enough to invoke the existence of said secrecy; it must also give reasons for its decision, explaining the specific reasons for believing that the documents would reveal confidential data". The Court ordered the Bank of Portugal to produce "(a)

[74] Case n. 1858/16.7BELSB, available at https://diariodarepublica.pt/dr/detalhe/acordao/1858-2019-191768275.

[75] The Bank of Portugal's argument laid on (i) the relevance of the information to Novo Banco's internal operations, particularly because the assets and liabilities analyzed were transferred to Novo Banco, (ii) the sensitive nature of Novo Banco's status as a credit institution, especially during its ongoing sale process, and (iii) the fact that the documents contained highly sensitive data about third parties, such as client information and assets.

	the Deloitte Final Report, (b) the requests for information and clarifications made by Deloitte in the execution of the report and the respective replies from the Bank of Portugal and (c) the preliminary report and pronouncement of the Bank of Portugal, purged of the information relating to the reserved matter."[76] The documents now being requested in this arbitration are certainly included among the documents the Portuguese courts ordered the Bank of Portugal to produce. Despite the Court's order, the Bank of Portugal produced very few documents and highly redacted versions of the Deloitte Report. On appeal before the Appellate Court, the Court found that the information dealing with the administrative procedure could not be concealed to the point of becoming unintelligible.[77] Notwithstanding its previous claim of secrecy of the requested documents, after the release of the above-mentioned decision from the Appellate Court, the Bank of Portugal later published the Deloitte Report in full online[78], without any redactions whatsoever, asserting that "[t]he publication of the full version of the report had not yet been possible because there were factors that required, under the law, the reservation of the information. […] [T]hese factors are outdated or mitigated, so Banco de Portugal, after consulting Banco Espírito Santo, S.A. – Em Liquidação, Novo Banco, S.A. ('Novo Banco') and Deloitte, takes the initiative to make public the full content of the report."[79] The reasoning of the Portuguese courts is clear. Thus, if a broader request for documents resulted in the publication of that information, and thus is no longer protected by any kind of secrecy, then a much narrower request – such as the Claimants' request which focuses only on the expected duration of the BES Liquidation – should be granted and the requested Documents produced. **(iii) Portuguese law positively *supports* disclosure of the requested Documents.** There is no applicable secrecy duties or exception in Portuguese law which supports the Respondent's objection. As the Bank of Portugal stated in the press release cited above,[80] their initial reasons to preserve the confidentiality of the information now no longer apply or are irrelevant. Even if there were any remaining applicable secrecy duties, the Claimants, as holders of (*inter alia*) NCWO rights arising out of the Oak Loan, are interested parties before the Bank of Portugal for the purposes of Article 80 (2) of the Banking Law, which provides grounds for any applicable secrecy to be lifted.

[76] Case n. 1858/16.7BELSB, see extracts of judgement of the Administrative Court of Lisbon, of 05 December 2016, available at https://diariodarepublica.pt/dr/detalhe/acordao/1858-2019-191768275

[77] Case n. 1858/16.7BELSB, Judgement of the South-Central Administrative Court of 23 May 2019, available at https://diariodarepublica.pt/dr/detalhe/acordao/1858-2019-191768275.

[78] See https://www.bportugal.pt/comunicado/banco-de-portugal-publica-versao-integral-do-relatorio-de-avaliacao-independente-sobre-o. See also **Exhibit C-121**.

[79] Bank of Portugal, 'Banco de Portugal publishes full version of the independent assessment report on the level of credit recovery in the BES liquidation scenario', Bank of Portugal Press Release (Lisbon, 16 August 2022), **Exhibit C-0121**.

[80] *Id.*.

	Finally, the Respondent's argument that the Documents exchanged between the Bank of Portugal and Deloitte are subject to professional secrecy under the BRRD must fail, as it is without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.[81]
Decision of the Tribunal	Denied. The request for all documents over a two-year period concerning the "duration" of the liquidation insufficiently narrow and specific.

[81] BRRD, Article 84 (6): "This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases", available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0059.

Document Request Number	**4.**
Documents or Category of Documents Requested	All Documents created during the period between 3 and 11 August 2014 setting out the commercial or public policy rationale for the imposition of the statutory moratorium on BES implemented by the 11 August 2014 Decision of the Bank of Portugal (**Exhibit R-0003**).
Relevance and Materiality according to the Requesting Party	The Respondent argues that Claimants' interests in the Oak Loan were acquired "in disregard of the Portuguese legal system" because (*inter alia*) the Assignment Agreements violated the moratorium decision of the Bank of Portugal of 11 August 2014 (and therefore Portuguese law) (Memorial on Jurisdiction, paras. 187, 189.a, 197 and 203, referring to **Exhibit R-0003**). In addition, the Respondent argues that the Claimants do not hold title to their investments since the Assignment Agreements were void and ineffective because, *inter alia*, the 2015 Assignment Agreement disregarded the Bank of Portugal's 11 August 2014 decision (Memorial on Jurisdiction, paras. 217-218, 220, referring to **Exhibit R-0003**). As the Claimants demonstrated in their Counter-Memorial on Jurisdiction, the statutory moratorium on BES, imposed by the Bank of Portugal's decision of 11 August 2014, did not prevent a contractual "event of default" from arising under the Facility Agreement, or stymie the contractual consequences (governed by English law) flowing from that event of default (Counter-Memorial on Jurisdiction, paras. 199-200, and 225, 228). The Documents requested will demonstrate that the intention of the moratorium was, as the Claimants explained in their Counter-Memorial on Jurisdiction and as the moratorium stated, to exempt BES from "the timely fulfilment of previously contracted obligations" such as the acceleration of amounts owed on the Oak Loan (**Exhibit R-0003**, Point Two (b)). The intention was not to interfere with the contractual consequences (as governed by English law) of an event of default, including *vis-à-vis* any assignment between two third-party creditors following such an event (*id*., paras. 199, 228). The requested documents are therefore relevant to the Respondent's objection regarding the legality of the Claimants' acquisition of their investments, as well as the Claimants' title to their investments, and in turn material to the outcome of the Respondent's *ratione materiae* objection. The requested Documents are in the possession, custody and control of the Respondent because the moratorium was imposed by a Decision of the Bank of Portugal. As the State organ that put in place the moratorium, the Bank of Portugal would have in its possession Documents that go to its rationale and purpose.
Objections to Document Request	Respondent objects to this request. First, the requested category of documents is neither relevant nor material to the outcome of the Respondent's objections to jurisdiction *ratione materiae*, in particular the objections based on the illegality of Claimants' acquisition of their purported investments and their lack of title to their alleged investments, as required by para. 15.2. of Procedural Order no. 1 and articles 3.3(b) and 9.2 (a) of the IBA Rules as

	Claimants have not shown how the Bank of Portugal's intention for imposing the moratorium implemented by the 11 August 2014 Decision of the Bank of Portugal (**Exhibit R-0003**) is relevant to determine its legal effects under Portuguese law. As explained by the Respondent on the Memorial on Jurisdiction, under Portuguese Law such a determination "suspends or postpones the affected obligations, depending on whether or not they are enforceable when the measures take effect." and therefore that no contractual event of default could be invoked by Claimants under the Facility Agreement on 29 December 2014[82]. Although challenging the Respondent's position, Claimants have not come forward with any argument under Portuguese law that refutes this position. Also, it should be noted that the foundations behind the institution of the statutory moratorium to BES by the Bank of Portugal, were publicly disclosed by the Bank of Portugal, namely in the Decision of the Bank of Portugal, of 11 August 2014, on the temporary exemption of Banco Espírito Santo, SA, from compliance with prudential rules and the punctual fulfilment of obligations previously contracted, (Exhibit R-0003)). That decision contains both the resolution measure approved by the Bank of Portugal on 3 August 2014, as well as the reasons and legal basis for enacting the statutory moratorium, in line with Article 145.º-J of the RGICSF. As such, this request should in any case be denied due to lack of material required by Article 3.3. (b) and 9.2 of the IBA Rules as Claimants were already provided with documents that serve as evidence to the facts pertaining to the same. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[83] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[84], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[85], Respondent cannot force it to hand over such documents. Moreover, all documents encompassed by this request with exception of documents comprised in the official preparatory file pertaining to the Decision of the Bank of 11 August 2014, approving the statutory moratorium on BES should in any case be

[82] Respondent's Memorial on Jurisdiction, para. 189 (a) and 194.

[83] Law 5/98, (Exhibit R-0072), Article 1 and Article 27(7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[84] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[85] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

	rejected pursuant to Article 9.2[86] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[87] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal in the context of the resolution of a credit institution as the requested Documents are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue). Finally, it should be noted that some documents responsive to this request may be protected by client-attorney privilege, including memos, drafts, and other preparatory materials or correspondence exchanged between the Bank of Portugal and its legal counsels for the purpose of seeking or giving legal advice or assistance in the context of the imposition of the statutory moratorium to BES, that are strictly confidential, as recognized by both international law and Portuguese Law under 92(3) of the Portuguese Bar Association Statutes, approved by Decree-Law no. 145/2015, of 9 September 2015[88]. Therefore, and as Claimants have not shown any exceptional circumstances that would justify their waiver or override, said documentation is therefore excluded from production under Article 9(2)(b) of the IBA Rules on the Taking of Evidence in International Arbitration.

[86] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[87] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

[88] Decree-Law no. 145/2015, of 9 September 2015, approving the Portuguese Bar Association Statutes ("Decree Law 145/2015") (Exhibit R-0083), Article 92 (1) ("The lawyer is required to maintain professional secrecy regarding all facts of which they become aware in the exercise of their functions or the provision of their services, namely (…)"), Article 92 (2) ("the obligation of profession secrecy exists whether the service requested or entrusted to the lawyer involves judicial or extra-judicial representation or not whether it should be remunerated or not, and whether the lawyer has accepted and performed the representation or service or not. The same applies to all lawyers who, directly or indirectly, have any involvement in the service") and Article 92 (3) ("Professional secrecy also covers documents and other events that relate, directly or indirectly, to facts subject to secrecy").

Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The Respondent misconstrues the issue in dispute; the issue is not the legal effects under Portuguese law of the moratorium. The intention behind the moratorium is relevant to whether the moratorium was to have an effect or interfere with the contractual consequences (as governed by English law) of an event of default, including the subsequent assignment of interests in the Oak Loan (Counter-Memorial on Jurisdiction paras. 199 and 228). The Respondent's argument that the moratorium undermines the legality of the assignment goes directly to the Respondent's objection regarding the legality of the Claimants' acquisition of their investments, as well as the Claimants' title to their investments, and in turn is therefore relevant and material to the outcome of the Respondent's *ratione materiae* objection. The Decision of the Bank of Portugal, of 11 August 2014, on the temporary exemption of Banco Espírito Santo, SA, from compliance with prudential rules and the punctual fulfilment of obligations previously contracted (**Exhibit R-0003**) does not provide the full picture in this respect, but rather a cursory and perfunctory summary of the reasons and legal basis for enacting the statutory moratorium. Accordingly, the Respondent is wrong to argue that "Claimants were already provided with documents that serve as evidence to the facts pertaining to" this issue. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal, as a Portuguese State organ, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.** Just as for its objections to Request nos. 2 and 3, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield (almost[89]) all responsive Documents to this request. It also cites "commercial secrecy" which, it says "will most likely accrue" to responsive Documents. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order

[89] The Respondent argues only that this does not apply to "documents comprised in the official preparatory file pertaining to the Decision of the Bank of 11 August 2014, approving the statutory moratorium on BES".

	production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[90] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[91] The Respondent's objections are in any case not supported by Portuguese law. **(i) No "general secrecy" exception exists in the Portuguese legal system to protect Documents created by the Bank of Portugal.** As explained in response to Requests nos. 2 and 3: no "general secrecy" exception exists in the Portuguese legal system to protect Documents created by the Bank of Portugal. **(ii) The Respondent's allegation that "any documents created by the Bank of Portugal in the context of the resolution of a credit institution as the requested Documents are also necessarily encompassed by legal secrecy" is meritless.** The Respondent's allegation that "any documents created by the Bank of Portugal in the context of the resolution of a credit institution as the requested Documents are also necessarily encompassed by legal secrecy" is meritless. As explained in response to Request no. 2: information concerning credit institutions in the context of resolution measures and liquidation processes is not protected by professional secrecy of the Bank of Portugal. In addition, the Portuguese courts have already been confronted with requests for disclosure of documents created by the Bank of Portugal in the context of the BES Resolution Measure and have ruled in favour of disclosure, dismissing arguments it has raised regarding the alleged potential impacts on the "stability of the Portuguese financial system". One example is Case n. 532/16.9BELSB, in which plaintiffs requested document certificates or authenticated reproductions of the entire administrative procedure leading to the Bank of Portugal's decision of 29 December 2015.[92] Mirroring the arguments now put forward by the Respondent in its objections to this Request, the Bank raised professional secrecy arguments under Articles 78 to 80 of the Banking Law, and argued that Article 83(1) of the Administrative Procedure Code and Article 6(6) of the LADA provide exceptions to the right of access to administrative information in cases where documents "reveal commercial secrets" or contain "secrets about the internal life of a company".[93] Following a partial disclosure of information by the Bank of Portugal, the Court determined it was impossible to ascertain whether the remaining elements not provided and/or redacted from the documentation submitted by the Bank of Portugal were covered by the access restrictions invoked, as it lacked the necessary

[90] See n. 35 above.

[91] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

[92] **Annex A**.

[93] Law 26/2016, Article 6 (6), **Exhibit R-0080**.

	information to make this determination (as the content of such documents was unknown). Consequently, since it was not apparent that the relevant and undisclosed elements contained confidential facts, the Court determined that the documents should be disclosed (even if partially, under Article 6(7) of LADA) and ultimately made fully accessible (only after the completion of the tender process for the sale of the Novo Banco).[94] **(iii) Portuguese law positively *supports* disclosure of the requested Documents.** The Claimants are the holders of the rights arising from the Oak Loan by means of the mentioned Assignment Agreements, which Respondent alleges were in contravention of the BES moratorium. Understanding its underlying commercial or public policy rationale is crucial to verify Claimants' explanation that the moratorium aimed to exempt BES from fulfilling the amounts owed under the Oak Loan. Even if professional or banking secrecy were considered applicable, based on these facts and because the mentioned secrecy duties are not absolute, they must yield before other principles pursuant to Articles 80 (2) and 79 (2) (e) of the Banking Law,[95] such as the Claimants' right of access to justice and effective judicial protection, right to private property and right to access to administrative information. Ordering Respondent to produce these documents would be an adequate and proportionate mean of demonstrating the facts identified in the "Relevance and Materiality according to the Requesting Party" section. These documents are not in the possession or control of the Claimant, cannot be obtained otherwise, and are relevant to the outcome of this case. **(iv) Portuguese legal privilege law does not support a blanket refusal to disclose.** Finally, as to Respondent's allegation that documents responsive to this request may be protected by "client-attorney privilege". It is important to note that the Portuguese Bar Association Statutes[96] do not provide a general prohibition on the disclosure of documents[97]. The rule is that all facts and documents containing such facts, of which

[94] Case n. 532/16.9BELSB, Judgment of the Administrative Court of Lisbon of 1 June 2016, **Annex A**.

[95] Banking Law – Article 79(2) "2 - Outside the case provided for in the previous paragraph, the facts and elements covered by the duty of secrecy can only be disclosed: e) To the judicial authorities, within the scope of a criminal proceeding", **Exhibit R-0078** and Article 80(2) "The facts and elements covered by the duty of secrecy may only be revealed with the authorization of the person concerned, transmitted to the Bank of Portugal, or under the terms laid down in criminal law and criminal procedure.", available at https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=948&tabela=leis&ficha=1

[96] Law 145/2015, **Exhibit R-0083**.

[97] See the Judgment of the Lisbon Court of Appeal, of 17 September 2009, on Case n. 883/04.5TVLSB.L1-2, available at https://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/b7c59fc52877e7ec8025766c006b82d9 .In this case, the Court states "I. The lawyer is bound by the duty of confidentiality concerning all facts that come to their knowledge in the exercise of their functions or the provision of their services. II. The duty of professional secrecy is not limited to providing statements for evidentiary purposes, but extends to any disclosure of facts subject to it, for example, in the pleadings of a legal action. III. The duty of professional

	the lawyer becomes aware, directly, or indirectly, in the exercise of their duties and related to the exercise of these duties, are covered by professional secrecy (i.e., specifically in relation to this objection, client-attorney privilege).[98] Excluded from this scope are publicly known facts, facts invoked in the defense of the client, facts contained in authenticated documents, and facts already proven in court. Since not all facts are covered by professional secrecy, but only those relating to professional matters of which the lawyer has become aware in the exercise of his or her duties and related to the exercise of these duties, including facts: i) of which the lawyer became aware exclusively through the client's revelation; ii) which were disclosed by the client, or within the scope of negotiations aimed at settling the dispute, whether such negotiations achieved the desired agreement (judicial or extrajudicial) or did not reach an agreement (failed negotiations), a case by case analysis is necessary.[99] Therefore, the Respondent cannot invoke professional secrecy as an objection without engaging in an analysis of the specific agents involved, and the specific facts (and not documents) that may fall under the umbrella of professional secrecy. The Claimants have set out their position as regards Documents properly subject to legal privilege in paragraph 5 of the introduction to Claimants' Responses, set out at p. 4 above.

secrecy is not an absolute duty, yielding in all matters that are absolutely necessary for the defense of the dignity, rights, and legitimate interests of the lawyer themselves or the client or their representatives."

Also, the Judgment of the Porto Court of Appeal, of 28-10-2015, on case 3705/11.7TBSTS-B.P1, available at https://www.dgsi.pt/jtrp.nsf/-/A57974D90B93090480257F1F00579DE1: "I - The Statute of the Bar Association does not contain any provision from which a general prohibition on disclosure or attachment to proceedings of correspondence exchanged between lawyers acting on behalf of their clients, or between lawyers and the opposing party or their representative, can be inferred. II - Paragraph 3 of Article 87 of the Statute of the Bar Association only prohibits the disclosure or attachment of documents when, based on their content, there would be a breach of the duty of secrecy. III - In subparagraph e) of paragraph 1 of the Statute of the Bar Association, what is prohibited is solely the disclosure and use of facts disclosed by the opposing party, personally or through a representative, during negotiations for an amicable settlement. IV - Attaching to the proceedings correspondence exchanged between legal representatives regarding the communication of defects and deficiencies in the leased property and requesting urgent resolution of these issues does not constitute a breach of the lawyer's professional secrecy under paragraphs 1, subparagraph e), and 3 of the Statute of the Bar Association."

[98] Law 145/2015, Article 92, (1) ("A lawyer is obliged to maintain professional secrecy regarding all facts learned in the course of their duties or the provision of services, specifically: a) Facts related to professional matters known exclusively through client disclosure or revealed at the client's order; b) Facts learned by virtue of holding a position within the Bar Association; c) Facts related to professional matters communicated by a colleague with whom they are associated or collaborate; d) Facts communicated by co-author, co-defendant, or co-interested party of their client or their representative; e) Facts disclosed by the opposing party of the client or their representatives during negotiations aimed at settling a dispute or litigation; f) Facts learned during any failed negotiations, oral or written, in which they participated.") and (3) ("Professional secrecy also extends to documents or other items directly or indirectly related to the confidential facts."), **Exhibit R-0083**.

[99] Case n. 532/16.9BELSB, Judgment of the Administrative Court of Lisbon of 1 June 2016, **Annex A.**

Decision of the Tribunal	Granted, subject to the provisos in PO4 concerning (i) privilege and (ii) confidentiality.

Document Request Number	**5.**
Documents or Category of Documents Requested	All Documents created by the Respondent, including in particular the Bank of Portugal, discussing the transfer(s) between BES and Novo Banco of the rights to the receivables or payments due under the letters of credit issued by BES on behalf of PDVSA, including any Documents evidencing discussion of such payments actually being made to Novo Banco or BES.
Relevance and Materiality according to the Requesting Party	In Section 2.1 of the Memorial on Jurisdiction, the Respondent attempts to paint the picture that the Oak Loan had no connection to Portugal. It argues, as one element of its *ratione materiae* objection, that the "Claimants cannot establish that their purported acquisition of interests in the Oak Loan amounted to a contribution in Portugal's territory" (Memorial on Jurisdiction, Section 3.2.1(a) heading, see also sub-heading (ii)) and that "Claimants cannot show their acquisition of interests in the Oak Loan was in the territory of Portugal" (*id.*, Section 3.2.1(a)(ii)b heading). In particular, the Respondent argues that "Claimants have not established that their purported acquisition of alleged interests in the Oak Loan made a 'contribution' in Portuguese territory" (*id.*, Section 3.2.1(a)(ii), para. 141). As the Claimants explained in the Counter-Memorial on Jurisdiction, "after the collapse of BES, the receivables due under the letters of credit issued by BES on behalf of PDVSA were transferred to Novo Banco", while the Oak Loan itself was transferred back to BES. The impact of this transfer was of significant financial benefit to Portugal: as a result of the transfer of the receivables to Novo Banco, alongside the transfer back of the Oak Loan to BES, Novo Banco experienced a significant increase in its equity, at a time when the Respondent was looking for potential buyers for the bank (see Counter-Memorial on Jurisdiction, paras. 23, 113-114, 147, and 176). These Documents are relevant because they provide further evidence that the Claimants' investment in the Oak Loan was a "contribution" in Portuguese territory. They are therefore material to the outcome of the case because they provide further evidence that the Respondent's *ratione materiae* objection is without basis (see Counter-Memorial on Jurisdiction, paras. 143-148, 176). The Documents should be in the possession or control of the Respondent (in particular, that of its organ, the Bank of Portugal, who took the 3 August 2014 Decision and the 22 December 2014 Decision (**Exhibit C-0052** and **Exhibit C-0069** respectively, see also the decisions cited at Memorial on Jurisdiction, fn. 309)).
Objections to Document Request	Respondent objects to this request. First, documents relating to the letters of credit issued by BES on behalf of PDVSA are neither relevant nor material to the outcome of the case, specifically in the context of Respondent's objection to the Tribunal's jurisdiction *ratione materiae*, as required by para. 15.2. of PO1 and articles 3.3(b) and 9.2 (a) of the IBA Rules. Although the purpose of the Oak Loan was for "trade finance and financing discounting

	arrangements" in relation to such letters of credit[100], Claimants' purported investments are its purported interests in the Oak Loan[101], not in the aforementioned letters of credit, in which Claimants had no role at all. Indeed, these letters of credit were issued at the request, and for the account, of third parties not involved in this arbitration (notably PDVSA Services BV (Netherlands and Wison Engineering Ltd. (China)). Consequently, insofar as the request seeks documents concerning the the letters of credit issued by BES on behalf of PDVSA, it must be denied pursuant to Article 3.3(b) of the IBA Rules.In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[102] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[103], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[104], Respondent cannot force it to hand over such documents. Moreover, all documents encompassed by this request should in any case be rejected pursuant to Article 9.2[105] of the IBA Rules as they are protected from disclosure by operation of legal and commercial secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[106] that is of the utmost

[100] Facility Agreement between Banco Espírito Santo, S.A., acting through its Luxembourg branch, Oak Finance Luxembourg SA and the Bank of New York Mellon, 30 June 2014, (**Exhibit C-0044**), Clause 3.1.

[101] Claimants' Memorial, para. 2 ("The Claimants' investments comprise their respective interests in a senior unsubordinated Loan (the "Oak Loan") in the amount of USD 834,642,768 extended to Banco Espírito Santo ("BES") in mid-July 2014, which the Claimants acquired from their respective group entities between March and April 2016.")

[102] Law 5/98, (Exhibit R-0072), Article 1 and Article 27(7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[103] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[104] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[105] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[106] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

	importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal in the context of the resolution of a credit institution as the requested Documents are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue). Specifically, the letters of credit issued by BES on behalf of PDVSA, since they constitute financial arrangements, which include several provisions describing the commercial and risk strategy of the contracting parties, are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above. In fact, the protection of their confidentiality is of paramount importance as, unlike the Oak Loan, these duties benefit parties which are not involved in these proceedings (notably PDVSA Services BV (Netherlands) and Wison Engineering Ltd. (China)) and which have trusted that the respective commercial and legal terms would remain confidential.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The Respondent misconstrues the nature of the Claimants' request and fails to address the actual documents requested. The Claimants' request specifically concerned Documents "discussing the transfer(s) between BES and Novo Banco of the rights to the receivables or payments due under the letters of credit issued by BES on behalf of PDVSA, including any Documents evidencing discussion of such payments actually being made to Novo Banco or BES", not "documents relating to the letters of credit issued by BES on behalf of PDVSA" (as the Respondent states). The Claimants' request thus focuses on the issue of payments and which entity possessed the rights to the receivables from the loan. This issue goes directly to the Respondent's *ratione materiae* objection and the requested documents will provide further evidence of the contribution made by the Oak Loan in Portuguese territory, including in particular the significant increase in Novo Banco's equity caused by the transfer of the receivables to Novo Banco. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by Portuguese State organs, including (but not limited to) the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.** Just as for its objections to Request nos. 2 to 4, the Respondent cites "general legal secrecy" applicable to

	"information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It also cites "commercial secrecy" which, it says "will most likely accrue" to responsive Documents. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[107] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[108] The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's Objections to Request no. 4. Further, the Respondent's response again misconstrues the Claimants' request when it argues that: > "Specifically, the letters of credit issued by BES on behalf of PDVSA, since they constitute financial arrangements, which include several provisions describing the commercial and risk strategy of the contracting parties, are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above." It is by no means obvious that the letters of credit themselves would necessarily even fall within the Claimants' request, which is rather for "All Documents created by the Respondent, including in particular the Bank of Portugal, *discussing the transfer(s) between BES and Novo Banco of the rights to the receivables or payments due under the letters of credit* issued by BES on behalf of PDVSA, including any *Documents evidencing discussion of such payments actually being made* to Novo Banco or BES." (Emphasis added). Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 5 – Documents discussing the transfer(s) between BES and Novo Banco of the rights to the receivables or payments due under the letters of credit issued by BES on behalf of PDVSA, including any Documents evidencing discussion of such payments actually being made to Novo Banco or BES – are directly intertwined with the Oak Loan. As holders of rights arising out of the Oak Loan, the Claimants' rights are thus directly tied to the letters of credit.
Decision of the Tribunal	Denied. The request for all documents created by "State organs and institutions" (using the Claimants' vocabulary in § 2 of their Request), including the Bank of Portugal, over an unspecified timeframe, discussing transfers of rights to receivables or payments of letters of credit issued by BES to a third party is, *prima facie*, not sufficiently relevant and material in relation to the likely burden.

[107] See n. 35 above.

[108] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

Document Request Number	**6.**
Documents or Category of Documents Requested	All Documents created by Portugal, in particular the Bank of Portugal, dating from the period 3 August 2014 to 11 February 2015 setting out the commercial rationale for, or the impact for Portugal of, the Bank of Portugal's decision of 22 December 2014 to transfer (with retroactive effect from 3 August 2014) the Oak Loan from Novo Banco back to BES (**Exhibit C-0069**), as confirmed and maintained in the Bank of Portugal's decision of 11 February 2015 (**Exhibit C-0070**).
Relevance and Materiality according to the Requesting Party	In its Memorial on Jurisdiction, the Respondent attempts to paint a picture that the Oak Loan had no connection with Portugal, and that it was used as a means for Goldman Sachs to finance a project in Venezuela (Memorial on Jurisdiction, paras. 16-20, 160-167). On this, among other bases, the Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants have not shown that their interests in the Oak Loan qualify as an "investment" under the ICSID Convention or the Mauritius-Portugal BIT (see for example Memorial on Jurisdiction, para. 126 and generally, Counter-Memorial on Jurisdiction, para. 97 and Section IV). In particular, Portugal argues that the Claimants "cannot establish that their purported interests in the Oak Loan are characterized by (i) a 'contribution' of any sort, let alone one on Portugal's territory" (Memorial on Jurisdiction, para. 126). The Claimants demonstrated in their Counter-Memorial on Jurisdiction that: > "Novo Banco (and, by extension, Portugal) benefited from a huge bump to its equity upon the successful repayment of the trade financing and the exclusion of the USD 834 million liability from its accounts (by virtue of the Oak Loan being transferred back to BES). The only losers were the Oak Lenders, whose money was used to provide the trade financing and who have been left at the bad bank, unlike other senior debt holders." (Counter-Memorial on Jurisdiction, para. 113). The requested Documents are relevant to the Respondent's argument that the Oak Loan did not "contribute" in any way to Portugal, and therefore material to the outcome of the Respondent's *ratione materiae* objection. The requested Documents are in the possession, custody and control of the Respondent, in particular the Bank of Portugal, the State organ who made the relevant transfer decisions of 22 December 2014 and 11 February 2015.
Objections to Document Request	Respondent objects to this Request. First, this request is not material for the outcome of the case, as required by Articles 3.3(b) and 9.2. of the IBA Rules since the Claimants were already provided with several documents that serve as evidence for the facts pertaining to this request in a judicial proceeding brought, *inter alia*, by Claimants non-

	Mauritian affiliates[109], including an internal note of the Bank of Portugal containing an analysis on the application of the applicable legal criteria for the non-transfer of the Oak Loan liability to Novo Banco, which was adopted in the Bank of Portugal's Decision of 22 December 2014. Since Claimants own affiliates are parties to these proceedings, Claimants should be in custody, possession, or control of these documents, pursuant to Article 3(3) (c) of the IBA Rules. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[110] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[111], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[112], Respondent cannot force it to hand over such documents. Moreover, all documents encompassed by this request should in any case be rejected pursuant to Article 9.2[113] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[114] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the

[109] Case No. 919/15.4BELSB, for example, Claimants' non-Mauritian affiliates sought the annulment of the Bank of Portugal's decision of 22 December 2014 (**Exhibits R-0020 and R-0024**).

[110] Law 5/98, (Exhibit R-0072), Article 1 and Article 27(7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[111] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[112] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[113] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[114] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

	Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal in the context of the resolution of a credit institution as the requested Documents are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue). Finally, it should be noted that some documents responsive to this request may be protected by client-attorney privilege, including memos, drafts, and other preparatory materials or correspondence exchanged between the Bank of Portugal and its legal counsels in connection with and for the purpose of obtaining technical and legal advice in preparation of the Decision of 22 December 2014 and litigation concerning the same, namely involving Claimants non-Mauritian affiliates which is currently ongoing[115] that are strictly confidential, as recognized by both international law and Portuguese Law under 92(3) of the Portuguese Bar Association Statutes, approved by Decree-Law no. 145/2015, of 9 September 2015[116]. Therefore, and as Claimants have not shown any exceptional circumstances that would justify their waiver or override, said documentation is therefore excluded from production under Article 9(2)(b) of the IBA Rules on the Taking of Evidence in International Arbitration. Finally, this request encompasses documents that are likely protected from disclosure on the grounds of privilege and confidentiality, pursuant to Articles 9.2.(b), (e) and (f) and 9.4 of the IBA Rules, namely legal or technical documents, including memos, drafts, and other preparatory materials or correspondence exchanged between the Bank of Portugal and its legal counsels in connection with and for the purpose of obtaining technical and legal advice in preparation of the Decision of 22 December 2014 and litigation concerning the same, namely involving Claimants non-Mauritian affiliates which is currently ongoing and that therefore should be in any case excluded from this request.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are "material" to the resolution of the dispute.** The Respondent does not deny that the Documents are "relevant" to the resolution of the dispute. The Respondent's objection is instead that they are not "material for the outcome of the case" (as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules), "since the Claimants were already provided with several documents that serve as evidence for the facts pertaining to this request in a judicial proceeding". This is not correct. The evidence

[115] See. Case No. 919/15.4BELSB, for example, Claimants' non-Mauritian affiliates sought the annulment of the Bank of Portugal's decision of 22 December 2014 (**Exhibits R-0020 and R-0024**).

[116] Decree-Law no. 145/2015, of 9 September 2015, approving the Portuguese Bar Association Statutes ("Decree Law 145/2015") (Exhibit R-0083), Article 92 (1) ("The lawyer is required to maintain professional secrecy regarding all facts of which they become aware in the exercise of their functions or the provision of their services, namely (…)"), Article 92 (2) ("the obligation of profession secrecy exists whether the service requested or entrusted to the lawyer involves judicial or extra-judicial representation or not whether it should be remunerated or not, and whether the lawyer has accepted and performed the representation or service or not. The same applies to all lawyers who, directly or indirectly, have any involvement in the service") and Article 92 (3) ("Professional secrecy also covers documents and other events that relate, directly or indirectly, to facts subject to secrecy").

provided by the Respondent included only the Bank of Portugal decision of 22 December 2014 (**Exhibit C-0069**) (with its annexes) and its decision of 11 February 2015 (**Exhibit C-0070**). These documents do not set out the information sought by the Claimants' request. The Claimants maintain that Request no. 6 is both relevant and material to the outcome of the case, in particular to the Respondent's *ratione materiae* argument that the Oak Loan did not "contribute" in any way to Portugal.

(2) The requested Documents are clearly within the possession, custody or control of the Respondent. The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and the Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by Portuguese State organs, including (but not limited to) the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent.

(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.

(i) Portuguese secrecy laws cannot provide a blanket shield against production of the requested Documents.

Just as for its objections to Request nos. 2 to 5, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It also cites "commercial secrecy" which, it says "will most likely accrue" to responsive Documents.

As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[117]

Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[118]

The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 6 – those "setting out the commercial rationale for, or the impact for Portugal of, the Bank of Portugal's decision of 22 December 2014 to transfer (with retroactive effect from 3 August

[117] See n. 35 above.

[118] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

	2014) the Oak Loan from Novo Banco back to BES" – directly concern the Oak Loan. The Claimants are the holders of the rights arising from the Oak Loan, which was specifically transferred to Novo Banco and then again specifically retransferred from Novo Banco back to BES. Understanding the underlying commercial rational considered by the Bank of Portugal for deciding to single out the Oak Loan in the 22 December 2014 Decision and is relevant and material to the assessment of the connection of the Oak Loan with Portugal. **(ii) Portuguese legal privilege law does not support a blanket refusal to disclose.** Finally, as to Respondent's allegation (more particularised than others among its Responses) that documents responsive to this request might be protected by client-attorney privilege, it is important to note that the Portuguese Bar Association Statutes do not provide a general prohibition on the disclosure of documents (as further described in the Claimants' response to the Respondent's objections to Request no. 4). The Claimants have set out their position as regards Documents properly subject to legal privilege in paragraph 5 of the introduction to Claimants' Responses, set out at p. 4 above.
Decision of the Tribunal	Granted in part. The subject matter of the request (i.e., the "rationale" and "impact" of Portugal's decision of 22 December 2014 to transfer the Oak Loan from Novo Banco back to BES) is vague, and the recipient (the "Respondent") is broad, but the timeframe is reasonable and the subject-matter of the request is *prima facie* relevant and material to the case. The Respondent shall produce documents of the Bank of Portugal setting out the commercial rationale for the 22 December 2014 decision over the requested period, subject to the provisos in PO4 on (i) privilege and (ii) confidentiality.

Document Request Number	**7.**
Documents or Category of Documents Requested	All Documents created by the Respondent, including in particular the Bank of Portugal, the Ministry of Finance, and the Council of Ministers, concerning the drafting of and intention behind the Decree-Law 114-A, of 1 August (i.e., the 2014 Banking Law) as it relates to creditors' NCWO rights, dating from before or on the publication date of that law on 1 August 2014.
Relevance and Materiality according to the Requesting Party	The Respondent argues that the Claimants' claims are based on events which occurred before they made their investments, or that the Claimants acquired their investments at a time when a dispute over Portugal's failure to make NCWO payments was foreseeable. For example, in relation to the latter argument, it claims that "a BES management report for fiscal year 2014 […] expressly stated that pursuant to Article 145-B (3) of the 2014 Banking Law, which governs the NCWO process, NCWO payments would be paid only at the end of the liquidation of BES." (Memorial on Jurisdiction, para. 48). The requested Documents are relevant and material to the Respondent's objections on jurisdiction including *ratione temporis* and the Respondent's allegations on abuse of process, because they show whether (as Respondent claims) Portugal intended through the 2014 Banking Law that it would withhold NCWO payments until the end of a liquidation. The requested Documents are therefore relevant and material to the question of the nature and subject matter of the dispute between the Parties (as framed by the Respondent itself in its objections to jurisdiction), and therefore to the Respondent's objections to jurisdiction *ratione temporis* and relating to an alleged abuse of process. The requested Documents are in the possession, custody and control of the Respondent because they concern a change in domestic law effected by the Respondent itself.
Objections to Document Request	Respondent objects to this request. First, the requested category of documents is neither relevant nor material to the outcome of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process, as required per para. 15.2. of Procedural Order no. 1 and articles 3.3(b) and 9.2 (a) of the IBA Rules as the 2014 Banking Law clearly states that NCWO rights will only be paid at the end of the liquidation of BES[119]. Therefore, any documents showing the government's intentions in drafting this law will not make this clearer and therefore its production should be rejected. Furthermore, these Documents are neither relevant nor material to the outcome of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process as on the Respondent's case the dispute between the parties does not pertain to the content

[119] 2014 Banking Law, (Exhibit C-0095), Article 145-B (3).

	of the 2014 Banking Law[120]. Rather, the point of conflict between the parties is on the temporal application of the law. Indeed, on the one hand Claimants argue that, "following the entry into force of the 2015 Banking Law on 1 April 2015, the Bank of Portugal should have started applying the resolution measures under the 2015 Banking Law instead of the 2014 Banking Law to BES[121]. Under the 2015 Banking law —according to Claimants— "prompt NCWO payments" should be made.". Respondent on the other hand maintains that since "the BES Resolution occurred while the 2014 Banking Law was in force, such that, pursuant to Portuguese law, the resolution measures of the 2014 Banking Law must apply to the NCWO right and process" because "this right arises at the moment the resolution measure is taken, in favour of the creditors of the credits that were not transferred to Novo Banco and were affected by the resolution measure."[122] In addition, all Documents encompassed in this request, as they concern the drafting of and intention behind the enactment of a legislative act (i.e. Decree-Law 114-A, of 1 August) should be rejected pursuant to Article 9.2 of the IBA Rules[123], they are protected by confidentiality, specifically national or state secrecy, which cannot be waived in these proceedings. According to the Portuguese law, notably the Resolution of the Council of Ministers no. 65/2024, of 24 April, and the Resolution of the Council of Ministers no. 29/2011, of 11 July, as well as Decree-Law no. 251-A/2015, of 17 December, it is established that: (i) all members of the Government are bound by a duty of secrecy concerning the content of debates and the positions taken in the Council of Ministers and (ii) the agendas, appraisals, opinions, deliberations, and summaries of the Council of Ministers and the Meeting of Secretaries of State are confidential. Likewise, documents related to governmental legislative procedures are classified as state secrets pursuant to Organic Law no. 2/2014, of 6 August. In addition, to the extent that any of the requested Documents were created by the Bank of Portugal, their production should also be denied pursuant to Article 3.3 (c) of the IBA Rules as they are in the possession, custody or control of the Bank of Portugal, not the Respondent and the Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[124] (See response to Request 2 above). If some of the requested documents were created by

[120] See Claimants' Memorial on the Merits, Section IV.B(iii), especially at paras. 103-106, specifically para. 104 (citing 2014 Banking Law, (Exhibit C-0094), Art 145-B(3)).

[121] Claimants' Memorial on the Merits, para. 114.

[122] Respondent's Memorial on Jurisdiction, para. 243.

[123] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[124] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4). The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 concerning primacy, annex to the Lisbon Treaty and Article 8(2, 4) of the Portuguese Constitution.

	the Bank of Portugal and they were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide such documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[125], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[126], Respondent cannot force it to hand over such documents. Moreover, the production of any documents in the possession, custody and control of the Bank of Portugal, should also be rejected pursuant to Article 9.2[127] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[128] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue). In any event, the request for any document concerning the drafting of and intention behind Decree-Law 114-A should be narrowed down to the legislative bodies involved in the enactment of this law, which is the Portuguese Government and the Council of Ministers and not, for example, the Bank of Portugal, which has no powers for enactment of a Decree-Law. Therefore, the intention behind the Decree-Law 114-A can only be assessed by reference to the competent legislative bodies.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The Respondent misconstrues the nature of the dispute between the Parties. The Respondent states that "on the Respondent's case the dispute between the parties

[125] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[126] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[127] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[128] In particular, Banking Law, Article 80 (1), **Exhibit R-0078**.

	does not pertain to the content of the 2014 Banking Law. Rather, the point of conflict between the parties is on the temporal application of the law." The Claimants have explained that irrespective of which version of domestic Portuguese banking law applies to the NCWO process, Portugal has breached its obligations under the BIT because of its unreasonable delay and failure to make NCWO payments. The requested documents are relevant and material because they go to the Respondent's intention (on Respondent's case) through the 2014 Banking Law that it would withhold NCWO payments until the end of the BES liquidation. The Respondent's claim that the request should be rejected because the "2014 Banking Law clearly states that NCWO rights will only be paid at the end of the liquidation of BES" is not relevant to Claimants' request which focuses on the Respondent's *intention* when drafting the 2014 Banking Law. The Respondent clearly acknowledges in its objection that this issue of the timing of NCWO payments and when they will be made is an issue of dispute between the Parties. The requested documents are relevant and material to the issue of the nature and subject matter of the dispute between the parties and when the specific dispute arose for the purposes of the *ratione temporis* and abuse of process objections. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal, not the Respondent and the Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by Portuguese State organs, including (but not limited to) the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.** **(i) Portuguese banking or commercial secrecy laws cannot provide a blanket shield against production of the requested Documents.** Just as for its objections to Request nos. 2 to 6, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It also cites "commercial secrecy" which, it says "will most likely accrue" to responsive Documents. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[129]

[129] See n. 35 above.

	Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[130] The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 7 – Documents concerning the drafting of and intention behind the 2014 Banking Law as it relates to creditors' NCWO rights – are directly relevant to the Claimants' rights arising from the Oak Loan. It was these rights that Portugal alleges were not to be paid, under the 2014 Banking Law, until the end of a liquidation. **(ii) Portuguese national or state secrecy laws do not support the Respondent's objections.** The Respondent also objects to the Claimants' request on the basis that the documents requested "are protected by confidentiality, specifically national or state secrecy, which cannot be waived in these proceedings", under the "Organic Law no. 2/2014, of 6 August". The Respondent fails, however, to cite any provision setting out that documents relating to governmental legislative procedures are classified as state secrets. The Respondent also erroneously blurs the confidentiality of "the assessments, debates, deliberations and summaries of the Council of Ministers" as provided for in Article 20 of the Resolution of the Council of Ministers n.º 65/2024, of 24 April, with all the other documents prepared in advance of the Council of Ministers and the meeting of the Secretaries of State, which are not confidential. In addition, the Respondent invokes Decree-Law 251-A/2015, of 17 December. However, this law does not apply to the Government that approved the Decree-Law 114-A/2014, of 1 August (i.e., what became the 2014 Banking Law) (the XIX Government), but rather only to the XXI Government. Therefore, there is no legal impediment to the production of any Documents concerning "the drafting of and intention behind the Decree-Law 114-A/2014, of 1 August" if these documents were not produced by the Council of Ministers itself during the meeting. There are a number of examples of responsive documents that are not confidential (and whose lack of confidentiality the Respondent does not deny), including:

[130] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

	(iv) documents of the Bank of Portugal requesting the Government to amend the Banking Law or memoranda with information later considered (even if not adopted) in the drafting of the Decree-Law 114-A/2014 of 1 August; (v) documents prepared by the Ministry of Finance in the drafting of a proposal to modify the banking law; (vi) documents prepared by the ministerial team of the Ministers or the Secretaries of State, namely the Secretary of State of the Presidency of Council of Ministers and his team in order to prepare the discussion of the draft in the Council of Ministers. This includes any related memos, notes, comparative charts, main topics or main exchanges sought out, etc. on the need to amend and the intention behind the amendment of the banking law; (vii) any "opinions or documents proving the legal hearings and consultations held" are submitted by the office proposing draft normative acts through the document management system of the government's computer network, according to Article 21(1) of the Resolution of the Council of Ministers n.º 29/2011, of 11 July (in force at the time when the Decree-Law 114-A/2014 of 1 August was discussed and approved), and as such, are not confidential. The Respondent does not and cannot deny that the enactment of a Decree-Law is based on information prepared by several entities and that these documents are not protected by the legislation mentioned by the Respondent. **(iii) There is no basis to "narrow down" the Claimants' request.** The Respondent argues that "the request for any document concerning the drafting of and intention behind Decree-Law 114-A should be narrowed down to the legislative bodies involved in the enactment of this law, which is the Portuguese Government and the Council of Ministers and not, for example, the Bank of Portugal, which has no powers for enactment of a Decree-Law". It is common in practice for the Ministry of Finance to seek the opinion of the Bank of Portugal on draft legislation in preparation[131] and it is also not uncommon for public entities to submit proposals, drafts and memos to the competent ministry requesting the drafting of legislation in their areas of activity when they consider that a certain amendment to the legislation should be enacted. Accordingly, there is no basis to "narrow" the Claimants' request as the Respondent proposes.
Decision of the Tribunal	Granted in part. The request for all documents created by "the Respondent" is insufficiently narrow and specific. The Respondent shall produce responsive documents of the stated government entities (i.e., Bank of Portugal, the Ministry of

[131] By way of example, Claimant cites the following case: "On 11 January 2019, the Ministry of Finance requested, as part of a direct consultation procedure with the Bank of Portugal, the Insurance and Pension Funds Supervisory Authority ('ASF') and the Securities Market Commission ('CMVM'), that the Bank of Portugal send its contributions on Draft Bill no. 575/2018 ('Draft Bill'), which establishes the National

	Finance, and the Council of Ministers), subject to the provisos in PO4 on (i) privilege and (ii) confidentiality.

Financial Supervision System ('SNSF')", available at: Parecer do Banco de Portugal sobre o Projeto de Proposta de Lei que cria e regula o Sistema Nacional de Supervisão Financeira (bpor\tugal.pt)

Document Request Number	**8.**
Documents or Category of Documents Requested	All Documents created by the Respondent, including in particular the Bank of Portugal, the Ministry of Finance, and the Council of Ministers, concerning the drafting of and intention behind bill no. 264/XII (i.e., what became the 2015 Banking Law) as it relates to creditors' NCWO rights, dating from before or on the publication date of that law on 26 March 2015.
Relevance and Materiality according to the Requesting Party	The Respondent argues that the Claimants' claims are based on events which occurred before they made their investments, or that the Claimants acquired their investments at a time when a dispute over Portugal's failure to make NCWO payments was foreseeable (Memorial on Jurisdiction, para. 48). The requested Documents will show why Portugal thought it was necessary to amend (through the Banking Law introduced in 2015) the previous NCWO provision introduced into Portuguese law by the 2014 Banking Law. The Documents go to the Respondent's claim that the dispute under the BIT is about which version of the banking law governs the BES NCWO process, and whether such a dispute was foreseeable when the Claimants acquired their investments. The requested Documents are therefore relevant and material to the question of the nature and subject matter of the dispute between the Parties (as framed by the Respondent itself), and therefore to the Respondent's objections to jurisdiction *ratione temporis* and relating to an alleged abuse of process. The requested Documents are in the possession, custody and control of the Respondent because they concern a change in domestic law effected by the Respondent itself.
Objections to Document Request	First, the requested category of documents is neither relevant or material to the outcome of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process, as required by para. 15.2. of Procedural Order no. 1 and articles 3.3(b) and 9.2 (a) of the IBA Rules as the purpose of the request is already satisfied by public documents, such as the Explanatory Memorandum included in bill no. 264/XII, available on the Portuguese Parliament's website[132]. Also, the requested category of documents is not relevant or material to the outcome of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process as there is no dispute between the parties regarding the amendment (through the Banking Law introduced in 2015) of the previous NCWO provision introduced into Portuguese law by the 2014 Banking Law. Rather, as mentioned above, the point of conflict between the parties relates to the temporal application of the law and this would not be clarified by the requested documents. Indeed, on the one hand Claimants argue that, "following the entry into force of the 2015 Banking Law on 1 April 2015, the Bank of Portugal should have started applying the resolution measures under the 2015 Banking Law instead of the 2014 Banking

[132]Bill no. 264/XII ,available at:
https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=38813

	Law to BES[133], pursuant to which—according to Claimants—"prompt NCWO payments" should be made.". In turn the Respondent maintains that since "the BES Resolution occurred while the 2014 Banking Law was in force, such that, pursuant to Portuguese law, the resolution measures of the 2014 Banking Law must apply to the NCWO right and process" because "this right arises at the moment the resolution measure is taken, in favour of the creditors of the credits that were not transferred to Novo Banco and were affected by the resolution measure."[134] In addition, as the requested Documents concern the drafting of and intention behind the enactment of a legislative act (i.e. bill no. 264/XII), their production should be also rejected pursuant to Article 9.2 of the IBA Rules[135] because they are protected by confidentiality, specifically national or state secrecy, which cannot be waived in these proceedings. According to the Portuguese law, notably the Resolution of the Council of Ministers no. 65/2024, of 24 April, and the Resolution of the Council of Ministers no. 29/2011, of 11 July, as well as Decree-Law no. 251-A/2015, of 17 December, it is established that: (i) all members of the Government are bound by a duty of secrecy concerning the content of debates and the positions taken in the Council of Ministers and (ii) the agendas, appraisals, opinions, deliberations, and summaries of the Council of Ministers and the Meeting of Secretaries of State are confidential. Likewise, documents related to governmental legislative procedures are classified as state secrets pursuant to Organic Law no. 2/2014, of 6 August. Moreover, to the extent that any of the requested Documents were created by the Bank of Portugal, their production should also be denied pursuant to Article 3.3 (c) of the IBA Rules as they are in the possession, custody or control of the Bank of Portugal, not the Respondent and the Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[136] (See response to Request 2 above). If some of the requested documents were created by the Bank of Portugal and they were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide such documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[137], as described

[133] Claimants' Memorial on the Merits, para. 114.

[134] Respondent's Memorial on Jurisdiction, para. 243.

[135] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[136] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[137] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

	below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[138], Respondent cannot force it to hand over such documents. Finally, the production of any documents in the possession, custody and control of the Bank of Portugal, should also be rejected pursuant to Article 9.2[139] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[140] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Considering the potentially disruptive effect on said stability, any documents created by the Bank of Portugal are also necessarily encompassed by legal secrecy (to which commercial secrecy will most likely accrue). In any event, the request for any document concerning the drafting of and intention behind bill no. 264/XII should be narrowed down to the legislative bodies involved in the enactment of this law, which are the Portuguese Parliament and the Council of Ministers and not, for example, the Bank of Portugal, which has no powers for enactment of a law. Therefore, the intention behind the bill no. 264/XII can only be assessed by reference to the discussions held by the competent legislative bodies as evidenced throughout the explanatory memorandum and the several proposals available at the Portuguese Parliament's website[141].
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The purpose of the request is not, as the Respondent claims, "already satisfied by public documents". The publicly available Explanatory Memorandum and "several proposals" on the legislation which the Respondent points contain only cursory information regarding the issue of NCWO rights under the 2015 Banking Law. As a result, they do not "satisfy" this request.

[138] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[139] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[140] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

[141] Bill no. 264/XII, available at:
https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=38813

	Further, the requested documents are relevant to the way in which the Respondent attempts to misconstrue the nature of the dispute between the Parties and will address the reasons why the Respondent amended the 2015 Banking Law. The Claimants have explained that irrespective of which version of domestic Portuguese banking law applies to the NCWO process, Portugal has breached its obligations under the BIT because of its unreasonable delay and failure to make NCWO payments. The requested documents are relevant and material because they go to the Respondent's intention in amending the 2015 Banking Law in respect of the payment of NCWO payments, and therefore what that intention says about how the Respondent construed the corresponding provisions under the 2014 Banking Law. The requested documents address contested issues around the nature of the dispute (as framed by the Respondent) and whether the dispute was foreseeable when the Claimants acquired their investment, and are therefore relevant and material to the Respondent's objections to jurisdiction *ratione temporis* and relating to an alleged abuse of process. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal, not the Respondent and the Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by Portuguese State organs, including (but not limited to) the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.** **(i) Portuguese banking or commercial secrecy laws cannot provide a blanket shield against production of the requested Documents.** Just as for its objections to Request nos. 2 to 7, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It also cites "commercial secrecy" which, it says "will most likely accrue" to responsive Documents. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[142] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[143]

[142] See n. 35 above.

[143] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

	The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 8 (i.e., documents concerning the drafting of and intention behind the 2015 Banking Law as it relates to creditors' NCWO rights) are directly relevant to the Claimants' rights arising from the Oak Loan. **(ii) Portuguese national or state secrecy laws do not support the Respondent's objections.** The Respondent also objects to the Claimants' request on the basis that the documents requested "are protected by confidentiality, specifically national or state secrecy, which cannot be waived in these proceedings", under the "Organic Law no. 2/2014, of 6 August". The Respondent's objection is baseless in relation to bill no. 264/XII (i.e., what became the 2015 Banking Law) for the same reasons (*mutatis mutandis*) as set out in the Claimants' response to the Respondent's objections to Request no. 7. Just as for the 2014 Banking Law, the Decree-Law 251-A/2015, of 17 December is not relevant as it does not apply to the Government that discussed the bill no. 264/XII (i.e., what became the 2015 Banking Law) (the XIX Government), but only to the XXI Government. **(iii) There is no basis to "narrow down" the Claimants' request.** The Respondent argues that "the request for any document concerning the drafting of and intention behind bill no. 264/XII should be narrowed down to the legislative bodies involved in the enactment of this law, which are the Portuguese Parliament and the Council of Ministers and not, for example, the Bank of Portugal, which has no powers for enactment of a law". It is common in practice for the Ministry of Finance to seek the opinion of the Bank of Portugal on draft legislation in preparation[144] and it is also not uncommon for public entities to submit proposals, drafts and memos to the competent ministry requesting the drafting of legislation in their areas of activity when they consider that a certain amendment to the legislation should be enacted. The Respondent also cites by way of example the "several proposals" relating to bill no. 264/XII (i.e., what became the 2015 Banking Law) available at the Portuguese Parliament's website. There are over 10 "proposals" in the website, including one from the Bank of Portugal, in which there is only one mention of the NCWO evaluation (which does not go to the issue to which this Request no. 8 relates). The same document also mentions that the Bank of Portugal and the Ministry of Finance were analysing and discussing several provisions of the bill, which may lead to additional comments:

[144] By way of example, Claimant cites the following case: "On 11 January 2019, the Ministry of Finance requested, as part of a direct consultation procedure with the Bank of Portugal, the Insurance and Pension Funds Supervisory Authority ('ASF') and the Securities Market Commission ('CMVM'), that the Bank of Portugal send its contributions on Draft Bill no. 575/2018 ('Draft Bill'), which establishes the National Financial Supervision System ('SNSF')". See link: Parecer do Banco de Portugal sobre o Projeto de Proposta de Lei que cria e regula o Sistema Nacional de Supervisão Financeira (bportugal.pt)

	"To this end, in order to ensure the correct transposition of Directives 2014/49/EU and 2014/59/EU, it became necessary to revise the national provisions in force in this area, by amending both the RBICSF and a number of separate pieces of legislation. To this end, the Bank of Portugal was actively involved in the technical side of preparing draft legislation that would enable the desired objectives to be achieved. The Bank of Portugal considers it positive that the draft, which aims to fulfil this commitment, corresponds in essence to the proposals it had presented to the Ministry of Finance up to that point. Without prejudice to the fact that a number of comments and drafting proposals are still being analysed and discussed between the Bank of Portugal and the Ministry of Finance, and that the Bank of Portugal may submit additional comments at a later date, the Draft deserves, in general terms, the favourable opinion of the Bank of Portugal."[145] Accordingly, there is no basis to "narrow" the Claimants' request as the Respondent proposes.
Decision of the Tribunal	Granted in part. The request for all documents created by "the Respondent" is insufficiently narrow and specific in this context. The Respondent shall produce responsive documents of the stated government entities (i.e., Bank of Portugal, the Ministry of Finance, and the Council of Ministers), subject to the provisos in PO4 on (ii) privilege and (ii) confidentiality.

[145] Bank of Portugal Proposal, 14 November 2014, p. 3 Print img-Y17093210-0001.tif (13 pages) (parlamento.pt).

Document Request Number	**9.**
Documents or Category of Documents Requested	All Documents created by the Bank of Portugal between the entry into force of the 2015 Banking Law up to April 2016, informing BES creditors that, even after the introduction of the 2015 Banking Law, the NCWO process would be carried out in accordance with the 2014 Banking Law.
Relevance and Materiality according to **the Requesting Party**	The Respondent argues in its Memorial on Jurisdiction (para. 249) that: > "the central point remains that the Bank of Portugal's decision to apply the 2014 Banking Law *instead of* the 2015 Banking Law was also made and repeatedly affirmed prior to the date when Claimants acquired their alleged investments." The Respondent's claim is not supported by any contemporaneous documents authored by State authorities. The requested Documents are therefore relevant to the Respondent's claim that the "the Bank of Portugal's decision to apply the 2014 Banking Law *instead of* the 2015 Banking Law was […] made and repeatedly affirmed prior to the date when Claimants acquired their alleged investments" and material to the Respondent's allegation that a "dispute" concerning the Respondent's failure to provide NCWO payments had arisen prior to the Claimants acquiring their investments. The Documents are, in turn, material to the outcome of the Respondent's objections *ratione temporis* and abuse of process. The Claimants are not in possession, custody or control of the requested Documents (as they never received any such alleged "repeated affirmations" by State authorities). Nor are Claimants aware of any other creditors of BES receiving any such "repeated affirmations", which on the Respondent's case is "the central point" of its objections to jurisdiction *ratione temporis* and relating to alleged abuse of process. The requested Documents are, according to the Respondent's assertions in this arbitration, in the possession, custody and control of the Respondent.
Objections to Document Request	Respondent objects to this request. First, Claimants have in their possession, custody, or control several documents confirming the application of the 2014 Banking Law to the NCWO process either because (i) they were made available to the public, such the Bank of Portugal's decisions of 3 August 2014 and 22 December 2014, which clarified that the 2014 Banking Law would apply to the BES Resolution Measure and thereby to Claimants' NCWO rights, BES's 2014 Management Report[146], which expressly stated that pursuant to Article 145-B (3) of the 2014 Banking Law, which governs the NCWO process, NCWO payments would be paid only at the end of the liquidation of BES; (ii) they were produced in the judicial proceedings where Claimants or Claimants'

[146] BES Management Report, 18 December 2015, (**Exhibit R-0019**), page 8, issued in the context of the Annual Financial Statements pertaining to the fiscal year of 2014.

	non-Mauritian parents were parties (See Exhibits R-0020, R-0021, R-0022 and R-0023); or (iv) they were produced by the Respondent in these proceedings (See Exhibit R-0024). Also, Claimants are best positioned to access these documents in their capacity as BES's creditors either directly or through their non-Mauritian parents, who were BES's creditors within the timeframe covered by the Request and therefore should have received the requested documents. Claimants attempt to transfer the burden of searching these documents on the Respondent. As a result, this request should be rejected pursuant to Articles 3.3(c)(ii) and 9.2(c) of the IBA Rules. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[147] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[148], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[149], Respondent cannot force it to hand over such documents. Moreover, all Documents created by the Bank of Portugal encompassed by this request should in any case be rejected pursuant to Article 9.2[150] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding

[147] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[148] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[149] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[150] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

	information obtained within the performance of their powers, duties and functions[151] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Specifically, considering that the request Documents encompass Documents sent to all BES creditors, they are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above. In fact, the protection of their confidentiality is of paramount importance as, these duties benefit parties which are not involved in these proceedings, and which have trusted that the respective commercial and legal terms would remain confidential.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) There is no basis to reject the Claimants' request pursuant to Articles 3.3(c)(ii) and 9.2(c) of the IBA Rules**. The Respondent does not deny that the documents requested are relevant and material to the resolution of the dispute. Instead, it argues that "Claimants have in their possession, custody, or control several documents confirming the application of the 2014 Banking Law to the NCWO process". In advancing this objection, the Respondent: (i) misconstrues the Claimants' request; (ii) identifies documents said to be in the Claimants' possession, custody or control which would not, in any event, fall within the Claimants' request; and (iii) attempts to shift the burden of accessing the documents by means other than its own production onto the Claimants, in circumstances where it would clearly be *less* burdensome for the Respondent to produce them. **(i) The Respondent misconstrues the Claimants' request.** The Respondent argues that Claimants have in their possession, custody, or control several documents confirming the application of the 2014 Banking Law to the NCWO process. However, what the Claimants have sought in Request no. 9 is "Documents *created by the Bank of Portugal* between the entry into force of the 2015 Banking Law up to April 2016, *informing BES creditors* that, *even after the introduction of the 2015 Banking Law, the NCWO process would be carried out in accordance with the 2014 Banking Law*". In other words, the Request specifically seeks documents created by the Bank of Portugal, and further which specifically inform creditors that the NCWO process (as distinct from the resolution as a whole) would be carried out in accordance with the 2014 Banking Law. **(ii) The Respondent identifies documents said to be in the Claimants' possession, custody or control which do not fall within the Claimants' Request.** The documents identified in the Respondent's objection are not responsive to the Claimants' request:

[151] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

(viii) "The Bank of Portugal's decisions of 3 August 2014 and 22 December 2014": these decisions, which pre-dated the 2015 Banking Law, cannot by definition "inform BES creditors […] even after the introduction of the 2015 Banking Law, [that] the NCWO process would be carried out in accordance with the 2014 Banking Law."

(ix) "BES's 2014 Management Report": this Report was not "created by the Bank of Portugal".

(x) Documents "produced in the judicial proceedings where Claimants or Claimants' non-Mauritian parents were parties (See Exhibits R-0020, R-0021, R-0022 and R-0023)", and those "produced by the Respondent in these proceedings (See Exhibit R-0024)": these documents are statements of claim relating to challenges to the Bank of Portugal's decisions and the retransfer powers under the 2014 and 2015 Banking Law. The documents do not address NCWO rights.

(iii) The Respondent's attempt to shift the burden of accessing documents responsive to this Request must fail.

Further, the Respondent's claim that "Claimants attempt to transfer the burden of searching these documents on the Respondent" and that the requested documents can be accessed in Claimants' "capacity as BES's creditors either directly or through their non-Mauritian parents, who were BES's creditors within the timeframe covered by the Request" is incorrect.

The Claimants are not in possession, custody or control of the requested Documents (as they never received any such alleged "repeated affirmations" by State authorities). Nor are Claimants aware of any other creditors of BES receiving any such "repeated affirmations", which on the Respondent's case is "the central point" of its objections to jurisdiction *ratione temporis* and relating to alleged abuse of process. The requested Documents are, according to the Respondent's assertions in this arbitration, in the possession, custody and control of the Respondent (specifically the Bank of Portugal, as author of the requested Documents). The Bank of Portugal is likely already to have identified such documents in the course of preparing for various domestic proceedings. Accordingly, it would clearly in these circumstances be *less* burdensome for the Respondent to produce them than for the burden to be shifted to the Claimants.

(2) The requested Documents are clearly within the possession, custody or control of the Respondent. The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent.

(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules. Just as for its objections to Request nos. 2 to 8, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of

	Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It adds that "considering that the request *[sic]* Documents encompass Documents sent to all BES creditors, they are also protected from disclosure by the legal secrecy and commercial secrecy duties mentioned above." As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[152] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[153] The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 9 (i.e., documents created by the Bank of Portugal informing BES creditors that, even after the introduction of the 2015 Banking Law, the NCWO process would be carried out in accordance with the 2014 Banking Law) are directly relevant to the Claimants' rights arising from the Oak Loan. In particular, they have a direct interest in knowing when their NCWO rights will be paid, which is impacted by the applicable law to the NCWO process. Therefore, the Claimants are interested parties before the Bank of Portugal for the purposes of Article 80 (2) of the Banking Law, which provides grounds for the relevant applicable secrecy to be lifted.
Decision of the Tribunal	Denied. The requests are disproportionately burdensome to their *prima facie* relevance and materiality.

[152] See n. 35 above.

[153] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

Document Request Number	**10.**
Documents or Category of Documents Requested	All Documents exchanged between the Bank of Portugal and Goldman Sachs relating to NCWO rights during the time period August 2014 through to April 2016.
Relevance and Materiality according to the Requesting Party	The Respondent argues that "[t]here *was* a dispute between the Parties prior to March 2016 concerning which law governs the BES Resolution proceedings and, consequently, the NCWO process" (Memorial on Jurisdiction, para. 244) and thus that "Claimants' claims over the NCWO payments are fundamentally based on events that occurred prior to Claimants' acquisition of their alleged investments." (*Id*., para. 249). Alternatively, it claims that even if the Tribunal were to uphold its jurisdiction *ratione temporis*, "it must still at the very least find that Claimants committed an abuse of process" because "the dispute over the application of the resolution measures under the 2014 Banking Law to the NCWO process, was not only existent when Claimants acquired their alleged investments, but was also, at the very least, foreseeable." (*Id*., paras. 250-251). As Claimants established in the Counter-Memorial on Jurisdiction, it is clear that the dispute arose after the Claimants acquired their investments (Counter-Memorial on Jurisdiction, Section V.B). Moreover, the Respondent has failed to show that the specific dispute between the Parties on NCWO payments was foreseeable at the time the Claimants acquired their investment (*id*., Section VI.B). The Respondent has failed to produce any evidence which demonstrates that the issue of NCWO entitlements was even discussed with any relevant parties prior to the Claimants' acquisition of their investments (*id*.). The requested Documents are relevant to the question of the nature and subject matter of the dispute between the Parties (as framed by the Respondent itself) and when the specific dispute at issue between the Parties arose or became foreseeable. The requested Documents are material to the outcome of the Respondent's objections on jurisdiction including *ratione temporis* and the Respondent's allegations on abuse of process. The Claimants are not in possession, custody or control of the requested Documents, as they involve a third party to the arbitration (Goldman Sachs) and the Bank of Portugal. The requested Documents are in the possession, custody and control of the Respondent because they were sent or received by the Bank of Portugal.
Objections to Document Request	Respondent objects to this request. To begin with, Claimants fail to establish the relevance and materiality of communications exchanged between the Bank of Portugal and Goldman Sachs regarding NCWO rights for the assessment of the nature and subject matter of the dispute and its foreseeability, and therefore, to the Respondent's objections to jurisdiction *ratione temporis* and abuse of process, as required by para. 15.2. of PO1 and Articles 3.3(b) and 9.2 (a) of the IBA Rules. As Claimants acknowledge,

	Respondent's objections are based on the fact that the dispute under the BIT concerns the application of the 2014 Banking Law to BES Resolution and therefore the corresponding NCWO process and the measures taken in this regard by the Bank of Portugal during that year. In this respect, the Respondent has submitted plenty of evidence that shows that (i) before purportedly acquiring the interests in the Oak Loan, Claimants were well aware that the 2014 Banking Law would apply to BES Resolution Measure and to Claimants NCWO rights; (ii) the application of the 2014 Banking Law to BES Resolution and therefore to Claimants NCWO rights was highly disputed by Claimants non-Mauritian affiliates prior to Claimants allegedly acquiring the interests in the Oak Loan. Indeed, Respondent has shown that prior to allegedly acquiring their rights in the Oak Loan, it was well established that the 2014 Banking Law would apply to the NCWO process, namely through (a) the Bank of Portugal's Decision of 3 August 2014 in which the 2014 Banking Law was applied to the BES Resolution Measure[154]; and (b) the Bank of Portugal's Decision of 22 December 2014, which ruled that the Oak Loan liabilities had never been transferred from BES to Novo Banco, on the basis of the 2014 Banking Law and of paragraph (b) (i) (a, c) of Annex 2 of the Resolution Measure of 3 August 2014[155] and; (iii) BES's 2014 Management Report[156], which expressly stated that pursuant to Article 145-B (3) of the 2014 Banking Law, which governs the NCWO process, NCWO payments would be paid only at the end of the liquidation of BES. Most importantly, Respondent has shown that Claimants' non-Mauritian affiliates in 2015 initiated judicial proceedings against the Bank of Portugal admitting expressly that the Bank of Portugal was applying the 2014 Banking Law and challenged its application to the resolution measures in respect of the BES resolution and that, even after Claimants' non-Mauritian affiliates did so, the Bank of Portugal challenged their understanding and continued to maintain that the resolution measures under the 2014 Banking Law would apply to the BES resolution proceedings[157]. Overall, there is plenty of evidence regarding the nature and the subject matter of the dispute brought to this Tribunal and that it existed or, at the very least, was highly foreseeable when Claimants purportedly acquired their credits in March/April 2016. Most importantly, this evidence demonstrates that the question of the application of the 2014 Banking Law to Claimants alleged NCWO rights was discussed and debated directly with Claimants own affiliates. As a result, whether or not this question was debated or discussed with third parties, namely Goldman Sachs, is not relevant nor material to the outcome of the case and therefore this request should be denied pursuant to Articles 3.3(b) and 9.2 (a) of the IBA Rules. Additionally, Claimants have also failed to establish that, to the extent that they exist, the requested documents are not in their possession, custody, or control. As alleged holders of NCWO rights and affiliates to parties directly involved in judicial proceedings where the law applicable to their alleged NCWO rights was discussed,

[154]Decision of the Bank of Portugal, 3 August 2014, (Exhibit C-0052), Point Two and para. (b) (i) (a, c) of Annex 2. In para. (b) (i) (a, c) of Annex 2 of said Decision of the Bank of Portugal of 3 August 2014, the Bank of Portugal reproduced the criteria for non-transferring of liabilities to the Novo Banco (the bridge bank) established in Article 145-H(2)(a ,c) of the 2014 Banking Law, (Exhibit C-0095)).

[155] Decision of the Bank of Portugal, 22 December 2014, (Exhibit C-0069), paras. 1-5 and point a), b) and c).

[156] BES Management Report, 18 December 2015, (Exhibit R-0019), page 8, issued in the context of the Annual Financial Statements pertaining to the fiscal year of 2014.

[157] See Respondent's Memorial on Jurisdiction, Section III. 3.3, paras 245-249 and Exhibits R-0020, paras. 1-5., R-0021, paras. 142, 176-180, 437, 438, 439, 441-448, R-0022, paras. 73-75, 128, 129, 152-156, R-0023, paras. 337 and 346 and R-0024, paras. 65, 136, 139, 269-283.

	any communications exchanged between Goldman Sachs and the Bank of Portugal relating to the same would not be outside of Claimants' possession. Also, it should be further noted that Claimants have produced in this arbitration several communications exchanged between Goldman Sachs and either the Bank of Portugal, BES, or Novo Banco ((Exhibits C-0057 to C-0060 and C-0229) which demonstrates that, to the extent that these documents exist, they are in the Claimants' possession, custody, or control. As a result, this request should also be denied pursuant to 3(3)(c) 9(2)(d) of the IBA Rules. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants state, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[158] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[159], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[160], Respondent cannot force it to hand over such documents. Moreover, all Documents created by the Bank of Portugal encompassed by this request should in any case be rejected pursuant to Article 9.2[161] of the IBA Rules as they are protected from disclosure by operation of legal secrecy rules, which cannot be waived in these proceedings (See response to Request 2 above). Indeed, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[162] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. Specifically, as mentioned, the employees and service providers of the Bank of Portugal are generally subject to a secrecy duty under article 80 (1) of the Banking Law regarding the facts which knowledge arises exclusively

[158] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[159] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[160] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[161] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[162] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

	from the exercise of such offices or the provision of such services. Although the Bank of Portugal may exchange information with entities intervening in liquidation proceedings of credit institutions, as could potentially be the case of Goldman Sachs in respect of NCWO rights during the time period designated by the Claimants, which is prior to the commencement of the insolvency proceedings, any such information would be considered confidential, with Goldman Sachs becoming subject to a secrecy duty as well. In this context, ordering the production of any documents or communications exchanged between the Bank of Portugal and Goldman Sachs, would force the Bank of Portugal and the Respondent to breach the confidentiality of documents benefiting a third party to these proceedings and in which such party has legitimately trusted to potentially exchange the same. As a result, this request should also be rejected pursuant to Article 9.2 of the IBA Rules[163].
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The Respondent claims that before the Claimants acquired their investment, they: (i) were "well aware that the 2014 Banking Law would apply to [the] BES Resolution and to Claimant[s'] NCWO rights"; and (ii) that the application of the 2014 Banking law to the BES resolution and therefore to Claimants' NCWO rights was "highly disputed by Claimants non-Mauritian affiliates prior to Claimants allegedly acquiring the interests in the Oak Loan". However, it has failed to respond to the Claimants' observation that the Respondent has failed to advance "any evidence which demonstrates that the issue of *NCWO entitlements* was even discussed with any relevant parties prior to the Claimants' acquisition of their investments" (emphasis added). The Documents to which the Respondent refers, as explained in the Claimants' response to the Respondent's objections to Request no. 9, are not relevant to the point at issue in this Request. Instead, the requested Documents are relevant to the question of the nature and subject matter of the dispute between the Parties (as framed by the Respondent itself) and when the specific dispute at issue between the Parties arose or became foreseeable. The Respondent also points to the Claimants' non-Mauritian affiliates challenges in the domestic Portuguese courts and the Respondent's interpretation of domestic law in those proceedings to allege that the issue of which domestic law governed the NCWO process was "high disputed" before the Claimants' acquired their investment. As the Claimants have explained in their Counter-Memorial on Jurisdiction, the domestic proceedings on which the Respondent relies relate not to the law applicable

[163] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

	to NCWO rights, but rather to other provisions of domestic law, including that relating to the Bank of Portugal's power to transfer the Oak Loan back to BES.[164] Further, the relevance and materiality of the Claimants' request is supported by the Respondent's own objection. The requested Documents go specifically to the Respondent's (presently unsubstantiated) contention that "there is plenty of evidence […] that [the dispute] existed or, at the very least, was highly foreseeable when Claimants purportedly acquired their credits in March/April 2016". This does not, however, concern "the question of the application of the 2014 Banking Law to Claimants alleged NCWO rights" alone. Rather, since the Claimants' claims are based on international standards and protections, and rights protected under the Portuguese constitution, it concerns the question of the timing of NCWO payments in general (see Claimants' Counter-Memorial on Jurisdiction, paras. 33, 278). The request is therefore relevant to the Respondent's *ratione temporis* and abuse of process objections because it goes to the question of whether a *specific* dispute had arisen or was foreseeable at the time the Claimants acquired their investment. Finally, the Respondent argues that "Claimants have also failed to establish that, to the extent that they exist, the requested documents are not in their possession, custody, or control". The Claimants do not have any arrangement in place to exchange communications with Goldman Sachs as regards its communications with the Bank of Portugal, nor are the Claimants aware of any case involving Goldman Sachs relating to NCWO rights. In any event, the Claimants obtained access to the communications exchanged between Goldman Sachs and either the Bank of Portugal, BES, or Novo Banco, that they have already produced in this arbitration (Exhibits C-0057 to C-0060 and C-0229) either through their own participation in a Portuguese domestic proceeding in which they were produced (Case No. 1126/23) or, following a specific request by the Bank of Portugal, as a result of the participation of the Claimants' affiliates in such a case (Cases 2666 and 772). As a result, there is no basis to deny this request pursuant to Article 3(3)(c) or 9(2)(d) of the IBA Rules. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2 of the IBA Rules.** Just as for its objections to Request nos. 2 to 9, the Respondent cites "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. It adds that "ordering the production of any documents or communications exchanged between the Bank of Portugal and Goldman Sachs, would force the Bank of Portugal and the Respondent to breach the confidentiality

[164] See Claimants' Counter Memorial on Jurisdiction, Section VII and Table 1 in Section VII.C.

	of documents benefiting a third party to these proceedings and in which such party has legitimately trusted to potentially exchange the same". As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[165] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[166] The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 10 (i.e., Documents exchanged between the Bank of Portugal and Goldman Sachs relating to NCWO rights) are directly relevant to the Claimants' rights arising from the Oak Loan. As explained in footnote 41 of the Claimants' Counter-Memorial on Jurisdiction, GSI was the "Arranger, Dealer, Calculation Agent, Disposal Agent and Process Agent" for the Oak Loan. The documents are specifically relevant to the Respondent's allegation that there was an existent, or at least foreseeable, dispute at the moment the Claimants made their investment.
Decision of the Tribunal	Denied. Requested documents are, *prima facie*, insufficiently relevant and material.

[165] See n. 35 above.

[166] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

Document Request Number	**11.**
Documents or Category of Documents Requested	All Documents relating to the Bank of Portugal's instructions to Deloitte regarding the law that Deloitte was required to apply in carrying out its assessment of the level of recovery of credits in a hypothetical BES liquidation, and any responses provided by Deloitte to the Bank of Portugal in relation to the same, in the period between 3 August 2014 and 4 July 2016.
Relevance and Materiality according to the Requesting Party	The Claimants observed in their Memorial (para. 141) that: "the Bank of Portugal gave the wrong instructions to Deloitte with respect to the legal framework that should apply to Deloitte's valuation. The Bank of Portugal specifically instructed Deloitte to perform the valuation pursuant to the 2014 Bank Resolution Law (and not the 2015 Bank Resolution Law, which was already in force and applicable to Deloitte's mandate)." The Respondent in its Memorial on Jurisdiction (para. 236) argued that: "all of Claimants' claims are based on two events that occurred prior to March 2016, namely: (1) the Bank of Portugal's Decision of 3 August 2014 in which the 2014 Banking Law was applied to the BES Resolution Measure;[] and (2) the Bank of Portugal's Decision of 22 December 2014 which ruled that the Oak Loan liabilities had never been transferred from BES to Novo Banco, on the basis of the 2014 Banking Law and of paragraph (b) (i) (a, c) of Annex 2 of the Resolution Measure of 3 August 2014. […] The direct effect and consequence of these two events was that the subsequent proceedings and acts relating to the rights resulting from the BES Resolution Measure, such as the NCWO rights, would be governed by the 2014 Banking Law. This is what Claimants are really complaining about." The Claimants have reiterated in their Counter-Memorial on Jurisdiction that their claims do not turn on which domestic Portuguese law should govern the NCWO process. The requested Documents are relevant to the Respondent's case that the dispute under the BIT is really about which version of the Respondent's Banking Law governs the Claimants' NCWO rights. The requested Documents will demonstrate what analysis informed the Bank of Portugal's instructions to Deloitte that it should apply the 2015 Banking Law to determine the level of recovery of credits in a hypothetical BES liquidation. The Respondent's reasons for such an instruction at the time are material to the outcome of the case (on the Respondent's presentation of it) as regards the nature of the dispute between the Parties. The requested Documents are therefore relevant and material to the Respondent's objection to jurisdiction *ratione temporis* and the Respondent's abuse of process objection.

	The requested Documents are in the possession, custody and control of the Respondent because they are documents produced or received by the Bank of Portugal.
Objections to Document Request	The Respondent objects to this request on the basis that the requested documents lack relevance and materiality under Articles 3.3(b) and 9.2(a) of the IBA Rules as the documents pertaining to the Bank of Portugal's instructions to Deloitte regarding the applicable law in assessing the level of recovery of credits in a hypothetical BES liquidation, and any responses provided by Deloitte, do not demonstrate, contrary to Claimants' assertion, that the "dispute under the BIT is really about which version of the Respondent's Banking Law governs the Claimants' NCWO rights" or that such dispute existed or was highly foreseeable prior to the date of the Claimants' alleged investment, which are the fundamental basis of the Respondent's objections to jurisdiction *ratione temporis* and abuse of process. First, the dispute under the BIT pertains to the application of the 2014 Banking Law to the BES Resolution Measure and therefore, to the NCWO process and the measures taken in this regard by the Bank of Portugal during that year[167]. Indeed, as the Respondent alleged, the basis of Claimants' claims for Respondent's alleged failure to make "prompt NCWO payments" is the application of the 2014 Baking Law to BES Resolution, which provides for NCWO payments only "at the end of the liquidation", instead of the 2015 Banking Law, pursuant to which NCWO payments would be made promptly after the application of the Resolution Measure to BES[168]. In this context, any instructions given by the Bank of Portugal to any entities involved in BES Resolution process, namely Deloitte, to apply that law are only a consequence of those measures. Therefore, communications between the Bank of Portugal and Deloitte regarding the legal instructions conveyed by the former to the latter to apply the 2014 Banking Law when carrying out its assessment of the level of recovery of credits in a hypothetical BES liquidation does not pertain to the substance of the dispute between the parties. Second, and even if the application of the 2014 Banking Law by Deloitte was not a mere consequence of events outside the control of the Bank of Portugal, Claimants were not privy to the instructions given by the Bank of Portugal to Deloitte. Therefore, any potential error or instruction by the Bank of Portugal regarding the applicable law, even if wrongful, does not inherently demonstrate a dispute between the parties under the BIT. In light of the above, it is clear that the requested documents do not serve to clarify the core issues in dispute between the parties. Therefore, pursuant to Articles 3.3(b) and 9.2(a) of the IBA Rules, their production should be rejected by the Tribunal. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such

[167] Decision of the Bank of Portugal, 3 August 2014, (Exhibit C-0052) and Decision of the Bank of Portugal, 22 December 2014, (Exhibit C-0069).

[168] *See* Respondent's Memorial on Jurisdiction, paras. 236 to 242.

	documents[169] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[170], as described below, and as the Bank of Portugal is functionally independent and cannot receive instructions from the Respondent[171], Respondent cannot force it to hand over such documents. Finally, this request should in any case be rejected pursuant to Article 9.2 (b) and (e) of the IBA Rules as the requested documents protected from disclosure by operation of legal secrecy and commercial secrecy rules, which cannot be waived in these proceedings. Firstly, as explained in response to Request 2 above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[172], which also encompasses any Documents exchanged between the Bank of Portugal and Deloitte.[173] Indeed, the interactions between the Bank of Portugal and Deloitte regarding the law that Deloitte was required to apply in carrying out its assessment of the level of recovery of credits in a hypothetical BES liquidation were made precisely within the context of the resolution proceedings of BES and cannot be taken out of such context. Secondly, besides such legal secrecy, commercial secrecy shall also dictate that the Documents requested by the Claimants cannot be disclosed. In order to draft its report, Deloitte had to evaluate detailed information on the assets and liabilities to be transferred from BES to Novo Banco and to analyze and factor in a multitude of documents containing highly sensitive, technical and complex data referring to the internal life of companies (notably of BES and all of its clients) which are subject to commercial and legal secrecy, remaining a legal exception to the right of access to administrative information.[174] As such, the disclosure of any of the Documents exchanged by the Bank of Portugal and Deloitte in this context, as those requested by the Claimants, would entail a breach of said secrecy.

[169] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[170] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

[171] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[172] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

[173] BRRD (Exhibit R-0082), Article 84 (1) ("The requirements of professional secrecy shall be binding in respect of the following persons: (a) resolution authorities; (…) (f) auditors, accountants, legal and professional advisers, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministers or by the potential acquirers referred to in point (e)").

[174] Law 26/2016 (Exhibit R-0080), Article 1 (4) (d) and Article 6 (6).

	It must be further underscored that the disclosure of any information of the Deloitte report which has not already been public could potentially hinder the stability of the Resolution Measure applied to BES proceeding and ultimately the public interest underlying the same which the Respondent has unceasingly sought to preserve: the stability of the financial system.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. The request is relevant and material to the outcome of the dispute because the reasons for the Respondent's instruction to Deloitte to apply the 2015 Banking law are material to the Respondent's argument about the nature of the dispute between the Parties. The Respondent claims that "communications between the Bank of Portugal and Deloitte regarding the legal instructions conveyed by the former to the latter to apply the 2014 Banking Law […] does not *[sic]* pertain to the substance of the dispute between the parties" because the instructions "are only a consequence of [the] measures". However, Documents relating to the Bank of Portugal's instructions to Deloitte will demonstrate what analysis informed the Bank of Portugal's instructions to Deloitte that it should apply the 2015 Banking Law to determine the level of recovery of credits in a hypothetical BES liquidation. The Respondent's reasons for such an instruction at the time are material to the outcome of the case (on the Respondent's presentation of it) as regards the nature of the dispute between the Parties. Contrary to the Respondent's objections, the question of whether the Claimants were aware of the instructions is not relevant to this issue. Accordingly, the request is relevant and material to the Respondent's objection to jurisdiction *ratione temporis* and the Respondent's abuse of process objection. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by Portuguese State organs, including (but not limited to) the Bank of Portugal, must be considered to be in the possession, custody or control of the Respondent. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2(b) or (e) of the IBA Rules.** Just as for its objection to Request no. 3, the Respondent cites the "operation of legal secrecy and commercial secrecy rules" of Portuguese domestic law in an attempt to shield all

	responsive Documents to this request.[175] Just as for its objections to Request nos. 2 to 10, the Respondent cites, in particular, "general legal secrecy" applicable to "information obtained within the performance of [the] powers" of the Bank of Portugal under Portuguese domestic law in an attempt to shield all responsive Documents to this request. The Respondent also cites "commercial secrecy". As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[176] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[177] The Respondent's objections are in any case not supported by Portuguese law. **(i) Portuguese banking or commercial secrecy laws cannot provide a blanket shield against production of the requested Documents.** The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The specific documents sought in this Request no. 11 (i.e., Documents relating to the Bank of Portugal's instructions to Deloitte regarding the law that Deloitte was required to apply in carrying out its assessment of the level of recovery of credits in a hypothetical BES liquidation, and any responses provided by Deloitte to the Bank of Portugal in relation to the same) are directly relevant to the Claimants' NCWO rights arising from the Oak Loan, including the NCWO rights. These rights are directly influenced by the law applicable to the analysis carried out by Deloitte. Therefore, the Claimants are interested parties before the Bank of Portugal for the purposes of Article 80 (2) of the Banking Law, which provides grounds for the relevant applicable secrecy to be lifted. In addition, Respondent's argument that the Documents exchanged between the Bank of Portugal and Deloitte are subject to professional secrecy under the BRRD must fail, as it is without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.[178] In any event, the Bank of Portugal has in the past, after raising objections that included the same secrecy concerns cited here, made public documents relating to broader requests for production presented in Portuguese courts regarding the Deloitte Report. See Claimants' response to the Respondent's objections to Request no. 3

[175] The Respondent sought to rely on such rules in an attempt to shield some of the Documents responsive to Request nos. 2, 5 and 9.

[176] See n. 35 above.

[177] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

[178] BRRD, Article 84 (6): "This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases", available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0059.

	above (on the Bank of Portugal's disclosure regarding the Deloitte report after raising objections in court). If a broader request for documents resulted in the publication of that information, and thus is no longer protected by any kind of secrecy, then the Claimants' much narrower request should be granted and the requested Documents produced. **(ii) "Commercial secrecy" under Portuguese law does not support the Respondent's objection.** The Claimants do not request the production, as Respondent appears to allege, of "detailed information on the assets and liabilities to be transferred from BES to Novo Banco" and analysis of "a multitude of documents containing highly sensitive, technical and complex data referring to the internal life of companies (notably of BES and all of its clients)". Accordingly, the "commercial secrecy" on which the Respondent relies simply does not arise. In addition, any information exchanged between the Bank of Portugal and the Liquidation Committee and/or Resolution Fund can also be disclosed in this arbitration based on the legal framework on professional secrecy and banking secrecy described (Articles 80 (2) and 79 (1) and (2) of the Banking Law), but also pursuant to Article 81 (6) (d) of the Banking Law, caveating the Bank of Portugal's secrecy duty. **(iii) The Claimants' Request no. 11 entails no threat to "the stability of the Resolution Measure applied to BES".** The Respondent's allegation that the "disclosure of any information of the Deloitte report which has not already been public could potentially hinder the stability of the Resolution Measure applied to BES proceeding and ultimately […] the stability of the financial system" is simply absurd. Ten years after the application of the Resolution Measure, disclosure of Documents relating to the Bank of Portugal's instructions to Deloitte regarding the law that Deloitte was required to apply in carrying out its assessment cannot possibly hinder (or even touch) the stability of the Resolution measure, still less the Portuguese financial system.
Decision of the Tribunal	Denied. Requested documents are, *prima facie*, insufficiently relevant and material.

Document Request Number	**12.**
Documents or Category of Documents Requested	All Documents produced or received by the Liquidation Committee or Bank of Portugal relating to the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements, other than written and other submissions and supporting documentation filed with the Court in Case 2248/20.2BELSB or Case 2666/15.8BELSB.
Relevance and Materiality according to the Requesting Party	The Respondent argues that the Tribunal lacks jurisdiction "because Claimants do not own the assets they claim to be protected by the BIT" and that "Claimants purportedly acquired their interests in the Oak Loan through assignment agreements that violated Portuguese law and regulations in a serious and non-trivial manner." (Memorial on Jurisdiction, paras. 207, 180). Further, the Respondent argues that the "Bank of Portugal has consistently maintained that the 2015 and 2016 Assignment Agreements violated Portuguese law, and specifically the measures enacted by the Bank of Portugal to safeguard the stability of the financial markets", but in making that claim referred exclusively to submissions of the Bank of Portugal in domestic court proceedings dating from September 2022 onwards (see Memorial on Jurisdiction, para. 201, and Counter-Memorial on Jurisdiction, para. 214). The Claimants established in the Counter-Memorial on Jurisdiction that they validly acquired their interests in the Oak Loan and did so without any violation of Portuguese laws and regulations, let alone any serious violation (Counter-Memorial on Jurisdiction, Section IV.E). The Claimants also highlighted that the Bank of Portugal had been aware of the 2015 Assignment Agreements since at least 1 December 2015, when the agreements were produced as evidence in domestic proceedings (Counter-Memorial on Jurisdiction, para. 213), but remained silent on their supposed illegality for many years (*id.*, para. 215). The requested Documents are relevant to the Respondent's largely unsubstantiated allegation that the assignments are invalid. The Documents are material to the Respondent's objection to jurisdiction *ratione materiae*. The Documents are also relevant to the question of whether the Respondent is estopped or otherwise precluded by the principle of good faith from advancing its jurisdictional objections that the Claimants acquired their respective interests in violation of Portuguese law and regulations, and that the Claimants do not own the assets. Other than those decisions of the Liquidation Committee and Orders of the Judicial Court of Lisbon cited in footnotes 379-381 of the Counter-Memorial on Jurisdiction, the Claimants are not in possession, custody or control of the requested Documents. The requested Documents are in the possession, custody and control of the Respondent as they were produced or received by the Liquidation Committee or Bank of Portugal.

Objections to Document Request	Respondent objects to this request. First, the request is irrelevant and immaterial to the outcome of the case, as Claimants have not shown how any additional documents produced or received by the Bank of Portugal and from the Liquidation Committee relating to the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements, other than written and other submissions and supporting documentation filed with the Court in Case 2248/20.2BELSB or Case 2666/15.8BELSB would affect the Tribunal's determination of the legality of the assignments. Second, the request is irrelevant and immaterial to the outcome of the case, as it does not relate to any of the Respondent's jurisdictional objections or the Claimants' claims on the merits. The Respondent's objection to jurisdiction *ratione materiae* is based on the argument that Claimants acquired their interests in the Oak Loan in violation of Portuguese law and regulations, and specifically the measures enacted by the Bank of Portugal to safeguard the stability of the financial markets. In this context, Respondent has provided ample evidence to support this assertion, namely its considerations within the context of the pending proceedings in the Portuguese judicial system, under which it has repeatedly stated that the Assignment Agreements were invalid[179]. Claimants have not disputed the authenticity or accuracy of these documents. As a result, the requested Documents lack relevance and materiality for the outcome of the case and therefore their production should be denied pursuant to Articles 3.3(b) and 9.2(a) of the IBA Rules. In addition, this request should also be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the requested documents, as Claimants acknowledge, are in the possession, custody or control of the Bank of Portugal and/ or the Liquidation Committee. Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents[180] (See response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal to provide the requested documents. The Bank of Portugal could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[181], as described below, and as the Bank of Portugal is functionally

[179] Respondent's Memorial on Jurisdiction, paras. 197-206; Lisbon Administrative Circle Court (Bank of Portugal's Application), Case No. 919/15.4BELSB, 7 December 2022, (Exhibit R-0064), paras. 117-131, 135, 139, 140; Lisbon Administrative Circle Court (Bank of Portugal's Application), Case No. 2666/15.8BELSB, 13 September 2022, (Exhibit R-0065), paras. 122-132, 136, 139, 140, 141; Lisbon Administrative Circle Court, Case No. 772/16.0BELSB (Bank of Portugal's Application), 7 December 2022, (Exhibit R-0066), paras. 117-130, 135, 138, 139, 140; Lisbon Administrative Circle Court, Case No. 1126/23.8BELSB (Bank of Portugal Defense), 29 June 2023, (Exhibit R-0067), paras. 268–288, 292- 294.

[180] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[181] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1).

	independent and cannot receive instructions from the Respondent[182], Respondent cannot force it to hand over such documents. Respondent also does not control the Liquidation Committee and has no means to oblige it to disclose the requested Documents. The Liquidation Committee is an organ appointed by judicial courts in the context of the liquidation Proceedings of a credit institution, in this case BES's, which replaces the management body of such institution. In this context, the Liquidation committee is also legally and functionally independent from the Respondent. Furthermore, this request should in any case be rejected pursuant to Article 9.2 (b) and (e) of the IBA Rules as all documents relating to the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements, other than those filed with the Court in Case 2248/20.2BELSB or Case 2666/15.8BELSB or in other judicial proceedings involving Claimants, Claimants' non-Mauritian affiliates or Goldman Sachs International[183] are protected from disclosure by operation of legal secrecy and commercial secrecy rules, as well as client-attorney privilege, which cannot be waived in these proceedings.[184] (See response to Request 2 above). Firstly, as explained above, the Bank of Portugal is subject to a general legal secrecy regarding information obtained within the performance of their powers, duties and functions[185] that is of the utmost importance for the regular performance of such powers, duties and functions, which ultimately aim at ensuring, *inter alia*, the stability of the Portuguese financial system. The prohibition on disclosing documents as a result of banking, professional and commercial secrecy also applies to any Documents produced or received by the Liquidation Committee. The Liquidation Committee is prohibited from disclosing documentation pursuant to a secrecy duty that arises as a result of any information exchange with the Bank of Portugal which is deemed subject to secrecy.[186] Indeed, all authorities, organs and persons with which the Bank of Portugal may exchange information are subject to a secrecy duty. Likewise, this request also encompasses that are legal or technical documents, including memos, drafts, and other preparatory materials or correspondence exchanged between the Liquidation Committee and/or the Bank of Portugal and their legal counsels' lawyers in connection with and for the purpose of providing or obtaining technical and legal advice in anticipation and preparation of the ongoing litigation where this matter is at stake. These documents are crucial for the protection of Portugal or the Bank of Portugal's legal strategy

[182] Law 5/98, (Exhibit R-0072), Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7.

[183] Cases 919/15.4BELSB (Exhibit R-0064) and 772/16.0BELSB (Exhibits R-0023 and R-0027).

[184] Pursuant to Article 9.2 of the IBA Rules, the Arbitral Tribunal shall exclude from evidence or production any Document based on, inter alia, (i) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (para. (b)); (ii) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling (para. (e)); and (iii) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Arbitral Tribunal determines to be compelling (para. (f)).

[185] In particular, Banking Law (Exhibit R-0078), Article 80 (1).

[186] Based on a joint reading of Banking Law (Exhibit R-0078), Article 81 (1) (f) (which provides that the Bank of Portugal may exchange information with entities intervening in liquidation proceedings of credit institutions) and Article 81 (5) (which provides that all authorities, organisms and persons participating in information exchange foreseen in the previous numbers shall be subject to a secrecy duty).

	under the ongoing judicial proceedings initiated by Claimants and their non-Mauritian affiliates where this matter is at stake. Overall, the protection of these documents is essential to uphold the principles of privilege and to safeguard the Respondent and the Bank of Portugal legal strategy in the ongoing proceedings. Therefore, pursuant to Articles 9.2.(b), (e) and (f) and 9.4 of the IBA Rules, their production should be denied by the Tribunal. Finally, the request is overly broad and burdensome, as it covers an indefinite and potentially large number of documents, without specifying the time frame, the subject matter, or the custodians of the documents sought. The request encompasses any document that relates in any way to the considerations on the validity of the assignments, regardless of whether it is material, probative, or confidential. The Respondent submits that the Claimants have not demonstrated any compelling need or justification for such a broad and intrusive request, and that granting it would violate the principle of proportionality and the Respondent's right to due process, pursuant to Article 9(2)(g) of the IBA Rules on the Taking of Evidence in International Arbitration.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are relevant and material to the resolution of the dispute.** The Respondent's objection that the requested documents are neither relevant nor material to the outcome of the case, as required by paragraph 15.2 of PO1 and Articles 3.3(b) and 9.2(a) of the IBA Rules, is without basis. Documents falling within the scope of this request go to the Respondent's claim that it has "consistently maintained" (despite referring only to positions it has taken in domestic court proceedings after the Claimants sent their notice of dispute to the Respondent in February 2022) that the 2015 and 2016 Assignment Agreements violated Portuguese Law (see Memorial on Jurisdiction, para. 201, and Counter-Memorial on Jurisdiction, para. 214), and therefore to the question of whether the Respondent is estopped or otherwise precluded from making these claims. This is directly relevant to aspects of the Respondent's *ratione materiae* objection, and as such relevant and material to the outcome of the case. **(2) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal and Respondent has absolutely no control over the Bank of Portugal and has no means to oblige it to grant such documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal, as a Portuguese State organ, must be considered to be in the possession, custody or control of the Respondent. In relation to the Liquidation Committee, the Respondent's assertion that it has "no means to oblige it to disclose the requested Documents" is wrong. The Bank of Portugal has intervention powers, as a supervisory body, to request information and documents from the Liquidation Committee, including the documents encompassed

	by this Request.[187] The Respondent has portrayed the Liquidation Committee as an organ appointed by judicial courts and with autonomy to conduct the management of BES at its own will. However, the Bank of Portugal is the entity responsible for selecting the members of the Liquidation Committee, which selections are later confirmed and formally made by a court. It is also the supervisory entity with competence to monitor the activities of the Liquidation Committee of BES, including with the capacity to request the removal of its members.[188] **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Article 9.2(b), (e) or (f) of the IBA Rules.** The Respondent cites the "operation of legal secrecy and commercial secrecy rules" of Portuguese domestic law in an attempt to shield all responsive Documents to this request. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[189] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[190] The Respondent's objections are in any case not supported by Portuguese law. **(i) Portuguese secrecy laws do not support the Respondent's objections.** The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. As holders of the rights arising out of the Oak Loan, by virtue of the Assignment Agreements mentioned in this Request no. 12 (seeking "Documents produced or received by the Liquidation Committee or Bank of Portugal relating to the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements […]"), the Claimants are interested parties before the Bank of Portugal for the purposes of Articles 80 (2) of the Banking Law, which allows the relevant applicable secrecy be lifted.

[187] Article 14 (1) and (2) of Decree-Law 199/2006, of 25 October: (1) "The Bank of Portugal has the right to monitor the activity of the judicial liquidator or the liquidation committee and may also request the judge to do whatever it deems appropriate. 2 - For the purposes of the preceding paragraph, the Bank of Portugal may examine the credit institution's accounts and request the judicial liquidator or liquidation commission to provide the information and submit the elements it deems necessary.", available at https://diariodarepublica.pt/dr/detalhe/decreto-lei/199-2006-545785.

[188] Article 10 (1) of Decree-Law 199/2006, of 25 October: "*The judge, on a proposal from the Bank of Portugal, appoints a court-appointed liquidator or a liquidation commission made up of three members, depending on the complexity and difficulty of the liquidation, who are responsible for carrying out the duties assigned to the insolvency administrator by the Insolvency and Company Recovery Code*." In addition, the Bank of Portugal also has the powers to request the removal or substitution of the members of the Liquidation Committee and to propose to the court their remuneration. Articles 10 (2) and (3), Decree-Law 199/2006, https://diariodarepublica.pt/dr/detalhe/decreto-lei/199-2006-545785.

[189] See n. 35 above.

[190] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

	In addition, any information exchanged between the Bank of Portugal and the Liquidation Committee can also be disclosed in this arbitration based on the legal framework on professional secrecy described (Article 80 (2) of the Banking Law), but also pursuant to Article 81 (6) (d) of the Banking Law, caveating the Bank of Portugal's secrecy duty. **(ii) Portuguese legal privilege law does not support a blanket refusal to disclose.** Finally, as to Respondent's allegation that documents responsive to this request might be protected by client-attorney privilege, it is important to note that the Portuguese Bar Association Statutes do not provide a general prohibition on the disclosure of documents (as further described in the Claimants' response to the Respondent's objections to Request no. 4). The Claimants have set out their position as regards Documents properly subject to legal privilege in paragraph 5 of the introduction to Claimants' Responses, set out at p. 4 above. **(4) The request should not be denied pursuant to Article 9.2(g) IBA Rules.** The Respondent's claim that "the request is overly broad and burdensome, as it covers an indefinite and potentially large number of documents, without specifying the time frame, the subject matter, or the custodians of the documents sought" is without basis. First, it is notable that the Respondent does not argue that the Request does not fulfil Article 3.3(a)(ii) IBA Rules (i.e., for a "narrow and specific requested category of Documents"). The Claimants' request is limited to documents concerning a very narrow subject-matter ("the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements"). The Claimants have identified the relevant author/recipients ("the Liquidation Committee or Bank of Portugal"). Accordingly, and in the absence of a specific objection from the Respondent, it is clear that the Request fulfils Article 3.3(a)(ii) IBA Rules. It does not, for the purposes of Article 9.2(c) IBA Rules, impose an "unreasonable burden" on the Respondent to produce responsive documents. Second, the Respondent argues "that granting [the request] would violate the principle of proportionality and the Respondent's right to due process, pursuant to Article 9.2(g) of the IBA Rules". Given the self-evident relevance and materiality, and the narrowness and specificity, of this Request, there is no basis to deny the Request pursuant to Article 9.2(g). Nevertheless, and without prejudice to the Claimants' position that its Request no. 12 as originally stated complies with Article 3.3(a)(ii) IBA Rules and does not fall foul of Article 9.2(c) or (g) IBA Rules, in the event that the Tribunal takes a different view, it proposes that the Request be ordered in the following amended form (with additions underlined): "All Documents produced or received by the Liquidation Committee or Bank of Portugal relating to the validity of the 2015 Assignment Agreements and the 2016 Assignment Agreements, <u>in the period between the conclusion of the 2015 Assignment Agreements and September 2022,</u> other than written and other submissions and supporting documentation filed with the Court in Case 2248/20.2BELSB or Case 2666/15.8BELSB."

Decision of the Tribunal	Granted, subject to the provisos in PO4 on (i) privilege and (ii) confidentiality.

Document Request Number	**13.**
Documents or Category of Documents Requested	(i) The contract for the sale of Novo Banco to Lone Star in 2017, and (ii) all Documents setting out any indemnity provided by Portugal (including the Bank of Portugal and the Resolution Fund) to Lone Star in the context of Lone Star's purchase of Novo Banco from Portugal, specifically relating to disputes concerning the Oak Loan (if not contained within (i)), as well as (iii) any Documents produced by the Respondent (including, in particular, the Bank of Portugal and the Resolution Fund) evidencing the rationale or negotiations behind any such indemnity given.
Relevance and Materiality according to the Requesting Party	In Section 2.1 of the Memorial on Jurisdiction, the Respondent attempts to paint the picture that the Oak Loan had no connection to Portugal. It argues, as one element of its *ratione materiae* objection, that the "Claimants cannot establish that their purported acquisition of interests in the Oak Loan amounted to a contribution in Portugal's territory" (Memorial on Jurisdiction, Section 3.2.1(a) heading, see also sub-heading (ii)) and that "Claimants cannot show their acquisition of interests in the Oak Loan was in the territory of Portugal" (*id.*, Section 3.2.1(a)(ii)b heading). In particular, the Respondent argues that "Claimants have not established that their purported acquisition of alleged interests in the Oak Loan made a 'contribution' in Portuguese territory" (*id.*, para. 141). In the Counter-Memorial on Jurisdiction, the Claimants establish that: > "[i]t is clear that the Oak Loan made a significant contribution to economic activity (i.e., to the financial services activities of BES), and the wider banking sector in Portugal. The Oak Loan was of a substantial value (USD 834,642,768) […]. Further, as a result of being assigned the receivables due from PDVSA under the letters of credit linked to the Oak Loan, the 'good' bank Novo Banco experienced a significant bump in its equity, at a time when the Respondent was looking for potential buyers for the bank." (Counter-Memorial on Jurisdiction, para. 176). The requested Documents are relevant and material to the issue of how the Oak Loan contributed to Portugal, including by improving the equity of Novo Banco (to Portugal's direct benefit), making it more attractive to potential buyers. The requested contract may also provide for certain indemnities and guarantees about the financial position of Novo Banco at the time of sale or protecting Novo Banco against future disputes relating to the Oak Loan. These documents are relevant and material because they belie the Respondent's allegations that the Claimants' interests in the Oak Loan are not protected "investments" under the Mauritius-Portugal BIT and the ICSID Convention (e.g., at Memorial on Jurisdiction, paras. 127, 136, 141, 157 and 167). The requested Documents are in the possession, custody and control of the Respondent (in particular, that of the Resolution Fund and the Bank of Portugal).

Objections to Document Request	Respondent objects to this Request. Firstly, this request should be denied pursuant to Article 3.3 (c) of the IBA Rules as the requested documents are not in the possession, custody or control of the Respondent. Rather, the Documents are in the possession, custody or control of the Bank of Portugal, the Resolution Fund and/or Lone Star and the Respondent does not control the Bank of Portugal nor the Resolution Fund and no means to oblige any of those entities[191/192] to grant such Documents (See Response to Request 2 above). If this request were to be admitted by the Tribunal, to comply with the Tribunal's order, Respondent would have to request the Bank of Portugal and/or the Resolution Fund to provide the requested documents. The Bank of Portugal and/or the Resolution Fund could, in turn, chose to legitimately refuse such a request, including due to its obligations of professional secrecy and the corresponding prohibition on disclosing documents protected by such professional secrecy[193],as described below, and as the Bank of Portugal and the Resolution Fund are functionally independent and cannot receive instructions from the Respondent, Respondent cannot force any of them to hand over such documents. Furthermore, the Respondent has absolutely no control over Lone Star, a private third party with no connection to these proceedings, and therefore no means to oblige it to grant any of the Documents requested. Secondly, this request should be denied pursuant to Article 3.3 (b) of the IBA Rules, as the requested Documents are not relevant to the outcome of the case. Rather, the Claimants' request is an attenuated attempt to refashion their argument on contribution, by giving the (wrong) impression that the exclusion of the Oak Loan from Novo Banco's liabilities, together with an indemnity (if any) to Loan Star, would benefit the Respondent as it would allow for an increase of the purchase price. Thirdly, this request should be rejected pursuant to Articles 9.2.(b), (e) and (f) and 9.4 of the IBA Rules, as the requested Documents are protected from disclosure by operation of legal and commercial secrecy rules. Indeed, the contract for the sale of Novo Banco to Lone Star in 2017 is subject to significant and complex confidentiality contractual undertakings, as has been publicly stated on multiple occasions[194]. These confidentiality undertakings are deeply intertwined with multiple legal secrecy duties, ranging from commercial secrecy and banking secrecy to data protection limitations (See response to Request 2 above), which are easily understandable in light of the asset being sold: the bridge

[191] Law 5/98, (Exhibit R-0072), Article 1 and Article 27 (7). See also TFEU (Exhibit R-0073), Article 130 and Protocol 4 annex to the TFEU (which has the same legal force as the Treaty), (Exhibit R-0074), Article 7. The aforementioned European rules apply by virtue of the principle of primacy, as per the Declaration no. 17 annex to the Lisbon Treaty (Exhibit R-0075) and of the Constitution of the Portuguese Republic (Exhibit R-0076), Article 8 (2, 4).

[192] Banking Law (Exhibit R-0078), Articles 153-B (1), 153-C and 153-P.

[193] Law 5/98 (Exhibit R-0072), Article 60. See also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (Exhibit R-0077), Article 37.1 and Banking Law (Exhibit R-0078), Article 80 (1), 81 (1) (n) and 81 (5).

[194] See, for instance, news piece dated 11 June 2021, available at https://eco.sapo.pt/2021/06/11/lone-star-recusa-divulgacao-publica-dos-contratos-do-novo-banco/

	bank[195], incorporated after the Resolution Measure applied to BES, to which, in the context of the resolution proceedings, were transferred numerous assets and liabilities, which pertain not only to BES and to Novo Banco (third parties to this proceeding), but also to their clients. Notably, the confidentiality of this contract is so critical that only redacted copies of the contract were shared to special commissions within the Portuguese parliament under the condition that it would remain and be treated as strictly confidential[196]. Moreover, it should be noted that the highly sensitive and confidential nature of the elements at stake precludes not only the disclosure of the provisions of the contract itself but also of any documents (if any) related with the same, including those pertaining to any eventual indemnity provided by Portugal. Indeed, particularly in respect of the Documents requested by the Claimants relating to the indemnity will pertain to arrangements between, or assessments (including risk assessment) by, the parties involved and be revealing, in one way or another, of confidential elements on the asset being sold. In light of the above, the disclosure of any of the Documents requested by the Claimants would entail an unprecedented damage to the Respondent, the Bank of Portugal and the Resolution Fund, including reputational damages, given the extensive list of breaches that would be caused thereby. As a result, pursuant to Articles 9.2.(b), (e) and (f) and 9.4 of the IBA Rules, the production of the document requested should be denied by the Tribunal.
Reply to Objections to Document Request	The Claimants request the Tribunal to order the Respondent to produce the Documents set out in this request. **(1) The requested Documents are clearly within the possession, custody or control of the Respondent.** The Respondent has sought to argue that the requested documents are not within its "possession, custody or control", but rather that they are in the "possession, custody or control of the Bank of Portugal, the Resolution Fund and/or Lone Star and the Respondent does not control the Bank of Portugal nor the Resolution Fund and no means to oblige any of those entities[] to grant such Documents". The Respondent's response is clearly wrong as a matter of international law, for the reasons set out in the Claimants' response to the Respondent's objections to Request no. 2. Accordingly, the requested Documents, to the extent that they are held by the Bank of Portugal and/or the Resolution Fund, as Portuguese State organs, must be considered to be in the possession, custody or control of the Respondent. **(2) The requested Documents are relevant and material to the resolution of the dispute.** The requested Documents are relevant and material to the Respondent's claims that the Claimants' investment did not provide a contribution in Portuguese territory. The requested documents are relevant to the issue of the contribution the Oak Loan provided to Portugal including by improving the equity of Novo Banco and making it more attractive to potential buyers.

[195] The legal nature of a credit institution should already entail, by itself, a considerable degree of cautiousness in light of the highly sensitive and confidential information involved.

[196] See, for instance, news piece dated 2 July 2020, available at https://rr.sapo.pt/noticia/economia/2020/07/02/novo-banco-deputados-ja-receberam-documentos-em-falta-do-contrato-de-venda-a-lone-star/198874/

	The Respondent argues that: > "Rather, the Claimants' request is an attenuated attempt to refashion their argument on contribution, by giving the (wrong) impression that the exclusion of the Oak Loan from Novo Banco's liabilities, together with an indemnity (if any) to Loan Star, would benefit the Respondent as it would allow for an increase of the purchase price." However, this statement is factually incorrect, as the Claimants explained above and as they established in their Counter-Memorial on Jurisdiction: > "[A]s a result of being assigned the receivables due from PDVSA under the letters of credit linked to the Oak Loan, […] Novo Banco experienced a significant bump in its equity, at a time when the Respondent was looking for potential buyers for the bank." (Counter-Memorial on Jurisdiction, para. 176). Accordingly, the requested Documents are relevant and material to the outcome of the case in respect of the Respondent's *ratione materiae* objection. **(3) There is no other basis for the Tribunal to exclude from production the requested Documents under Articles 9.2 or 9.4 of the IBA Rules.** The Respondent cites the "operation of legal and commercial secrecy rules" of Portuguese domestic law in an attempt to shield all responsive Documents to this request. As explained in the Claimants' response to the Respondent's objections to Request no. 2, as a general matter, the Tribunal is not constrained in its decision to order production by domestic Portuguese law. Investment arbitration tribunals have confirmed this on multiple occasions.[197] Even if there were grounds on which to withhold production of the requested Documents in the ordinary course (*quod non*), that is not a basis to reject the Claimant's request.[198] The Respondent's objections are in any case not supported by Portuguese law. **(i) Portuguese secrecy laws do not support the Respondent's objections.** The Respondent's objections are in any case not supported by Portuguese law, for the reasons explained in sections (3)(i)-(ii) of the Claimants' response to the Respondent's objections to Request no. 4. Moreover, Portuguese law positively *supports* disclosure of the requested Documents, for the reasons set out in section 3(iii) of the Claimants' response to the Respondent's objections to Request no. 4. The Claimants are the holders of the rights arising from the Oak Loan, and thus directly impacted by any disputes and/or indemnity provided by Portugal to Lone Star under the contract for the sale of Novo Banco in 2017. Therefore, Claimants are interested parties before Bank of Portugal / Resolution Fund for the purposes of Articles 80 (2), which provides grounds for the relevant applicable secrecy to be lifted. In addition, any information exchanged between the Bank of Portugal and the Resolution Fund can also be disclosed in this arbitration based on the legal

[197] See n. 35 above.

[198] See paragraph 4 of the introduction to Claimants' Responses, set out at p. 3 above.

	framework on professional secrecy and banking secrecy described (Articles 80 (2) and 79 (1) and (2) of the Banking Law), but also pursuant to Article 81 (6) (d) of the Banking Law, caveating the Bank of Portugal's secrecy duty. **(2) The Respondent's concerns regarding secrecy and "[c]onfidentiality […] undertakings" applicable to the contract for the sale of Novo Banco are overstated.** The Respondent also objects to the production of the contract for the sale of Novo Banco and related documents based on allegedly "complex confidentiality contractual undertakings", which are said to be intertwined with legal secrecy duties. The Respondent does not, however, identify any specific legal secrecy duties or the provision from which they arise. Further, the Portuguese Courts have already decided a dispute concerning the disclosure of the contract for the sale of Novo Banco. In Case n. 1352/17.9BELSB, the Plaintiffs requested the Bank of Portugal to disclose the entire administrative procedure leading to the sale of Novo Banco, following the Procedures for the Sale on the Market and the Strategic Sale of Novo Banco, and the procedure leading to the determination of the need to strengthen Novo Banco's funds by EUR 500 million, a precondition for the sale to Lone Star. There, as here, the Bank of Portugal argued that the documents were covered by commercial secrecy, and contained contents relating to the internal life of the companies that participated in the tender for the sale of Novo Banco, which is "information expressly exempted by Article 83(1) of the CPA from the right of access to information". Specifically, the Bank of Portugal argued that "the disclosure of information regarding the internal life and commercial secrets of the latter [of the entities "owners" of the information purged - as is the case of Lone Star] may, in fact, generate damages and competition problems - therefore, this information has, or may have, commercial value". The lower court ruled that the Bank of Portugal must give access to the documents, restricting only those containing secrets under Article 6 of LADA. The Court concluded the Bank of Portugal should balance all fundamental rights and the principle of open administration, while giving the Plaintiff access to relevant information while redacting other elements under Article 6(8) of LADA.[199] In these circumstances, the Respondent's claim that "the disclosure of any of the Documents requested by the Claimants would entail an unprecedented damage to the Respondent, the Bank of Portugal and the Resolution Fund, including reputational

[199] Case n. 1352/17.9BELSB, Judgment of the Administrative Court of Lisbon of 7 December 2017. The Bank of Portugal appealed, arguing the Court misapplied Articles 6(6) and 6(8) of LADA and that it had conducted the required balancing act. It argued the Plaintiff had access to all relevant information and reiterated the presence of commercial and internal life secrets. The Bank also stated that redacting confidential information would render the documents unintelligible, thus making redaction impossible under Article 6(8). The Court maintained that the Bank of Portugal could not justify the impossibility of redaction and stated that redacting confidential information does not render documents unintelligible, otherwise Article 6(8) of LADA would be useless. Available at https://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/2081c82152f909d7802582b20048a55e.

	damages, given the extensive list of breaches that would be caused thereby" is nothing more than hyperbole, and must be dismissed as such. Accordingly, there is no basis for the Tribunal to exclude from production the requested Documents under Articles 9.2 or 9.4 of the IBA Rules.
Decision of the Tribunal	Granted, subject to the provisos in PO4 on (i) privilege and (ii) confidentiality.

(ICSID ARBITRATION CASE NO. ARB/22/28)

SUFFOLK (MAURITIUS) LIMITED, MANSFIELD (MAUTITIUS) LIMITED, SILVER POINT MAURITIUS

v.

PORTUGUESE REPUBLIC

RESPONDENT'S REQUEST FOR PRODUCTION OF DOCUMENTS DATED 25 JUNE 2024; CLAIMANTS' OBJECTIONS TO PRODUCE DATED 9 JULY 2024; RESPONDENT'S REPLIES TO CLAIMANTS' OBJECTIONS DATED 23 JULY 2024

CUATRECASAS

I. INTRODUCTION

1. The Portuguese Republic ("**Respondent**" or "**Portugal**") hereby submits its request for the production of documents ("**Request for Documents**") in accordance with the procedural timetable set out in Annex B to Procedural Order No. 1 dated 13 July 2023 ("**PO1**").

2. In **Section II** below, Respondent provides definitions and interpretations to inform and clarify its requests for documents ("**Requests**"). **Section III** sets forth additional terms applicable to Respondent's Requests.

3. Respondent's Requests are set out in the Redfern Schedule attached hereto and forming a part hereof.

4. Pursuant to paragraph 15.2 of PO1 and its Annex C, in identifying its Requests in the Redfern Schedule, Respondent provides a description of each document or category of documents sought and a statement as to why each Request is relevant to the case and material to its outcome.

5. As will be apparent from the descriptions set out herein, the requested documents are by their nature of the sort that should necessarily be in the possession, power, custody, or control of Claimants and Claimants' non-Mauritian parents and affiliates and are not available in the public domain. The Requests are being made in furtherance of the search for the truth in this matter and are in no way intended to create an unreasonable burden for the responding party. Failing Claimants' voluntary production, the Respondent requests the Tribunal to order Claimants to produce the requested documents as identified in the Redfern Schedule below.

6. Respondent's justifications for the documents requested in this Request for Documents are subject to its other arguments and defenses. All references to Claimants' arguments of fact or law are without any admission as to the correctness of, and without prejudice to, Respondent's position on the same.

7. Nothing in the Requests is intended to waive privilege in respect of any matter referred to and privilege is not being waived.

II. DEFINITIONS AND INTERPRETATIONS

8. Defined terms in this Request for Documents and the Redfern Schedule shall have the meaning given to them in Respondent's Memorial on Jurisdiction of 16 April 2024. Additionally, the following definitions shall apply to Respondent's Request for Documents:

   a) "and" and "or" shall be construed conjunctively and disjunctively as necessary so as to acquire the broadest possible meaning;

   b) "any" and "all" mean "all" so as to acquire the broadest possible meaning;

   c) The use of the present tense shall be construed to include the past tense, and vice versa, so as to make the request inclusive rather than exclusive;

   d) The singular includes the plural and the masculine gender includes the feminine and the neuter, wherever appropriate, and vice versa, in order to bring within the scope of each Request any information that might otherwise be considered beyond its scope;

   e) "Pleadings" means all submissions, including witness statements, expert reports, exhibits and legal authorities filed with the Arbitral Tribunal by the Claimants or the Respondent within these arbitral proceedings, pursuant to paragraphs 13, 14, 16 and 17 of PO1 and its Annex B.

f) “Claimants’ Memorial on the Merits” means the Memorial on the Merits filled by the Claimants on 17 October 2022;

g) “Respondent’s Request for Bifurcation” means the Request for Bifurcation filled by the Respondent on 5 December 2023;

h) ″Claimants’ Response to the Request for Bifurcation” means the Response to the Respondent's Request for Bifurcation filled by the Claimants on 23 January 2024;

i) “Respondent’s Memorial on Jurisdiction” means the Memorial on Jurisdiction filled by the Respondent on 16 April 2024;

j) “Claimants’ Counter-Memorial on Jurisdiction” means the Counter-Memorial on Jurisdiction filled by the Claimants on 11 June 2024;

k) “Communication(s)” and “communication(s)” means letters, memoranda, facsimiles, e-mails and any similar documents and including any attachments thereto;

l) “Document(s)” and “document(s)” means any writing, communication (including letters, memoranda, e-mails, and facsimiles), report, notes, meeting minutes, drafts and mark-ups, presentations, memoranda, notes of conversations (including telephone or videoconference), personal notes (including diaries and calendars), reports, studies, analyses, records, preparatory papers, resolutions, translations and transcripts, talking points, speech, agreement (and annexes thereto), contract, financial statement, accounting record, proposal, pictures or photographs, diagram, drawing, chart, program, or data of any kind, in whichever form, and in any media however stored, including without limitation electronic data files, audio recordings and video recordings;

m) “include” and “including” means “including but not limited to”;

n) “Native format” means and refers to the format used by the software application that created the document (i.e., the file structure of an electronic document as defined by the original creating application); and

o) “Relevant and material” means pertaining to the issues “relevant to the case and material to its outcome” within the meaning of Article 3(7) of the of the Rules on the Taking of Evidence in International Commercial Arbitration issued by the International Bar Association (2020) (“IBA Rules”).

9. Any reference to one or more of the words “address,” “refer to,” “reflect,” “concern,” “constitute,” “describe,” “discuss,” “evidence,” “demonstrate,” “identify,” “comprise,” “contain,” or any like word shall be deemed to incorporate all such words and, accordingly, be construed inclusively.

10. Reference to any company shall be considered to also include its employees, directors, officers and agents.

III. ADDITIONAL TERMS

11. Each document request seeks production of documents in their entirety, without abbreviation, expurgation or redaction, and including all distinct versions of the same Document (e.g., a hard copy of a Document with manuscript annotations or an e-mailed copy of that same Document).

12. For avoidance of doubt, a draft or non-identical copy of that Document (including one with notations) is considered a separate document or information that must be produced as responsive.

13. All attachments, exhibits, appendices, or equivalent of a requested document are to be produced, including any internal communication in connection therewith.

14. Production of duplicate documents should be avoided where possible.

15. The requested documents are reasonably believed to exist and to be within the possession, custody or control of Claimants, as explained in the Redfern Schedule. The requested documents are not in Respondent's possession, custody or control, or would be unreasonably burdensome for Respondent to locate. The Request for Documents seeks production of the documents and category of documents listed in the Redfern Schedule as soon as possible on a rolling basis, and in any event no later than 23 July 2024 for uncontested documents and 20 August 2024 for documents ordered to be produced by the Tribunal, as contemplated by the Procedural Timetable.

16. Respondent's Request for Documents is continuing, such that Claimants shall produce any additional responsive documents that come to their attention or come into their possession, custody or control after the date of the initial production.

17. To the extent that Documents responsive to any request are located and withheld by the Claimants or the Claimants' non-Mauritian affiliates on account of any alleged privilege, Claimants are asked to provide a privilege log, identifying each responsive Document withheld because of privilege and explaining the basis for withholding. The privilege log should identify with reasonable particularity, the date, title, author/sender of such Documents, intended/actual recipients of such Documents, and the document type, as well as any lawyers who were involved in the drafting, sending, distribution or receipt of such Documents. Respondent reserves its rights in connection with the documents identified as privileged.

18. Respondent suggests that Claimants produce the requested documents through the file sharing platform Box. The requested documents should be submitted:

    a) electronically, in a searchable PDF format if the original document is a hard copy, or, where the document was originally in electronic format, in the original format, without removing or altering any metadata;
    b) organized to clearly identify which of the requests enumerated in the Redfern Schedule Claimants' produced documents respond to; and
    c) accompanied by a list identifying the produced requested documents by their type (e.g., "letter" or "email"), date, and authority who prepared and sent/received them, and specifying to which request (or requests) they are responsive.

19. Should no documents exist in response to a given request, Respondent requests that the requested Party states this.

20. Respondent's Request for Documents is without prejudice to any request that Respondent may make in the future that the Tribunal order the production of documents or other evidence at any time during the arbitral proceedings pursuant to Paragraph 16.3 of PO1, including in case of Claimants' non-compliance with Requests granted by the Tribunal. Respondent reserves all rights in this regard.

IV. CLAIMANTS' COMMENTS

21. Claimants set out herein certain overarching comments applicable to a number of the Respondent's requests.

22. The vast majority of the Respondent's requests concern its objection to jurisdiction *ratione personae* (requests nos. 1-11[1]). As the Claimants explained in their Counter-Memorial on Jurisdiction, the Respondent's objection *ratione personae* is based on a flawed interpretation of Article 1(3)(b) of the BIT. As a result, Respondent seeks production of documents that are not "relevant to the dispute" or "material to the outcome of the case", contrary to paragraph 15.2 of PO1 and Article 9.2 (a) of the IBA Rules.

23. As the Claimants explained in their Counter-Memorial on Jurisdiction, the requirement under the BIT that the Claimants have a "main office" (or "*sede*", in the Portuguese version) in the territory of Mauritius means the "place of 'effective management' or 'some sort of actual or genuine corporate activity'".[2] It is a "flexible test", such that an investor operating a "bricks and mortar" business reasonably could be expected to have a very different "office" or premises to an institutional investor operating in the financial services industry (for whom an "office" or premises may not be required to establish or operate their investment). The

[1] Requests nos. 1 and 2 are also said to be relevant to the Respondent's abuse of process objection; and nos. 1 and 10 are also said to be relevant to the Respondent's *ratione materiae* objection.

[2] Claimants' Counter-Memorial on Jurisdiction, para. 46.

prevailing jurisprudence on this point adopts a pragmatic approach by acknowledging that the test for "main office" necessarily takes into account the individual circumstances of the investor.[3] These circumstances necessarily include, in this case, the fact that each of the three Claimants are subsidiaries, under the ultimate control of their parent companies. This has an impact on decision-making at the subsidiary. However, as the Claimants explained in their Counter-Memorial on Jurisdiction, it does not automatically lead to the conclusion that the effective management of the Claimants took place outside the home State.[4]

24. The Respondent's requests nos. 1-11 suffer from the same flaws as the Respondent's approach set out in its Memorial on Jurisdiction. In particular, the Respondent seeks production of a vast range of documents that are largely irrelevant to the applicable test for jurisdiction *ratione personae*, and which have therefore not been taken into account by other tribunals considering similar objections.

25. A number of further general comments regarding the Respondent's requests are merited, in the light of Article 3.5 (read in conjunction with Articles 9.2 and 3.3) of the IBA Rules:

    a. First, a vast number of the documents requested are subject to attorney-client or litigation privilege under the applicable legal rules, most notably: (i) United States Federal and State law – being the law applicable, most notably, to documents created in connection with and for the purpose of providing or obtaining legal advice relating to the transfer of the interests in the Oak Loan to the Claimants, which is in the possession, custody or control of the Claimants' non-Mauritian parents and affiliates; (ii) Portuguese law – being the law applicable to documents created or made in connection with and for the purpose of obtaining legal advice in connection with the treatment of the Claimants' investments in the Oak Loan by the Bank of Portugal, the Resolution Fund, Novo Banco and the Liquidation Committee (in the possession, custody or control both of the Claimants and of the Claimants' non-Mauritian parents and affiliates); and (iii) English law – being the law

[3] Claimants' Counter-Memorial on Jurisdiction, Section III.A, especially paras. 45-55.

[4] Claimants' Counter-Memorial on Jurisdiction, para. 61, and see also para. 59.a (regarding the findings of the *Alverley* tribunal on this point).

applicable to documents created or made in connection with and for the purpose of obtaining legal advice in connection with the initiation of these arbitral proceedings.

b. Second, the Respondent's requests deliberately conflate the "Claimants" and the "Claimants' non-Mauritian parents and affiliates", as is evident most notably from paragraph 5 of the Respondent's introduction above. The Respondent asserts that "the requested documents are by their nature of the sort that should necessarily be in the possession, power, custody, or control of Claimants and Claimants' non-Mauritian parents and affiliates and are not available in the public domain".[5] However, it fails (where indicated in the Claimants' responses to the Respondent's requests below) to provide an explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party". The Claimants – and not their "non-Mauritian parents and affiliates" – are the only other "Party" to this proceeding.[6]

c. Third, the combination of the first and second points gives rise to a further impediment to the production of many of the documents requested: that the legal privilege is that of a third party to this proceeding.

d. Fourth, as further set out below, a number of the Respondent's requests impose an unreasonable burden on the Claimants, demanding the identification and production of significant volumes of evidence dating back nearly a decade in some cases, which is unlikely to be of any relevance – let alone any materiality – to the outcome of this proceeding. Further,

[5] Respondent's Request for Production of Documents, para. 5.

[6] To the extent that the Claimants are ordered to produce Documents responsive to the Respondent's requests that are not in the possession, custody or control of the Claimants, but the Claimants believe that responsive, non-privileged, Documents may be in the possession, custody or control of the Claimants' non-Mauritian parents and affiliates, the Claimants will request the Claimants' non-Mauritian parents and affiliates to consent to provide such Documents. This is consistent with the Claimants' approach in the arbitration proceedings where they sought consent to obtain and place on the record certain Documents that were in the possession, custody or control of the Claimants' non-Mauritian parents and affiliates.

and relatedly, it would be contrary to considerations of procedural economy and proportionality for the Claimants to be required to identify and produce such significant volumes of documents.

26. In response to those requests (identified below) where the Claimants agree to produce certain responsive, non-privileged documents, they do so only to the extent that the documents are in the possession, custody or control of the Claimants and where there is no legal impediment or other applicable objection for the purposes of Article 9.2 of the IBA Rules.

V. RESPONDENT'S COMMENTS

27. Respondent sets out herein its responses to Claimants' overarching comments to Respondent's requests.

28. First, in paragraphs 22-24, Claimants object to a number of Respondent's Document Requests on the grounds that they are not relevant or material to the present dispute because they are based on a "flawed interpretation of Article 1(3)(b) of the BIT" as based on the "prevailing jurisprudence."[7] These objections must be rejected because they are based solely on the premise that the standard for jurisdiction *ratione personae* that Respondent developed in its Memorial on Jurisdiction is inapplicable, an actively contested issue. The relevance and materiality of a requested document should be judged by reference to whether the requesting party can use the requested document to present its case[8]. Notably, Claimants do not dispute that the requested documents are relevant and material to jurisdiction *ratione personae*, inasmuch as Respondent's test for determining jurisdiction *ratione personae* applies. At present, the Claimants and Respondent have submitted first-round briefs concerning their jurisdictional arguments. Claimants' objections to Respondent's Document Requests will be resolved by the Tribunal before

[7] *See supra*, para. 23.

[8] *See* R. Marghitola, *Chapter 5: Interpretation of the IBA Rules*, in Document Production in International Arbitration, International Arbitration Law Library, Volume 33, Kluwer Law International 2015, (**Exhibit RL-0146**), page 50.

Respondent has had a chance to rebut Claimants' arguments in its Reply on Jurisdiction. Therefore, it would be inappropriate to deny Respondent's Document Requests solely on the ground of contested and partially briefed legal issues.

29. In any event, Claimants are wrong about the applicable test for determining jurisdiction *ratione personae* under the BIT. It is undisputed that to satisfy the test for *sede* or "main office," each Claimant must show it satisfied more than the mere legal requirements of incorporation in Mauritius.[9] Claimants also seem to accept that for each Claimant to prove it has a "main office" or "*sede*" in Mauritius, each must demonstrate that it is "effectively managed" from Mauritius.[10] As Claimants themselves stress,[11] the jurisprudence on the topic adopts a "flexible" approach, which is tailored the "precise nature of the company in question and its actual activities."[12] This also means that there is no fixed or determined list of factors that are relevant to such a showing. As Respondent demonstrated in its Memorial on Jurisdiction (and will elaborate in its forthcoming Reply on Jurisdiction), for Claimants, the test of effective management requires a showing of "independent decision-making" in Mauritius.[13] There is therefore no basis for Claimants to object to Respondent's Document Requests bearing on jurisdiction *ratione personae* on the basis of relevance or materiality because all such requests seek documents that are probative of the location of independent decision-making.

30. In paragraph 25(a) & (c) above, Claimants contend that "a vast number of the documents requested are subject to attorney-client or litigation privilege under the applicable legal rules" and briefly comment on privilege with respect to affiliated companies. While legal privilege can be a legitimate argument to object to a document request, it must be done in a specific and targeted manner. In other words, Claimants cannot reasonably argue that an entire category of the requested documents fall under legal

[9] *See* Respondent's Memorial, paras. 87-88; Claimants' Counter-Memorial, paras. 51-52.

[10] *See* Respondent's Memorial, para. 90; Claimants' Counter-Memorial, para. 52.

[11] *See supra*, para. 23.

[12] *See* Respondent's Memorial, para 92.

[13] *See* Respondent's Memorial, para. 91.

privilege. Rather, Claimants have the "burden of proving that such privilege applies to each document"[14]. Therefore, to the extent that Claimants intend to withhold any documents responsive to any request on the grounds of privilege, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege. Among other elements, such a privilege log should identify the documents responsive to Respondent's document requests over which they claim privilege, as stated in paragraph 17 of this submission, identifying with reasonable particularity the document and the basis by which privilege may apply. This includes providing adequate information that said document falls under legal privilege in the sense of Article 9.2 of the IBA Rules. Where such a document is authored by an attorney, Claimants must provide information proving that "the attorney [was] indeed acting as such and providing legal advice, and [was] not acting as a policy-maker or corporate officer".[15]

31. Claimants, in paragraph 25(b) above, allege that Respondent "deliberately conflate[s]" the "Claimants" and their "non-Mauritian parents and affiliates", further asserting that Claimants' non-Mauritian parents and affiliates entities should be regarded as third parties in the current proceedings for the purposes of the Respondent's request for document production. As such, Claimants' position is that they cannot be required to produce such documents.

[14] *See Glamis Gold Ltd. v. United States of America*, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, 17 November 2005, (**Exhibit RL-0147**), para. 23 ("The Tribunal notes that the party asserting the privilege has the burden of proving that such privilege applies to each document but, after that showing is made, the burden shifts to the other party to contest the privilege. The Tribunal recognizes that, when asserting this privilege, it is important to make clear that the attorney is indeed acting as such and providing legal advice and is not acting as a policy-maker or corporate officer. Therefore, it is critical that, when invoking the privilege, the invoking party explain with sufficient specificity the role the attorney is taking.").

[15] *Id.*

32. But it is accepted that a party's duty to disclose documents in the context of document production encompasses the duty to disclose documents held by its affiliates, assuming the requested party can reasonably access these materials[16]. Tribunals have regularly ordered parties to produce documents that are in the possession of parent companies and affiliates in the same corporate group[17].

33. As R. Marghitola points out, raising formal objections to the production of documents held by affiliated companies is questionable in international arbitration.[18] Instead, a broad definition of "possession, custody or control" should be adopted: "documents are considered to be in the possession, custody, or control of a party if the party or an entity within the same corporate group holds the requested documents or has the right to obtain them".[19] Where the requested party is related to an entity in the possession, custody or control of Documents that are relevant in the context of a legal proceeding to which it is party, it is reasonable to

[16] *See* R. Marghitola, *Chapter 5: Interpretation of the IBA Rules* (**Exhibit RL-0146**), pages 33 to 116; R. Bradshaw, *How to Obtain Evidence from Third Parties: A Comparative View*, in Maxi Scherer (ed), Journal of International Arbitration, Volume 36, Issue 5, Kluwer Law International 2019 (**Exhibit RL-0148)**, pages 629 to 658; V. Hamilton, *Document Production in ICC Arbitration* in Document Production in ICC Arbitration – 2006 Special Supplement, (**Exhibit RL-0149**) pages 63 to 81.; G. B. Born, *Chapter 16: Disclosure in International Arbitration* (Updated September 2022), in International Commercial Arbitration (Third Edition), Kluwer Law International 2021 (**Exhibit RL-0150**) and R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, in Roman Mikhailovich Khodykin, Carol Mulcahy, et al., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, Oxford University Press 2019, (**Exhibit RL-0151**), pages 106 to 213.

[17]*See* G. B. Born, *Chapter 16: Disclosure in International Arbitration* (Updated September 2022), (**Exhibit RL-0150**) ("Tribunals have not infrequently ordered parties to produce documents held by other members of a corporate group, on the theory that these are generally in the control of a member of that group.[…] [T]he rationale of a number of rulings by international arbitral tribunals is that a member of a corporate group can be required to produce documents in the possession or custody of all other members of the group."); V. Hamilton, *Document Production in ICC Arbitration*, (**Exhibit RL-0149**), citing an ICC order holding that a party has control over documents of entities that are part of same corporate group and *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 11 March 2003, (**Exhibit RL-0152**), para. 65 ("Documents of advisors to Claimant shall be disclosed to the extent that these documents are in the possession of the Claimant and/or its affiliated companies or should have been transmitted by the advisor to the Claimant in the ordinary course of business");*Vito G. Gallo v. The Government of Canada*, PCA Case No. 2008-03, Procedural Order No. 2, 10 February 2009, (**Exhibit RL-0153**), para. 8 ("The Arbitral Tribunal considers that, in this respect, in addition to entities which may be controlled by a party, there may be entities or persons with whom a party has a relationship which is relevant for the purposes of this arbitral processing.").

[18] *See* R. Marghitola, *Chapter 5: Interpretation of the IBA Rules,* (**Exhibit RL-0146**), page 67.

[19] *Id*.

conclude that the requested party is either already in possession of such documentation or will be in a better position to directly secure those documents, therefore avoiding additional inefficiencies and complexities in the document production phase [20].

34. This is precisely the case here.

35. *First*, the requests for documents involving Claimants' non-Mauritian affiliates relevant to Respondent's objections to jurisdiction *ratione personae* pertain to the decision-making processes of Claimants and the extent to which they are effectively managed from Mauritius. Documents demonstrating that Claimants' parents and affiliates are engaged in the effective management of Claimants are likely to be in the possession, custody and/or control of Claimants. At the very least, it would be highly unusual if Claimants were unable to obtain documents dealing with business or management decisions made on their behalf.

36. Additionally, many of the requests for the production of documents involving Claimants' non-Mauritian affiliates presented by Respondent pertain to their purported acquisition of interests in the Oak Loan and to the exercise of any rights related to the same. Since Claimants subsequently acquired their purported interests in the Oak Loan from these affiliates, it is reasonable to assume that any information related to this purported investment, even if predating Claimants' acquisition, is within Claimants' possession, custody and/or control. In fact, it would be quite odd, to say the least, for Claimants to have purportedly inherited rights from their non-Mauritian affiliates and to be pursuing claims related to those rights without being provided possession, custody and/or control over all the relevant documentation regarding such rights.

37. *Second*, even if this were not the case and any information and documents concerning Claimants' non-Mauritian affiliates' purported investment in the Oak Loan had not been disclosed to Claimants (which would be atypical), as companies within the same group[21], it would be unreasonable to assume that Claimants would not be able to obtain such information and documents. Not least, since, as demonstrated in Respondent's Memorial on Jurisdiction, Claimants are mere paper façades or mailbox

[20] *Id*.

[21] *See* Claimants' Memorial on the Merits, 17 October 2023, paras. 20 to 31, pages 8 to 13.

companies for foreign entities to conduct their own business in Mauritius.[22] In particular, Claimants' key business decisions were made from the offices of their parent entities, the Elliott International Group and the Silver Point Capital Group[23]. In addition, Suffolk and Mansfield's non-Mauritian directors hold senior roles with Elliott Management Corporation and, likewise, Silver Point's foreign directors are employees of its parent group entities which further confirms the extent of control and integration between the companies[24].

38. *Third,* Claimants have already produced in this arbitration a great number of documents from their affiliates pertaining to business decisions and/or the alleged acquisition of interests in the Oak Loan by the same, for instance:

    a. Exhibit C-0028; Silver Point Mauritius Activity Plan, 31 December 2015;

    b. Exhibit C-0056: Buyer Trade Confirmations for Silver Point Luxemburg S.A.R.L, 22 and 28 July 2014;

    c. Exhibit C-0061: Buyer Trade Confirmation for Elliott International, L.P, 20 October 2014;

    d. Exhibit C-0062: Buyer Trade Confirmation for Liverpool Limited Partnership, 20 October 2014;

    e. Exhibit C-0063: Assignment agreement between Oak Finance Luxembourg S.A and Silver Point Luxembourg S.à r.l., 23 February 2015;

    f. Exhibit C-0064: Assignment agreement between Oak Finance Luxembourg S.A and Elliott International L.P., 23 February 2015;

[22] *See* Respondent's Memorial on Jurisdiction, 16 April 2024, Section 3.1.

[23] *See* Respondent's Memorial on Jurisdiction, 16 April 2024, Section 3.1.2.

[24] *See* Respondent's Memorial on Jurisdiction, 16 April 2024, Section 3.1.2, specifically para. 102.

g. Exhibit C-0065: Assignment agreement between Oak Finance Luxembourg SA and The Liverpool Limited Partnership, 23 February 2015;

h. Exhibit C-0066: Letter of Direction from The Liverpool Limited Partnership, 24 February 2015;

i. Exhibit C-0067: Letter of Direction from Elliott International L.P, 24 February 2015; and

j. Exhibit C-0068: Letter of Direction from Silver Point Luxembourg Platform S.à.r.L, 24 February 2015.

39. Therefore, Claimants' arguments are artificial, if not made in bad faith, as it is evident that Claimants have possession, custody and/or control over information and documents relating to their affiliates' decisions regarding the management of Claimants and their interests in the Oak Loan. Indeed, to allow Claimants to produce such documents within the possession, custody and/or control of their affiliates, while denying Respondent the opportunity to make document production requests of Claimants' affiliates, would permit Claimants to cherry-pick what documents are introduced to the record from their affiliates, substantially prejudicing Respondent and its due process rights.

40. In paragraph 25(d), Claimants make a general objection that Respondent's requests impose an unreasonable burden on the Claimants. Claimants have not provided evidence for this assertion. Claimants have initiated a claim for damages in excess of USD 85,000,000, and, in this context, it is not unduly burdensome nor disproportionate to request documents that are reasonably located within Claimants' or their parents and affiliates possession, custody and control. Respondent further notes that, pursuant to the IBA Rules, Claimants are required only to undertake a "reasonable and proportionate" search for such responsive documents and have not identified any reason that they are unable to do so.

Document Request Number	**1**
Documents or Category of Documents Requested	All documents and communications between 15 December 2015 and 30 May 2016 relating to Claimants' decisions to acquire, and their parents' and affiliates' decisions to purport to transfer to Claimants, interests in the Oak Loan, including but not limited to: a. Internal memoranda, presentations, investment analysis and proposals, notes, opinions, due diligence reports, communications or any similar documents relating to Claimants' alleged acquisition of, and their parents' and affiliates' decisions to purport to transfer to Claimants, interests in the Oak Loan; b. Financial analysis, forecasts and/or similar documents detailing the expected performance, and/ or revenue projections expected from Claimants under the Oak Loan; c. Board meeting minutes, resolutions or other corporate documentation relating to Claimants' alleged acquisition of, and their parents' and affiliates' decisions to purport to transfer to Claimants, interests in the Oak Loan; d. Contracts, financial statements, and transaction records of Claimants (to the extent that they have not been provided) and Claimants' parents' and affiliates' relating to Claimants' alleged acquisition of, and their parents' and affiliates' decisions to purport to transfer to Claimants interests in the Oak Loan; e. Due diligence, legal opinions, notes, reports, or any kind of legal advice delivered to Claimants addressing the process of resolution and liquidation of BES and the Claimants' eventual rights in the context of such resolution and/or liquidation, including any documents relating to Claimants NCWO entitlements under the BRRD and the Portuguese Law; f. Drafts, mark-ups, redlines and other documents related to each of the 2016 Assignment Agreements (C-0081; C-0085 and C-0086). For the avoidance of doubt, in respect of Exhibit C-0081 this includes the two

	prior versions of the document confirmed to exist by the version number in its bottom left corner (301492873 v3); or g. Drafts, mark-ups, redlines and other documents related to any version of the Form of Transfer Certificate included in Schedule 5 to the Facility Agreement (C-0044) that was created in the process that led from that Form of Transfer Certificate to the final version of the 2016 Assignment Agreements (C-0081; C-0085 and C-0086), (including the 2015 Assignment Agreements (C-0063, C-0064 and C-0065), on which the 2016 Assignment agreements (C-0081; C-0085 and C-0086) appear to have been based).
Relevance and Materiality according to the Requesting Party	Respondent has argued that this Tribunal lacks jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[25] Documents reflecting how Claimants' decisions to acquire interests in the Oak Loan were made are relevant and material to demonstrating the location from which Claimants are effectively managed. Respondent has also argued that the Tribunal lacks jurisdiction *ratione materiae* because, *inter alia*, Claimants' purported investment does not satisfy the contribution and risk requirements necessary for an investment to qualify as such under Article 1(1) of the Mauritius-Portugal BIT and Article 25 of the ICSID Convention because Claimants' purported investment consisted in the mere acquisition of claims against Portugal, including to receive NCWO payments in the context of the resolution of BES, and therefore did not entail any contribution to an economic activity in Portugal[26] or the assumption of any risk associated with the success of an economic venture[27]. In response, Claimants deny and argue that, *inter alia*, at the time of their purported investment, they did not know and reasonably could not have known what (if any) NCWO entitlements they would have[28]. Documents revealing the grounds, information, and knowledge behind the Claimants' decision to acquire, and their parents' and

[25] Respondent's Memorial on Jurisdiction, para. 90.

[26] Respondent's Memorial on Jurisdiction, paras. 142 and 147 to 153.

[27] Respondent's Memorial on Jurisdiction, para. 168.

[28] Claimants' Counter-Memorial on Jurisdiction, para. 11.

	affiliates' decisions to transfer to Claimants interests in the Oak Loan are relevant and material to demonstrate that Claimants acquired their respective interests in the Oak Loan with the expectation of pursuing claims against Portugal and therefore the acquisition does not amount to a protected investment. Requested documents will also reveal Claimants' understanding of the risks associated with their purported investment and demonstrate that they understood that economic risks were not associated with the success of the underlying economic venture but rather to the success of future litigation brought against Portugal. Additionally Respondent has argued that the Tribunal lacks jurisdiction *ratione materiae* because the 2015 Assignment Agreements (C-0063, C-0064 and C-0065) and, in turn, the 2016 Assignment Agreements (C-0081; C-0085 and C-0086) violated the Bank of Portugal's Decisions and Portuguese law as such Assignments were made (i) on the premise that an event of default under the Oak Loan had occurred on 29 December 2014 but pursuant to the Bank of Portugal's Decision of 11 August 2014 (R-0003) no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make payments; (ii) on the premise that the borrower under the Facility Agreement was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[29]. Claimants', in contrast, have argued that the Assignment Agreements were not made in violation of Bank of Portugal's Decisions and the Portuguese law as the moratorium enacted by the Bank of Portugal pursuant to such decisions did not preclude the existence of a "contractual event of default itself arising under the Facility Agreement (C-0044), nor the contractual consequences (as governed by English law) that flowed from such an event" and that "Claimants' affiliates take the view that the Oak Loan was transferred to and remained in Novo Banco, while the Bank of Portugal argues that it was validly transferred back to BES"[30]. Claimants' arguments are not backed by any legal opinions, analysis or due diligence addressing the formalities and procedures required for the entering into of the Assignment Agreements in light of the Bank of Portugal's Decisions and the Facility Agreement (C-0044). The documents requested are therefore relevant and material to establish Respondent's position with respect to the illegality of Claimants' purported investment. Documents responsive to this request are also relevant to establish that Claimants have no title to their alleged investment. Indeed, as Respondent has stated: "Claimants do not have title to any interest in the Oak Loan under

	the Portuguese law because the 2015 (C-0063, C-0064 and C-0065) and 2016 (C-0081; C-0085 and C-0086) Assignment Agreements are void and ineffective"[31], as they (i) violate the Bank of Portugal's Decisions and Portuguese law; and (ii) breached the terms of the Facility Agreement (C-0044), due to fact that no event of default had occurred and no prior consent on the Assignment Agreements was requested and obtained from BES. Claimants, in contrast, argued that they "acquired their investments legally and those lawful assignments conferred title to the Claimants to their interests in the Oak Loan" and that the occurrence of an Event of Default exempted the need of prior consent for the Assignment Agreements[32]. Respondent further argued that each Claimant's acquisition of interests in the Oak Loan constitutes an abuse of process because it amounted to a restructuring to enable bringing a claim before an arbitral tribunal at a time when the dispute was foreseeable[33]. Indeed, Claimants admit that they "wanted to avail themselves of Mauritius' bilateral investment treaty with Portugal" in the making of their investment[34]. The requested documents are relevant to evidence that Claimants acquired their interests in the Oak Loan for the purpose of bringing a claim against Portugal.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, documents responsive to the request set out in categories "a", "e", "f" and "g" are covered by legal privilege, within the meaning of Article 9.2(b) of the IBA Rules, since the documents concerned were created in connection with and for the purpose of providing or obtaining legal advice (as set out in Article 9.4(a)).

[29] Respondent's Memorial on Jurisdiction, paras. 192 to 197.

[30] Claimants' Counter-Memorial on Jurisdiction, paras. 199 to 201 and 207.

[31] Respondent's Memorial on Jurisdiction, paras. 216 to 225.

[32] Claimants' Counter-Memorial on Jurisdiction, paras. 225, 228 and 229.

[33] Respondent's Memorial on Jurisdiction, para. 265.

[34] Claimants' Memorial, para. 74.

	Second, the Respondent's request (other than in categories "f" and "g") fails to identify a "narrow and specific" requested category of documents, and therefore fails to satisfy the requirements of Article 3.3(a)(ii) of the IBA Rules. The request is also overbroad because it fails to exclude documents that the Claimants have already submitted to the record in these proceedings. For example, the Claimants have already produced the following documents which would be responsive to request no. 1, "a"-"e": • Suffolk (Mauritius) Limited, Board Meeting Minutes, 23 March 2016 (C-0009); • Mansfield (Mauritius) Limited, Board Meeting Minutes, 23 March 2016 (C-0020); • Silver Point Mauritius Activity Plan, 31 December 2015 (C-0028); • Email from REIF to Silver Point Mauritius attaching wire transfer request, 18 March 2016 (C-0084); • Assignment agreement between Elliott International L.P and Suffolk (Mauritius) Limited, 11 April 2016 (C-0085); • Assignment agreement between Liverpool Limited Partnership and Mansfield (Mauritius) Limited, 11 April 2016 (C-0086); • Barclays Bank Statement, Suffolk (Mauritius) Limited, issued 29 April 2016 (C-0170); • Barclays Bank Statement, Mansfield (Mauritius) Limited, issued 29 April 2016 (C-0171); • Silver Point Mauritius, Minutes of Board Meeting, 15 February 2016 (C-0227). Third, the Respondent's request deliberately conflates the "Claimants" and the "Claimants' non-Mauritian parents and affiliates". It fails to provide any explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party" – that is, the Claimants – as opposed to the Claimants' "non-Mauritian parents and affiliates". Fourth, the Respondent has failed to explain how documents identified in categories "a" to "c", dating from the time period 15 December 2015 and 30 May 2016, and "reflecting how Claimants' decisions to acquire interests in the Oak Loan were made", are sufficiently relevant or material (within the meaning of paragraph 15.2 of PO1 and Article 9.2 (a) of the IBA Rules) to the issue of "demonstrating the location from which Claimants are effectively managed" (i.e., the Respondent's *ratione personae* objection). As the Claimants demonstrated in the Counter-

	Memorial, investment tribunals have routinely recognised that the date at which a claimant must show that it was an "investor" (or had a "main office" or "*sede*") in the host State is the date on which proceedings were commenced. There is therefore no basis to elevate the decisions specifically relating to the acquisition of the investments at issue in this arbitration to the exclusion of all other decisions taken by the Claimants in the run up to the Request for Arbitration.[35] Fifth, the Respondent has failed to explain how documents identified in categories "f" and "g" are sufficiently relevant or material within the meaning of paragraph 15.2 of PO1 and Article 9.2 (a) of the IBA Rules. These categories of documents are plainly of no relevance to the Respondent's *ratione personae* objection or its *ratione materiae* objection insofar as it relates to the alleged "requirements" of contribution and risk. They are of no apparent relevance to the Respondent's abuse of process objection. To the extent that the Respondent argues that these categories of documents are relevant to the Respondent's *ratione materiae* objection as it relates to the alleged "illegality" of the Claimants' acquisition of their investments, and their title to their investment, the Respondent has also failed to demonstrate that they are sufficiently relevant or material (within the meaning of paragraph 15.2 of PO1 and Article 9.2 (a) of the IBA Rules) to those issues: a. As the Claimants observed in their Counter-Memorial on Jurisdiction, both Parties agree that "in accordance with law" clauses of BITs exclude from protection only those investments that involve serious or severe breaches of local law.[36] The Respondent's allegations have not come close to meeting that threshold.[37] In any event, the question of whether the Claimants acquired their interests in the Oak Loan in violation (serious or otherwise) of Portuguese laws and regulations is an objective one of Portuguese law. Accordingly, it is impossible to see how documents in the nature of the categories identified at "f" and "g" could be of any relevance to this objective issue.

[35] Claimants' Counter-Memorial on Jurisdiction, para. 63, referring to *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, para. 251, **CL-0018**.

[36] See Counter-Memorial on Jurisdiction, Section IV.E(i).

[37] *Id*., Section IV.E(ii).

	b. Similarly, as the Claimants explained in their Counter-Memorial on Jurisdiction, the question of whether the Claimants validly acquired their interests in the Oak Loan is an objective matter of Portuguese and English law (the latter of which governed the agreements).[38] Accordingly, it is impossible to see how documents in the nature of the categories identified at "f" and "g" could be of any relevance to this objective issue.
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, as to Claimants' allegation that the documents responsive to the request set out in categories "a", "e", "f" and "g" are covered by legal privilege Respondent refers the Tribunal to its reply in paragraph 30 above, building on paragraph 17. Claimants have failed to demonstrate the necessary requirements for establishing privilege. Reliance on Article 9.2(b) of the IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and providing specific details demonstrating how such documents meets the criteria for legal privilege, such as the nature of the legal advice sought, the context in which the documents were created, and the relationship between the parties involved in the same. Claimants did not do any of this. Instead, Claimants limited this objection to simply stating that "the documents concerned were created in connection with and for the purpose of obtaining legal advice," without even specifying why such legal advice was required and obtained. To the extent that Claimants intend to withhold any documents responsive to this request on the grounds of privilege, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by

[38] See Counter-Memorial on Jurisdiction, Section IV.E(iv); *see also* Section IV.E(ii).

	the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege. Second, Claimants' objection that the request is overbroad should be rejected because Claimants' sole argument for this objection lacks any basis. It is understood by both Parties that document requests do not include documents already submitted to the record. Indeed, the documents listed by Claimants in this respect, only underline why it is important all documents responsive to this request are produced, to prevent Claimants cherry-picking the documents it produces (as it presently seeks to do). Moreover, these requests are narrow and specific. A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[39] Here, there should be no difficulty in making such a determination, particularly in light of the seven sub-points which Respondent has given enumerating precisely the sorts of documents that will fall within the request. Respondent has also given a specific time frame for the request. Third, as regards Claimants' objection concerning Claimants' parent and affiliate companies, Respondent's reply is provided in paragraphs 31 to 38 above. Fourth, Claimants object that the requested documents from time period 15 December 2015 and 30 May 2016 are not relevant and material to the issue of jurisdiction *ratione personae.* This argument should be rejected because it rests entirely on a legal theory, asserted for the first time in Claimants' Counter-Memorial, that the date for determining jurisdiction *ratione personae* is "the date on which proceedings were commenced."[40] Respondent contests this theory, but has not yet had an opportunity to rebut it. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. It is uncontroverted that the requested materials are relevant and material if a broader time frame is adopted. Additionally, Claimants misstate the applicable law, improperly conflating the nationality requirement of Article 25(2)(a) of the ICSID Convention[41] with the nationality requirements of the BIT. Article 9 of the BIT requires that a dispute referred to arbitration

[39] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151),** para. 6.60.

[40] *See* Claimants' Counter-Memorial, para. 63.

[41] ICSID Convention, Article 25(a)(2) ("'National of another Contracting State' means: any natural person who had the nationality of a Contracting State... On the date on which the parties consented to submit such dispute to conciliation or arbitration as well as the date on which the request was registered.").

	arise out of "an investment of the investor." This requires an investor to meet the nationality requirements at the time of the investment *and* at the time that the dispute arises. Investor-State tribunals analysing similar BIT language have endorsed this approach.[42] Claimants cite only to *Alverley Investments Limited*, which concerns a different BIT, to support their argument, but the sole paragraph relevant to Claimants' position provides no rationale or analysis supporting the position.[43] Fifth, with respect to Claimants' objection on the basis of relevance and materiality to the issue of jurisdiction *ratione materiae* of the documents identified in categories "f" and "g" of, particularly as it relates to the requirements of contribution and risk, Respondent notes that Claimants do not provide any justification for their position. These documents are relevant and material within the meaning of paragraph 15.2 of PO1 and Article 9.2 (a) of the IBA Rules. As thoroughly detailed above, on Respondent's case, Claimants' purported investment does not satisfy the contribution and risk requirements necessary for an investment to qualify as such under Article 1(1) of the Mauritius-Portugal BIT and Article 25 of the ICSID Convention because Claimants' purported investment consisted in the mere acquisition of claims against Portugal, including to receive NCWO payments in the context of the resolution and liquidation of BES, and therefore did not entail any contribution to an economic activity in Portugal[44] or the assumption of any risk associated with the success of an economic venture[45]. In this context, any documents revealing the grounds, information, and knowledge behind the Claimants' decision to acquire, and their parents' and affiliates' decisions to transfer to Claimants, interests in the Oak Loan are relevant and material to demonstrate that Claimants acquired their respective interests in the Oak Loan with the expectation of pursuing

[42] *See Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, (**Exhibit RL-0154**), para. 187 ("the relevant dates for assessing the application of the treaty for the purposes of this debate are (i) the date in which the host State allegedly adopted the measures breaching the BIT, and (ii) the date of the claim's filing."); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, (**Exhibit RL-0155**) para. 354-55 ("Not requiring from a purported foreign investor to demonstrate that it meets the nationality criterion at the time of the alleged breach of the Treaty would run afoul of the clear intent of the BIT signatories… Claimants must thus establish that [Claimants met nationality requirements] not only at the time of consent… but also before the dispute arose, that is when the alleged breaches of the BIT first occurred.").

[43] *See Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, (**Exhibit CL-0018**), para. 251.

[44] *See* Respondent's Memorial on Jurisdiction, paras. 142 and 147 to 153.

[45] *See* Respondent's Memorial on Jurisdiction, para. 168.

	claims against Portugal. That, in turn, would confirm that their purported acquisition of interests in the Oak Loan does not entail a contribution to an economic activity in Portugal's territory nor the assumption of an investment risk. This is precisely the information that the documents encompassed in this request, including those identified in categories "f" and "g" above, will confirm. Indeed, documents identified in f) and g), which include, *inter alia*, drafts, mark-ups, redlines and any documentation related to each of the 2016 Assignment Agreements and any prior version of the same (including all versions that led from the Form of Assignment Agreement included in Schedule 6[46] to the Facility Agreement to each of the final versions of the 2016 Assignment Agreements and any documents related to the same) are essential to trace the changes to the agreements through which Claimants purportedly acquired their interests in the Oak Loan, to bring claims against Portugal. This would reveal the fundamental reasons, information, and knowledge underpinning Claimants' decisions to acquire and their affiliates' decisions to transfer to Claimants the interests in the Oak Loan. Insofar as Claimants object to the relevance and materiality of these documents based on their assertion that any illegality in the acquisition of interests in the Oak Loan is not sufficiently grave to deprive the purported investments of protection under the BIT, that issue remains in dispute between the Parties. It would be inappropriate to deny Respondent's Document Requests solely on the ground of contested and partially briefed legal issues. In any event, Claimants have deliberately and wrongfully mischaracterized Respondent's position on the scope of protection afforded by BITs to investments not acquired "in accordance with the laws and regulations". Indeed, Respondent has consistently maintained that the threshold for the loss of protection encompasses both serious and non-trivial violations of domestic law, as affirmed in several ICSID Tribunal decisions[47]. Claimants' assertion that "both Parties" agree that "only those investments that involve serious or severe breaches of local law" do not warrant protection under the BIT is thus false. Additionally, Respondent has sufficiently elaborated and demonstrated the seriousness and non-triviality of the illegality arising from the conclusion of the 2015 Assignment Agreements and, consequently, the 2016 Assignment Agreements, so as to meet even Claimants' standard for illegality. As Respondent carefully explained, the resolution measures enacted by the Bank of Portugal through its decisions of 3 August 2014, 11 August 2014 and

	22 December 2014 were intended to secure the inherent public interest of financial market stability by ensuring an orderly resolution of BES and safeguarding the transmission of assets from BES to Novo Banco without the risk of further capital outflows[48]. These decisions were taken both under a special legal framework – the 2014 Banking Law (namely, Article 145-A) – and pursuant to an authoritative power to issue binding, imperative and self-executing acts which constitute a core expression of the Bank of Portugal's role in resolution procedures[49]. Contravention of these instruments is illegal in Portuguese law[50]. Both the 2015 and 2016 Assignment Agreements clearly breached the Bank of Portugal's Decisions as they were based on false premises aimed at circumventing the effects of those decisions: (i) on the premise that an event of default under the Oak Loan had occurred on 29 December 2014, though, pursuant to the Bank of Portugal's Decision of 11 August 2014 (R-0003), no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make payments; and (ii) on the premise that the borrower under the Facility Agreement was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[51]. The same reasoning applies to the Respondent's *ratione materiae* objection on lack of title[52]. As to Claimants' assertion that "*the question of whether the Claimants acquired their interests in the Oak Loan in violation (serious or otherwise) of Portuguese laws and regulations is an objective one of Portuguese law*", this does not diminish the importance of the Respondent's request for documents. Tribunals consider the intention

[46] The Respondent has observed that an inadvertent mistake was made in the document request by referring to Schedule 5 (Form of Transfer Certificate) instead of Schedule 6 (Form of Assignment Agreement), which is the document that actually contains the relevant contractual framework for the 2016 Assignment Agreements (and the 2015 Assignment Agreements, for that matter) and therefore that should have been cited and hereby requests that all references to Schedule 5 (Form of Transfer Certificate) be read as Schedule 6 (Form of Assignment Agreement).

[47] *See* Memorial on Jurisdiction, Section 3.2.2.

[48] *See* Memorial on Jurisdiction, paras. 189 to 190; 203 to 206.

[49] *See* Memorial on Jurisdiction, paras. 188.

[50] *See* Memorial on Jurisdiction, paras. 198 to 200.

[51] *See* Respondent's Memorial on Jurisdiction, paras. 192 to 197 and 216 to 225.

[52] *See* Respondent's Memorial on Jurisdiction, paras. 216 to 225.

	underlying the investor's conduct in determining whether illegality is grave[53]. The requested documents are relevant and material to the purpose of establishing Respondent's objections *ratione materiae* illegality and lack of title to jurisdiction and in assisting the Tribunal to determine the illegality of the investments and material to the outcome of the proceedings at their current stage because they will assist in establishing that the 2016 Assignment Agreements were made in willful disregard for Portuguese laws and regulations or, at the very least, in the absence of necessary diligence. Also, even on Claimants' case whereby the transfer of title is a matter to be determined in English law, the validity of such title would be examined by reference to the intention of the parties to the assignment agreements, and whether the parties, by the Assignment Agreements, were attempting to bypass foreign law.[54]
Decision of the Tribunal	Granted in part. The Claimants shall produce responsive documents in categories a, b, c, d, and e, subject to the provisos in PO4 on (i) privilege, (ii) confidentiality, and (iii) possession, custody, or control. Requests for documents in categories f and g are denied as, *prima facie*, insufficiently relevant and material.

[53] *See* Memorial on Jurisdiction, para. 184, citing *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, (Exhibit RL-0098), para. 156 (Translation provided by counsel: "And the severity will be measured by determining the relevance of the breached regulation and the intention of the investor.") (Spanish original: "Y la gravedad se medirá determinando la relevancia de la normativa infringida y la intención del inversor.").

[54] *See e.g., Foster v. Driscoll and Others*, [1929] 1 KB 470, (**Exhibit R-0156**). The rule in such case provides that a contract will be unenforceable in English law where "the parties have entered into their arrangement with the object and intention that an act be undertaken which is illegal in the place in which it is to be performed.".

Document Request Number	**2**
Documents or Category of Documents Requested	All documents and communications between 2016 and the filing of Claimants' Request for Arbitration relating to Claimants' decision to initiate the present arbitration, including but not limited to: a. Board meeting minutes, resolutions, and other documents relating to Claimants' decision to initiate the arbitration; and b. Internal memoranda, presentations, business analyses, due diligence reports, and/or communications relating to decision to initiate the arbitration.
Relevance and Materiality according to the Requesting Party	Respondent has argued that there is no jurisdiction *ratione personae* because Claimants are not effectively managed from Mauritius[55]. Claimants deny this and argue in their Counter-Memorial on Jurisdiction that "the date at which a claimant must show that it was an 'investor' is the date on which proceedings were commenced."[56] The requested categories of documents are relevant and material to showing whether Claimants were effectively managed from Mauritius on the date that Claimants argue is the relevant date for assessing effective management. Respondent has argued that the Tribunal lacks jurisdiction because Claimants' institution of these proceedings amounts to an abuse of process[57]. In this regard, Claimants admit that Elliott and Silver Point transferred their interests in the Oak Loan to their Mauritian companies because they "wanted to avail themselves of Mauritius' bilateral investment treaty with Portugal, which would protect the Claimants against future, and at the time unforeseeable, misconduct by the State against their investments"[58]. Because the dispute already existed at the time of the transfer, or was at least foreseeable, Claimants' institution of these proceedings amounts to an abuse

[55] Respondent's Memorial on Jurisdiction, para. 94.

[56] Claimants' Counter-Memorial on Jurisdiction, para. 63.

[57] Respondent's Memorial on Jurisdiction, paras. 250-265.

[58] Claimants' Memorial, para. 5.

	of process.[59] In response, Claimants assert, *inter alia*, that "Respondent is unable to show that the specific dispute at issue … was foreseeable"[60] when they acquired their investment and that, at that time, they "were not aware of what their entitlement to NCWO rights would be."[61] The requested categories of documents are relevant and material to showing that Claimants restructured their investment with the intent to obtain protection under the BIT so as to initiate this arbitration.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "all documents and communications" spanning a period of nearly seven years. It therefore fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii) of the IBA Rules. The request is also overbroad because it fails to exclude documents that the Claimants have already submitted to the record in these proceedings, namely: • Silver Point Mauritius, Minutes of Board Meetings, 27 October 2021 (C-0033); • Silver Point Mauritius, Draft Minutes of Board Meetings, 9 June 2022 (C-0034); • Silver Point Mauritius, Directors' Written Resolution, 28 September 2022 (C-0143); • Suffolk (Mauritius) Limited, Directors' Written Resolution, 5 October 2022 (C-00141); • Mansfield (Mauritius) Limited, Directors' Written Resolution, 5 October 2022 (C-0142); • Power of Attorney by Suffolk (Mauritius) Limited to Fietta LLP, 9 September 2022 (C-0144/ C0009); • Power of Attorney by Mansfield (Mauritius) Limited to Fietta LLP, 9 September 2022 (C-0145/ C0010); • Power of Attorney by Silver Point Mauritius to Fietta LLP, 28 September 2022 (C-0146 / C0011); • Power of Attorney by Suffolk (Mauritius) Limited to PLMJ, 9 September 2022 (C-0147/ C0012); • Power of Attorney by Mansfield (Mauritius) Limited to PLMJ, 9 September 2022 (C-0148/ C0013); • Power of Attorney by Silver Point Mauritius to PLMJ, 28 September 2022 (C-0149/ C0014).

[59] Respondent's Memorial on Jurisdiction, para. 251.

[60] Claimants' Counter-Memorial on Jurisdiction, para. 270.

[61] Claimants' Counter-Memorial on Jurisdiction, para. 272.

	Second, documents responsive to this request are covered by legal privilege, within the meaning of Article 9.2(b) of the IBA Rules, since the documents concerned were created in connection with and for the purpose of providing or obtaining legal advice (as set out in Article 9.4(a)). Third, the production of the requested documents would be unreasonably burdensome under Article 9.2(c) of the IBA Rules. The Claimants would have to search through, for, and organise, a large quantity of documents, most notably "communications" (including with legal counsel) relating to Claimants' decision to initiate the present arbitration. It would be contrary to considerations of procedural economy for the Claimants to be required to identify and produce such significant volumes of documents, and disproportionate to the probative value of the requested documents (and therefore contrary also to Article 9.2(g) of the IBA Rules). Fourth, the Respondent has failed to explain how documents "relating to Claimants' decision to initiate the present arbitration" are sufficiently relevant or material (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules) to the Tribunal's jurisdiction *ratione personae*. The Respondent has not demonstrated why the decisions specifically relating to the commencement of this arbitration are relevant, or still less material, to an assessment of the effective management of the Claimants in the run up to the date on which these proceedings were commenced (i.e., the date of the Request for Arbitration). In addition, as the Claimants demonstrated in the Counter-Memorial, investment tribunals have routinely recognised that the date at which a claimant must show that it was an "investor" (or had a "main office" or "*sede*") in the host State is the date on which proceedings were commenced.[62] The Respondent has not, therefore, demonstrated how documents predating that date by many years are relevant to the Tribunal's jurisdiction *ratione personae*.

[62] Claimants' Counter-Memorial on Jurisdiction, para. 63, referring to *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, para. 251, **CL-0018**.

	Fifth, the Respondent has failed to explain how documents *post-dating* the Claimants' acquisition of their investments in March and April 2016 could be relevant, let alone material (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules), to the question of whether "the dispute already existed at the time of the transfer" (i.e., the Respondent's objection *ratione temporis*).
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[63] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, i.e., board meeting minutes, resolutions, memoranda, presentations, business analyses, and due diligence reports. Additionally, Respondent has limited the category of documents sought to those produced between 2016 and 2022, a period during which Claimants were anticipating litigation. As set out in Respondent's proposed general "Additional Terms," Respondent requests documents that are not within its possession, custody or control,[64] and therefore this Document Request should be understood to exclude the documents identified by Claimants in their objections that they have already produced. Second, with regard to Claimants' assertion that the documents responsive to the request are covered by legal privilege, Respondent refers the Tribunal to its reply in paragraph 30 above, building on paragraph 17. Moreover, Respondent's request plainly covers categories of documents that are not likely to be covered by legal privilege, including, *inter alia*, board meeting minutes, resolutions, business analyses, etc. Indeed, as Claimants note above, they have already produced seventeen documents which they consider to be responsive to this document request. These documents refute Claimants' broad and unsupported assertion of privilege, as they demonstrate that a large number of documents that are responsive to this request are not privileged. For example, Claimants seem to accept that Minutes of Board or Shareholder meetings are not privileged, nor are company resolutions or activity plans.

[63] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151),** para. 6.60.

[64] *See supra*, para. 15.

	Moreover, Claimants have failed to demonstrate the necessary requirements for establishing privilege. Reliance on Article 9.2(b) of the IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and providing specific details demonstrating how such documents meets the criteria for legal privilege, such as the nature of the legal advice sought, the context in which the documents were created, and the relationship between the parties involved in the same. Claimants did not do any of this. Instead, Claimants limited this objection to simply stating that "the documents concerned were created in connection with and for the purpose of obtaining legal advice," without even specifying why such legal advice was required and obtained. Therefore, and to the extent that Claimants intend to withhold any documents responsive to this request on the grounds of privilege, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege. Third, Claimants' assertion that it would be unreasonably burdensome to produce responsive documents is without merit. Pursuant to Articles 9.2(c) and 9.2 (g) of the IBA Rules, Claimants are required only to undertake a "reasonable" and "proportionate" search for such responsive documents; they have not identified any reason that they are unable to do so. Fourth, Claimants' objection to the relevance and materiality of the requested documents to jurisdiction *ratione personae* should be rejected because it rests entirely on a legal theory, asserted for the first time in Claimants' Counter-Memorial, that the date for determining jurisdiction *ratione personae* is "the date on which proceedings were commenced."[65] Notably, Claimants do not dispute the relevance and materiality of these documents if the applicable time frame for determining jurisdiction *ratione personae* is the time of the investment or the time that

[65] *See* Claimants' Counter-Memorial, para. 63.

	the dispute arose. Respondent disputes Claimants' position concerning the relevant date, but has not yet had an opportunity to rebut it. It would be inappropriate for the Tribunal to resolve this legal dispute at the document production stage. In any event, Claimants are wrong that the date for determining jurisdiction *ratione personae* is "the date on which proceedings were commenced;"[66] as Respondent will demonstrate in its Reply on Jurisdiction, Claimants must meet nationality requirements at the time of the investment and the time the dispute arose.[67] Moreover, even if Claimants' theory is accepted, the case Claimants cite in support of their argument, *Alverley Investments Ltd.*, expressly acknowledges that consideration of "evidence of the Claimants' conduct before" the date on which proceedings were commenced is "unavoidable" and relevant "insofar as it gives an insight into the position at the date of commencement."[68] Moreover, documents regarding Claimants' decision to commence arbitration in the run-up to arbitration are relevant and material to Respondent's objection on jurisdiction *ratione materiae* because they will be probative of Claimants' "effective management" and independent decision-making during the period relevant to this dispute. Fifth, Respondent notes that Claimants have not objected to this document request on that basis that the requested category of documents post-dating the acquisition of Claimants' interests in the Oak Loan are not relevant or material to Respondent's abuse of process objection, which is a basis of its request. Accordingly, Claimants' objection based on lack of relevance and materiality to jurisdiction *ratione temporis* is irrelevant. In any event, such documents post-dating the acquisition of Claimants' interests in the Oak Loan are relevant and material to the existence, or foreseeability, of a dispute because they are likely to provide information regarding decisions that had just recently been made. Notably, by limiting this objection to documents post-dating the transfer, Claimants accept that documents that pre-date their acquisition of their interests in the Oak Loan are relevant and material to Respondent's arguments on jurisdiction *ratione temporis*.
Decision of the Tribunal	Granted in part. The request, in category a, for the production of "[i]nternal memoranda, presentations, investment analysis and proposals, notes, opinions, due diligence reports, communications or any similar documents relating to Claimants' alleged acquisition of, and their parents' and affiliates' decisions to purport to transfer to Claimants,

[66] *See* Claimants' Counter-Memorial, para. 63.

[67] *See supra*, Respondent's Reply to Objections to Document Request No. 1.

[68] *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, para. 251, (**CL-0018**)

	interests in the Oak Loan" over a nearly seven-year period is insufficiently narrow and specific. The Claimants shall produce documents in category b, subject to the proviso in PO4 on privilege.
Document Request Number	**3**
Documents or Category of Documents Requested	Documents or communications between 2016 and the filing of Claimants' Request for Arbitration relating to the duties, background and qualifications of each Mauritian director of each Claimant, including but not limited to: **For Suffolk and Mansfield**: Pamela Balassoupramanien, Deven Coopsamy, Abdool Azize Owasil, Naushad Ally Sohoboo, Sandeep Fakun, Vandana Jhupsee-Ramooah; and Sevin Chendriah **For Silver Point**: Mario Chutel and Subash Lallah. Categories of documents requested include but are not limited to: a. Documents or communications relating to the selection process of directors, officers, or management employees of Claimants and decision to appoint these individuals as directors, officers, or management employees of Claimants; b. Resumes or CVs for each these individuals at the time of their appointment; c. Documents identifying other entities for which these individuals serve as corporate directors; d. Contracts or agreements governing these individuals' relationships with Claimants; e. Documents or communications addressed to, from, or copying these individuals, concerning their duties with regard to Claimants and made in discharging their duties.

Relevance and Materiality according to the Requesting Party	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[69] In order to demonstrate effective management, Claimants must show that their day-to-day substantive management and business activities actually take place in Mauritius.[70] In their Counter-Memorial on Jurisdiction, Claimants assert that they are effectively managed from Mauritius because, *inter alia*, they engage in active decision-making at board meetings held in Mauritius.[71] This document request is relevant and material to testing the veracity of these assertions.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "all documents or communications" spanning a period of nearly seven years. It therefore fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii) of the IBA Rules. Second, this request seeks production of documents that are not "relevant to the dispute" or "material to the outcome of the case", contrary to paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. This is one of a number of the Respondent's requests which seeks the production of a range of documents that are largely irrelevant to the case and immaterial to its outcome in accordance with the applicable test for jurisdiction *ratione personae*. As the Claimants explained in paragraph 23 of their comments at the outset of these objections, the requirement under the BIT that the Claimants have a "main office" (or "*sede*", in the Portuguese version) in the territory of Mauritius means the "place of 'effective management' or 'some sort of actual or genuine corporate activity'",[72] and is a "flexible test". Applying the wrong test (i.e., that of "substantive management and business activities"), the Respondent seeks production of documents which are irrelevant and have not been taken into account by other tribunals considering objections to jurisdiction *ratione personae* based on similarly-worded BITs. Further, the Claimants have already produced extensive contemporaneous evidence relating to the factors routinely considered

[69] Respondent's Memorial on Jurisdiction, para. 90.

[70] Respondent's Memorial on Jurisdiction, para. 91.

[71] Claimants' Counter-Memorial on Jurisdiction, paras. 75 to 77.

[72] Claimants' Counter-Memorial on Jurisdiction, para. 46.

	by investment tribunals in determining the location of a claimant's "*sede*", most notably those identified in the Claimants' Counter-Memorial on Jurisdiction at paragraphs 53 and 54. The Respondent has therefore failed to demonstrate the relevance and materiality of the further documents sought in this request. Third, the production of the requested documents would be unreasonably burdensome under Article 9.2(c) of the IBA Rules. The Claimants would have to search through, for, and organise, a large quantity of documents, most notably "communications" covering a nearly seven-year period. It would be contrary to considerations of procedural economy for the Claimants to be required to identify and produce such significant volumes of documents, and disproportionate to the probative value of the requested documents (and therefore contrary also to Article 9.2(g) of the IBA Rules). Without prejudice to the above objections, including in particular the lack of relevance (and less still materiality) of the documents requested to the outcome of this case, the Claimants agree to produce non-privileged documents, within their possession, custody and control, falling within the following categories that are not already in the custody and control of the Respondent (to the extent such documents exist): a. Documents setting out the "decision[s] to appoint these individuals as directors, officers, or management employees of Claimants"; b. "Resumes or CVs for each these individuals at the time of their appointment"; and e. Board minutes of Suffolk, Mansfield and Silver Point "concerning their duties with regard to Claimants and made in discharging their duties". The Claimants reserve the right to redact personal information contained in such documents it agrees to produce.

Reply to Objections to Document Request	Respondent acknowledges Claimants' agreement to produce non-privileged documents within their possession, custody, and control concerning a subset of Respondent's Document Request. Respondent maintains its request for additional documents responsive to this request, all of which are relevant and material to its jurisdictional objection, namely: a. Documents or communications relating to the selection process of directors, officers, or management employees of Claimants; c. Documents identifying other entities for which these individuals serve as corporate directors; d. Contracts or agreements governing these individuals' relationships with Claimants; e. Documents or communications addressed to, from, or copying these individuals, concerning their duties with regard to Claimants and made in discharging their duties. Respondent contests Claimants' objections to the document request. First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[73] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, e.g., contracts or agreements, or communications to, from, or copying the identified individuals. Additionally, Respondent limited the time frame of the category of documents sought to a period between 2016 and 2022, a period during which Claimants were anticipating litigation. Second, Claimants' objection based on the relevance and materiality of the requested documents to jurisdiction *ratione personae* must be rejected for the reasons given in paragraphs 28-29 above. Claimants' objection is wholly

[73] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**), para. 6.60.

	dependent on their legal theory regarding the applicable test for determining jurisdiction *ratione personae*, which Respondent disputes. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's test for determining jurisdiction *ratione personae* applies. Third, Claimants' assertion that it would be unreasonably burdensome to produce responsive documents is without merit. Pursuant to Articles 9.2(c) and 9.2 (g) of the IBA Rules, Claimants are required only to undertake a "reasonable" and "proportionate" search for such responsive documents; they have not identified any reason that they are unable to do so. Respondent notes and does not object to Claimants' reservation of rights vis-à-vis the redaction of personal information.
Decision of the Tribunal	Granted in part. The Tribunal notes the Claimants' undertaking to produce specified "non-privileged documents, within their possession, custody and control, falling within the following categories that are not already in the custody and control of the Respondent (to the extent such documents exist)." The Claimants shall also produce documents in categories c and d, subject to the provisos in PO4 on (i) privilege and (ii) possession, custody, or control. The remaining document requests are denied as, *prima facie*, not sufficiently relevant and material.

Document Request Number	**4**
Documents or Category of Documents Requested	Documents or communications between 2016 and the filing of Claimant's Request for Arbitration relating to the duties, background and qualifications of each non-Mauritian director of each Claimant, including but not limited to: **For Suffolk and Mansfield**: Elliot Greenberg, Charles Edward Clifton Eckley, James Nicholas Barrie Smith, Rajat Bose, Wing Fai Danny Hui, Daniel Knowles, **For Silver Point**: Daniel Knowles, Jennifer Poccia, Milena Wartak Katarzyna Categories of documents requested include but are not limited to: a. Documents or communications relating to the selection process of directors, officers, or management employees of Claimants and decision to appoint these individuals as directors, officers, or management employees of Claimants; b. Resumes or CVs for each these individuals at the time of their appointment; c. Documents, such as employment contracts and job descriptions, reflecting the nature of the duties these individuals discharged as directors, officers, or management employees of any of Claimants' parents or affiliates; d. Documents or communications addressed to, from, or copying these individuals, concerning their duties with regard to Claimants and made in discharging their duties.

Relevance and Materiality according to the Requesting Party	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[74] Claimants have asserted in their Counter-Memorial on Jurisdiction that "[t]here is no other place that could conceivably be considered the Claimants' 'main office'."[75] Respondent's document request is relevant and material to testing the veracity of this assertion.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "all documents or communications" spanning a period of nearly seven years. It therefore fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii) of the IBA Rules. Second, this request seeks production of documents that are not "relevant to the dispute" or "material to the outcome of the case", contrary to paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. In particular, as the Claimants explained in their comments at the outset of these responses, this is one of a number of the Respondent's requests which seeks the production of a range of documents that are largely irrelevant to the case and immaterial to its outcome in accordance with the applicable test for jurisdiction *ratione personae*. The Respondent seeks production of documents which have not been taken into account by other tribunals considering objections to jurisdiction *ratione personae* based on similarly worded BITs. The Respondent has failed to demonstrate how the categories of document indicated could be relevant to determining whether there is somewhere other than Mauritius that "could conceivably be considered the Claimants' 'main office'." Further, the Claimants have already produced extensive evidence relating to the factors routinely considered by investment tribunals in determining the location of a claimant's "*sede*", most notably those identified in the Claimants' Counter-Memorial on Jurisdiction at paragraphs 53 and 54. The Respondent has therefore failed to demonstrate the relevance and materiality of the further documents sought in this request.

[74] Respondent's Memorial on Jurisdiction, para. 90.

[75] Claimants' Counter-Memorial on Jurisdiction, para 5.

	Third, the production of the requested documents would be unreasonably burdensome under Article 9.2(c) of the IBA Rules. The Claimants would have to search through, for, and organise, a large quantity of documents, most notably "communications" covering a nearly seven-year period. It would be contrary to considerations of procedural economy for the Claimants to be required to identify and produce such significant volumes of documents, and disproportionate to the probative value of the requested documents (and therefore contrary also to Article 9.2(g) of the IBA Rules). Without prejudice to the above objections, including in particular the lack of relevance (and less still materiality) of the documents requested to the outcome of this case, the Claimants agree to produce non-privileged documents, within their possession, custody and control, falling within the following categories that are not already in the custody and control of the Respondent (to the extent such documents exist): a. Documents setting out the "decision[s] to appoint these individuals as directors, officers, or management employees of Claimants"; b. "Resumes or CVs for each these individuals at the time of their appointment"; and d. Board minutes of Suffolk and Mansfield and Silver Point "concerning their duties with regard to Claimants and made in discharging their duties". The Claimants reserve the right to redact personal information contained in such documents it agrees to produce. The Claimants also observe that Daniel Knowles is a director of Suffolk and Mansfield, not of Silver Point Mauritius as the Respondent's request suggests (see the registers of directors produced by the Claimants (C-0008; C-0019 and C-0031).

Reply to Objections to Document Request	Respondent acknowledges Claimants' agreement to produce non-privileged documents within their possession, custody, and control concerning a subset of Respondent's Document Request. Respondent maintains its request for additional documents responsive to this request, all of which are relevant and material to its jurisdictional objection, namely: b. Documents or communications relating to the selection process of directors, officers, or management employees of Claimants; c. Documents identifying other entities for which these individuals serve as corporate directors; d. Contracts or agreements governing these individuals' relationships with Claimants; f. Documents or communications addressed to, from, or copying these individuals, concerning their duties with regard to Claimants and made in discharging their duties. Respondent contests Claimants' objections to the document request. First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[76] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, e.g., contracts or agreements, or communications to, from, or copying the identified individuals. Additionally, Respondent limited the time frame of the category of documents sought to a period between 2016 and 2022, a period during which Claimants were anticipating litigation.

[76] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**), para. 6.60.

	Second, Claimants' objection based on the relevance and materiality of the requested documents to jurisdiction *ratione personae* must be rejected for the reasons given in paragraphs 28-29 above. Claimants' objection is wholly dependent on their legal theory regarding the applicable test for determining jurisdiction *ratione personae*, which Respondent disputes. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's test for determining jurisdiction *ratione personae* applies. Third, Claimants' assertion that it would be unreasonably burdensome to produce responsive documents is without merit. Pursuant to Articles 9.2(c) and 9.2 (g) of the IBA Rules, Claimants are required only to undertake a "reasonable" and "proportionate" search for such responsive documents; they have not identified any reason that they are unable to do so. Respondent notes and does not object to Claimants' reservation of rights vis-à-vis the redaction of personal information.
Decision of the Tribunal	Granted in part. The Tribunal notes the Claimants' undertaking to produce specified "non-privileged documents, within their possession, custody and control, falling within the following categories that are not already in the custody and control of the Respondent (to the extent such documents exist)." The Claimants shall also produce "documents identifying other entities for which these individuals serve as corporate directors" and "contracts or agreements governing these individuals' relationships with Claimants," subject to the provisos in PO4 on (i) privilege and (ii) possession, custody, or control. The remaining document requests are denied as, *prima facie*, not sufficiently relevant and material.

Document Request Number	**5**
Documents or Category of Documents Requested	Employment contracts, work services contracts, and/or job descriptions of Claimants' employees and/or independent contractors between 2016 and the filing of Claimants' Request for Arbitration.
Relevance and Materiality according to the Requesting Party	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[77] As Claimants have conceded, even where a holding company is expected to have limited operational activities within its jurisdiction of incorporation, the effective management test nevertheless requires that such companies "have management."[78] The nature of the day-to-day activities of Claimants' non-director employees (or lack thereof) is relevant and material to demonstrating whether any management is taking place in Mauritius.
Objections to Document Request	The Claimants do not employ individuals and/or independent contractors for their day-to-day operational activities. The Claimants therefore have no documents that are responsive to request no. 5 in their possession, custody or control.
Reply to Objections to Document Request	Claimants' representation that they do not employ individuals and/or independent contractors is noted.
Decision of the Tribunal	The Claimants' representation is noted.

[77] Respondent's Memorial on Jurisdiction, para. 90.

[78] Claimants' Counter-Memorial on Jurisdiction, para. 59(b).

Document Request Number	**6**
Documents or Category of Documents Requested	Corporate bylaws, charters, and/or other documents setting out the corporate governance structures of Claimants between 2016 and the filing of Claimants' Request for Arbitration.
Relevance and Materiality according to the Requesting Party	Respondent has argued that Claimants are not effectively managed from Mauritius.[79] However, Claimants have provided little current information about the processes by which the day-to-day management of Claimants takes place.[80] The requested documents are probative of whether Claimants engage in independent decision-making, or whether all of the decisions undertaken in the course of their management must be authorized or approved by their corporate parents and affiliates. The requested categories of documents are therefore relevant and material to Respondent's argument that this Tribunal lacks jurisdiction *ratione personae*.
Objections to Document Request	The Claimants agree to produce non-privileged and responsive documents, within their possession, custody and control, that are not already in the custody and control of the Respondent (to the extent such documents exist and have not already been produced in the arbitration).
Reply to Objections to Document Request	Respondent acknowledges Claimants' agreement to produce documents responsive to this request.
Decision of the Tribunal	The Claimants' representation is noted.

[79] Respondent's Memorial on Jurisdiction, para. 94.

[80] *See* Claimants' Counter-Memorial on Jurisdiction, paras. 71 to 96.

Document Request Number	**7**
Documents or Category of Documents Requested	Internal compliance policies, due diligence protocols, or any other documents bearing on processes for the day-to-day management and administration of the Claimants.
Relevance and Materiality according to the Requesting Party	Respondent has argued that Claimants are not effectively managed from Mauritius.[81] However, Claimants have provided essentially no information about the processes by which the day-to-day management of Claimants takes place.[82] The requested documents are probative of whether Claimants have actually engaged in any independent decision-making, and what, if any, management decisions are actually undertaken at its purported "main office" in Mauritius. The requested categories of documents are therefore relevant and material to Respondent's argument that this Tribunal lacks jurisdiction *ratione personae*.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "[i]nternal compliance policies, due diligence protocols, or *any other documents*" (emphasis added) with no defined date range. It therefore fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii) of the IBA Rules. Second, this request seeks production of documents that are not "relevant to the dispute" or "material to the outcome of the case", contrary to paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. The Respondent

[81] Respondent's Memorial on Jurisdiction, para. 94.

[82] *See* Claimants' Counter-Memorial on Jurisdiction, paras. 71 to 96.

	has failed to demonstrate how documents emanating from the entire corporate history of each of the Claimants could be relevant, let alone material, to the Respondent's *ratione personae* objection.
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[83] Here, there should be no difficulty in making such a determination. Nonetheless, Respondent agrees to limit the defined date range of the request to documents produced between 2016 and the filing of Claimants' Request for Arbitration, the period during which Claimants were anticipating litigation. Second, Claimants' objection based on the relevance and materiality of the requested documents to jurisdiction *ratione personae* must be rejected for the reasons given in paragraphs 28-29 above. Claimants' objection is wholly dependent on their legal theory regarding the applicable test for determining jurisdiction *ratione personae*, which Respondent disputes. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's test for determining jurisdiction *ratione personae* applies.
Decision of the Tribunal	Denied. The request for all documents, over a seven-year period, "bearing on processes for the day-to-day management and administration of the Claimants" is not sufficiently narrow and specific.

[83] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**), para. 6.60.

Document Request Number	**8**
Documents or Category of Documents Requested	Current and former contracts, and all communications, from 2016 to the filing of Claimants' Request for Arbitration, between Claimants and: a. Their Mauritian corporate management firms (IQ/EQ Corporate Services for Suffolk and Mansfield, and Citco (Mauritius) Ltd. for Silver Point Mauritius); and b. Other corporate services providers in Mauritius, including but not limited to PricewaterhouseCoopers.
Relevance and Materiality according to the Requesting	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius, in part because their day-to-day management has been outsourced to corporate management firms.[84] Claimants respond by arguing that "the use of management companies or external regulatory compliance services is a legitimate business decision with no (negative) bearing on the location of the entity's 'effective management.'"[85] Claimants have also argued that they engage in an appropriate "level of activity" in Mauritius because of their relationship with services suppliers in Mauritius including PricewaterhouseCoopers.[86] Documents responsive to this request will provide details concerning the services that these firms provide Claimants, which is relevant and material to whether Claimants' contracting these firms for such services bears on their "effective management" in Mauritius.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "all communications" between the Claimants and their "corporate service providers in Mauritius" spanning a period of nearly seven years. To that extent, it fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii).

[84] Respondent's Memorial on Jurisdiction, para. 90.

[85] Claimants' Counter-Memorial on Jurisdiction, para. 65.

[86] Claimants' Counter-Memorial on Jurisdiction, para. 73.

	Second, the production of the requested "communications" would be unreasonably burdensome under Article 9.2(c) of the IBA Rules. The Claimants would have to search through, for, and organise, a large quantity of "communications" over a seven-year period. Third, the Respondent has failed to demonstrate that such "communications" are relevant or – still less – material (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules) to the issue of "whether Claimants' contracting these firms for such services bears on their 'effective management' in Mauritius" (i.e., the Respondent's *ratione personae* objection). The Claimants have already produced extensive evidence relating to the factors routinely considered by investment tribunals in determining the location of a claimant's "*sede*", most notably those identified in the Claimants' Counter-Memorial on Jurisdiction at paragraphs 53 and 54. The Respondent has therefore failed to demonstrate the relevance and materiality of the further documents sought in this request. Without prejudice to the above objections, the Claimants agree to produce non-privileged "[c]urrent and former contracts" from 2016 to the filing of the Claimants' Request for Arbitration, within their possession, custody and control between Claimants, on the one hand, and on the other (i) their Mauritian corporate management firms (IQ/EQ Corporate Services for Suffolk and Mansfield, and Citco (Mauritius) Ltd. For Silver Point Mauritius) or (ii) other corporate services providers in Mauritius, including but not limited to PricewaterhouseCoopers, that are not already in the custody and control of the Respondent (to the extent such documents exist).
Reply to Objections to Document Request	Respondent acknowledges Claimants' agreement to produce non-privileged documents within their possession, custody, and control concerning a subset of Respondent's Document Request. Respondent repeats its request for additional categories of documents which are relevant and material to its jurisdictional objections, namely communications between Claimants and their corporate services providers. Respondent contests Claimants' objections to the document request.

	First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[87] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, which are restricted to contracts/agreements and communications between a limited number of senders and recipients. Additionally, Respondent has imposed a fixed timeframe on the category of documents sought, limiting it to a period between 2016 and 2022 during which Claimants were anticipating litigation. Second, Claimants' assertion that it would be unreasonably burdensome to produce responsive documents is without merit. Moreover, the relevant documents can easily be identified merely with reference to the sender and recipient of a given communication. Respondent further notes that, pursuant to the IBA Rules, Pursuant to Articles 9.2(c) and 9.2 (g) of the IBA Rules, Claimants are required only to undertake a "reasonable" and "proportionate" search for such responsive documents; they have not identified any reason that they are unable to do so. Third, Claimants' objection based on the relevance and materiality of the requested documents to jurisdiction *ratione personae* must be rejected for the reasons given in paragraphs 28-29 above. Claimants' objection is wholly dependent on their legal theory regarding the applicable test for determining jurisdiction *ratione personae*, which Respondent disputes. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's test for determining jurisdiction *ratione personae* applies. Additionally, on Claimants' own case, the documents requested are relevant and material to the issue of jurisdiction *ratione personae*. In particular, Claimants have submitted that their relationships with corporate management firms and their engagement of auditors in Mauritius are factors weighing in favor of a finding that they have their "main office" or "*sede*" in Mauritius.[88] Documents concerning those relationships, which are the documents responsive to this request, are therefore relevant and material to determining whether such relationships weigh in favor or against determining that Claimants are effectively managed from Mauritius.

[87] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**), para. 6.60.

[88] *See* Claimants Memorial on the Merits, para.182(d)-(e); Claimants' Counter-Memorial on Jurisdiction, paras.65, 71, 83, 90.

Decision of the Tribunal	Granted in part. The Tribunal notes the Claimants' undertaking to produce specified documents. The remaining requests are denied as insufficiently narrow and specific.

Document Request Number	**9**
Documents or Category of Documents Requested	Documents and communications concerning business decisions made by Claimants, including in board meetings, shareholder general meetings, and activity plans, between 15 December 2015 and the filing of the Request for Arbitration. These documents should include, but not be limited to: a. Documents and communications relating to preparation of the Silver Point Mauritius Activity Plan (C-0028), dated 31 December 2015; b. Any minutes of corporate resolutions, including shareholders' general meetings and board of directors' meetings; c. Any documents, including but not limited to letters, annexes, plans, resolutions, or the like, discussed at board meetings or referenced in the minutes of board meetings and shareholder general meetings, and activity plans; d. Documents and communications concerning Claimants' investment portfolios from 2016 to the filing of Claimants' Request for Arbitration; and e. Documents and communications relating to the decision of Suffolk and Mansfield to make investments in India.
Relevance and Materiality according to the Requesting	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[89] To contest this point, Claimants argue that they make investment decisions other than those involving the Oak Loan.[90] Documents reflecting how Claimants' substantive business decisions, other than those related to the Oak Loan, were made are relevant and material to demonstrating the location from which Claimants are effectively managed.

[89] Respondent's Memorial on Jurisdiction, para. 90.

[90] Claimants' Counter-Memorial on Jurisdiction, paras. 74 and 86.

Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers "documents and communications" over a period of nearly seven years. To that extent, it fails to identify a "narrow and specific" requested category of documents, contrary to the requirements of Article 3.3(a)(ii) of the IBA Rules. Second, the production of the requested documents would be unreasonably burdensome under Article 9.2(c) of the IBA Rules. The Claimants would have to search through and organise a large quantity of documents covering *every single business decision* made over a nearly seven-year period. It would be contrary to considerations of procedural economy for the Claimants to be required to identify and produce such significant volumes of documents, and disproportionate to the probative value of the requested documents (and therefore contrary also to Article 9.2(g) of the IBA Rules). Third, the Respondent has failed to demonstrate that such documents are "material" (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules) to "demonstrating the location from which Claimants are effectively managed" (i.e., the Respondent's *ratione personae* objection). As the Claimants explained in their comments at the outset of these responses (paragraph 23 above), the requirement under the BIT that the Claimants have a "main office" (or "*sede*", in the Portuguese version) in the territory of Mauritius means the "place of 'effective management' or 'some sort of actual or genuine corporate activity'", which is a "flexible test" that necessarily takes into account the individual circumstances of the investor. In this case, the individual circumstances of the Claimants include not only their status as holding company subsidiaries within wider group companies Elliott International group and Silver Point Capital, but also the following. As the Claimants explained

	in their Memorial on the Merits, Suffolk's and Mansfield's principal activity is to own financial investments[91]; while Silver Point Mauritius was incorporated for the purposes of holding "potential investments in debt, equity or other securities, obligations or instruments primarily focusing on misvalued, mislevered, leveraged or financially distressed companies and in event-oriented and other special situations".[92] In its Counter-Memorial on Jurisdiction, the Claimants explained that Suffolk and Mauritius "serve[] […] important strategic business function[s] for the wider group, acting as a gateway for investment opportunities in India", that they have had "various exposures to Indian equity futures" and that they have "held investments in AstraZeneca in India".[93] The Claimants have already produced evidence relating to these points. They have also produced extensive evidence relating to the other factors routinely considered by investment tribunals, most notably those identified in the Claimants' Counter-Memorial on Jurisdiction at paragraphs 53 and 54. The Respondent has therefore failed to demonstrate the materiality of the further documents sought in this request. Fourth, given that the "documents and communications" requested in category "a" predate the incorporation of Silver Point Mauritius (on 28 January 2016), the Respondent has failed adequately to explain why it assumes that those documents are within the possession, custody or control of the Claimants, as opposed to that of Silver Point Mauritius' affiliates in the Silver Point Capital Group. Fifth, the Claimants have already submitted as exhibits, and therefore the Respondent already has in its possession, custody and control, documents responsive to the request at category "e", for example: C-0005, C-0007, and C-0193 (in relation to Suffolk), and C-0016 and C-0213 (in relation to Mansfield). The Respondent has failed to demonstrate the relevance and materiality to its jurisdiction *ratione personae* objection of any further "[d]ocuments and communications relating to the decision of Suffolk and Mansfield to make investments in India".

[91] Memorial on the Merits, paras. 22 and 25.

[92] Memorial on the Merits, para. 28.

[93] Counter-Memorial on Jurisdiction, paras. 74 and 86.

Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, Respondent's request is not overbroad because it contains "a description in sufficient detail… of a narrow and specific requested category of documents." A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[94] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, e.g., minutes of corporate resolutions, including shareholders' general meetings and board of directors' meetings, as well as documents discussed at those meetings. Additionally, Respondent limited the time frame of the category of documents sought to a period between 2016 and 2022, a period during which Claimants were anticipating litigation. Second, Claimants' assertion that it would be unreasonably burdensome to produce responsive documents is without merit. Pursuant to Articles 9.2(c) and 9.2 (g) of the IBA Rules, Claimants are required only to undertake a "reasonable" and "proportionate" search for such responsive documents; they have not identified any reason that they are unable to do so. Third, Claimants' objection based on the relevance and materiality of the requested documents to jurisdiction *ratione personae* must be rejected for the reasons given in paragraphs 28-29 above. Claimants' objection is wholly dependent on their legal theory regarding the applicable test for determining jurisdiction *ratione personae*, which Respondent disputes. It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's test for determining jurisdiction *ratione personae* applies. Moreover, in making their objection, Claimants state that their business activities, including in India, are individual circumstances of each Claimant that should be taken into account in applying a "flexible test" for effective management in Mauritius. Claimants similarly point to Silver Point Mauritius' "purposes" as set out in its 31 December 2015 Activity Plan,[95] neglecting to mention that it appears to have been created entirely for purposes

[94] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit**), para. 6.60.

[95] *See* Silver Point Mauritius Activity Plan (31 Dec. 2015) (**C-0028**).

	of receiving interests in the Oak Loan.[96] The fact that "Claimants have already produced evidence relating to these points" is not a reason to find that the requested documents are not relevant or material. If anything, the need to apply a flexible test to determining the location of effective management of an entity underscores the relevance of the requested documents, which would illustrate how and from where Claimants make their substantive business decisions, if any, other than as relate to the Oak Loan. Fourth, Claimants' objection based on the fact that the documents in "category "a" predate the incorporation of Silver Point Mauritius" and their assertion that such documents are not within their possession, custody and/or control should be rejected for the reasons outlined in paragraphs 31 to 38 above. In particular, it is reasonable to infer that Silver Point Mauritius—and each of the other Claimants—has possession, custody, and control over responsive documents, and/or can easily obtain those documents from corporate parents or affiliates, because they have produced documents in this arbitration prepared by Silver Point Mauritius' parents or affiliates that predate the incorporation of Silver Point Mauritius, e.g., documents C-0028, C-0056, C-0063, C-0068, and C-0187. Fifth, to the extent that Claimants recognize the relevance and materiality of the documents responsive to this request that they have produced to the issue of jurisdiction *ratione personae*, there is no reason to permit them to avoid producing the remaining set of similarly relevant and material documents. As set out in Respondent's proposed general "Additional Terms," Respondent requests documents which are not within its possession, custody, or control, and therefore this document request should be understood to exclude the documents identified by Claimants in their objections as already produced.
Decision of the Tribunal	Granted in part. The Claimants shall produce documents in categories a and b, subject to the proviso in PO4 on possession, custody, or control. The remaining requests are denied as insufficiently narrow and specific.

[96] *Id.*, 2.0 Background ("The Company is being created to hold an investment in a Portuguese bank, Novo Banco (which bank inherited substantially all the assets and liabilities of Banco Espírito Santo, S.A. pursuant to a resolution measure dated 3 August 2014) and/or other potential investments…")

Document Request Number	**10**
Documents or Category of Documents Requested	Claimants' financial statements from incorporation until the present date and any supporting documentation. For the avoidance of doubt, in respect of the year 2023, this includes Suffolk Mauritius's and Mansfield's financial statements, as well as any Minutes of the Board of Directors of Suffolk and Mansfield, resolutions, internal correspondence, notes, memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan.
Relevance and Materiality according to the Requesting	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[97] Claimants have responded that there is evidence of effective management because they engage in appropriate levels of financial activity.[98] The requested category of documents is relevant and material to the question of whether Claimants have levels of financial activity that would be expected for a holding company engaged in investment activities in Mauritius. Respondent has also argued that this Tribunal lacks jurisdiction *ratione materiae* because, *inter alia*, Claimants Suffolk Mauritius and Mansfield did not pay cash consideration for the alleged acquisition of their purported interests in the Oak Loan and therefore the contribution requirement for an investment to qualify as such under Article 1(1) of the BIT and 25(1) of the ICSID Convention was not met in respect of such Claimants. Indeed, in the Request for Bifurcation, Respondent noted that "despite asserting that Suffolk Mauritius and Mansfield each paid consideration for the acquisition of the credits, Claimants have come forward with no evidence of the transfer of those funds. Moreover, according to the financial statements, it appears that the consideration, at least in respect of Suffolk Mauritius and Mansfield, was paid in shares. That means that these entities did not make any effective cash investment"[99]. Claimants, in their Response to the Request for Bifurcation, have repeated that "Suffolk paid cash consideration of approximately USD 24.5 million for its investment" and "Mansfield paid cash consideration

[97] Respondent's Memorial on Jurisdiction, para. 90.

[98] Claimants' Counter-Memorial on Jurisdiction, paras. 73, 85, 92.

[99] Respondent's Request for Bifurcation, para. 24.

	of approximately USD 12.6 million for its investment"[100] and, in respect of Respondent's argument that Suffolk's and Mansfield's 2022 financial statements evidence that both Claimants agreed to pay in shares, Claimants simply stated they "intend to clarify these further at an appropriate time in the proceedings"[101]. Respondent has maintained the argument in the Memorial on Jurisdiction[102]. Although this issue had already been raised by the Respondent in the Request for Bifurcation, on the Counter-Memorial on Jurisdiction, Claimants have argued for the first time that "The Claimants Suffolk and Mansfield noticed and have now rectified an error discovered in the notes to their statutory financial accounts for 2022, which referred to "shares" instead of "cash" payment for the acquisition of the investment. This mistake has been rectified in the equivalent notes of the 2023 statutory financial accounts, which confirm that Suffolk and Mansfield paid cash consideration to acquire their interests in the Oak Loan"[103]. The requested documents in respect of Claimants Suffolk and Mansfield are relevant and material to demonstrate that their explanation regarding the identification of an alleged error in that respect in their financial statements for 2022 and the corresponding rectification is a post-factum construction, to attempt to meet the necessary requirements for an investment and that Respondent is correct that they have not paid adequate consideration for the acquisition of their purported interests in the Oak Loan.
Objections to Document Request	The Claimants partially object to the production of the requested documents on the following grounds: First, the Respondent has failed to demonstrate the relevance and materiality of "Claimants' financial statements from incorporation until the present date" (emphasis added). It has not explained how financial statements pre-dating the Claimants' investments, or post-dating the Claimants' Request for Arbitration, could be of any relevance, let alone materiality, to its objection to jurisdiction *ratione personae*. Accordingly, in this respect, the Respondent has failed to explain how these documents are sufficiently relevant or material within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules.

[100] Claimants' Response to the Respondent's Request for Bifurcation, para. 42, d).

[101] Claimants' Response to the Respondent's Request for Bifurcation, *fn.* 52; Exhibits C-005 (Suffolk (Mauritius) Limited, Financial Statements for the year ended 30 June 2022), p. 19 and C-0016 (Mansfield (Mauritius) Limited, Financial Statements for the year ended 30 June 2022), p. 18.

[102] Respondent's Memorial on Jurisdiction, para. 79.

[103] Claimants' Counter-Memorial on Jurisdiction, § 32, fn. 49.

	The Claimants agree to produce Claimants' financial statements from 2016 (when they acquired their investments in the Oak Loan) until the year end of the year in which the Request for Arbitration was submitted. The Claimants note that the following financial statements are already on the record: • Silver Point Mauritius, Annual Report for the year ended 31 December 2022 (C-0029); • Suffolk (Mauritius) Limited, Financial Statements for the year ended 30 June 2022 (C-0005); • Mansfield (Mauritius) Limited, Financial Statements for the year ended 30 June 2022 (C-0016). Second, as the Claimants have explained, all three Claimants paid cash consideration for their investments.[104] The Claimants have also explained that "[t]he Claimants Suffolk and Mansfield noticed and have now rectified an error discovered in the notes to their statutory financial accounts for 2022, which referred to 'shares' instead of 'cash' payment for the acquisition of the investment. This mistake has been rectified in the equivalent notes of the 2023 statutory financial accounts, which confirm […] that Suffolk and Mansfield paid cash consideration to acquire their interests in the Oak Loan" (Counter-Memorial on Jurisdiction, fn. 49). The Claimants intended to submit the Financial Statements for the year ended 30 June 2023 for Suffolk and Mansfield to the record (as is clear from footnote 49 in the Counter-Memorial) with the Claimants' Counter-Memorial on Jurisdiction, however due to a typographical error with exhibit numbering, the exhibits were not filed with the submission. As set out above, the Claimants agree to produce Claimants' financial statements from 2016 until the year end of the year in which the Request for Arbitration was submitted. This will include the Financial Statements for the year ended 30 June 2023 for Suffolk and Mansfield. As the Claimants also explained, the bank statements provided in C-0170 and C-0171 also confirm the cash payment on 19 April 2016, which should be the end of the matter. To allege that "the corresponding rectification is a post-factum construction, to attempt to meet the necessary requirements for an investment", as the Respondent does in its request, is a serious (and baseless) allegation, that the Claimants Suffolk and Mansfield have essentially falsified their accounts. As a result, the Respondent has failed to demonstrate that "Minutes of the Board of Directors of Suffolk and Mansfield, resolutions, internal correspondence, notes, memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports

[104] Claimants' Response to the Respondent's Request for Bifurcation, para. 42.d.

	relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan" are sufficiently relevant or material within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. Third, the second aspect of the Respondent's request[105] fails to identify a "narrow and specific" requested category of Documents, and therefore fails to satisfy the requirements of Article 3.3(a)(ii) of the IBA Rules.
Reply to Objections to Document Request	Respondent takes note that Claimants will produce their financial statements from 2016 until the year end on which the Request for Arbitration was submitted, including Suffolk's and Mansfield's financial statements for the year ended 30 June 2023. Respondent accepts Claimants' limitation of the Request to only this time period. However, Respondent maintains its Request for the production of the minutes of the board of directors of Suffolk and Mansfield, resolutions, internal correspondence, notes, memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan and reiterates that these documents are relevant and material to assess whether Claimants Suffolk and Mansfield have paid cash consideration for the acquisition of their purported interests in the Oak Loan and therefore for the Respondent's objection to the Tribunal's jurisdiction *ratione materiae*. Respondent contests Claimants' objections to the document request.

[105] That is, for "Minutes of the Board of Directors of Suffolk and Mansfield, resolutions, internal correspondence, notes, memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan".

	First, Claimants object to the relevance and materiality of Respondent's request to the issue of jurisdiction *ratione personae* only on the basis of the identified timeframe. Respondent's agreement to limit the time frame of requested documents renders it moot. Second, Claimants' objection based on their assertion that "the bank statements provided in C-0170 and C-0171 also confirm the cash payment on 19 April 2016, which should be the end of the matter" should be rejected because, contrary to what Claimants allege, the bank statements provided in C-0170 and C-0171 do not unequivocally confirm that Claimants Suffolk and Mansfield paid cash consideration for the acquisition of their purported interests in the Oak Loan. In this respect, Respondent notes in particular that these are isolated bank statements of Mansfield and Suffolk which seemingly evidence that a transfer was made from Mansfield and Suffolk to their respective non-Mauritian affiliates, namely Liverpool Limited Partnership and Elliott International Ltd, 8 days after they allegedly acquired the corresponding interests in the Oak Loan from these entities. Given the amounts involved in each of these transactions, the deferral of the alleged payment by one week is, at the very least, uncommon. Also, there are no other documents on the record that evidence the terms agreed by the parties for these payments in order to allow the Respondent to confirm that these bank statements in fact correspond to payments regarding the interests in the Oak Loan. Moreover, the only other documents on record that mention the form of payment for these interests – Suffolk's and Mansfield's financial statements for the year ended 30 June 2022 – directly contradict these bank statements, as they refer to a payment agreed upon in shares. Claimants' observation the allegation that Claimants have engaged in "a post-factum construction, to attempt to meet the necessary requirements for an investment" is serious only confirms why it is important that documents be produced to permit Respondent to investigate and establish this allegation. Moreover, such allegation is justified, considering that this alleged investment was presumably the sole asset or the most significant asset of these companies, making it, to say the least, odd that such a serious accounting error in Suffolk's and Mansfield's

	financial statements with very significant impact (given that it even affects the shares issued by each company) allegedly occurred and that it was only detected by the Claimants and their auditors in 2023 (more than 6 years after the purported investment) and several months after the Respondent pointed out that these companies' financial statements for the year ended 30 June 2022 contained such a reference[106]. Third, Claimants are incorrect notes that Respondent's request for Documents relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan is overbroad. A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[107] Here, there should be no difficulty in making such a determination. Indeed, Respondent's request identifies the types of documents that would be responsive to the request, i.e., minutes of the board of directors of Suffolk and Mansfield, resolutions, internal correspondence, notes, memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports. Additionally, the scope of the Request is limited to a single change in the accounting treatment of a specific issue, i.e., the form of payment for the purported acquisition of interests in the Oak Loan by Suffolk and Mansfield. Finally, the requested documents pertain to a specified period in time, of which Claimants, by their own admission, are well aware of: "[t]he Claimants Suffolk and Mansfield noticed and have now rectified an error discovered in the notes to their statutory financial accounts for 2022, which referred to 'shares' instead of 'cash' payment for the acquisition of the investment. This mistake has been rectified in the equivalent notes of the 2023 statutory financial accounts, which confirm […] that Suffolk and Mansfield paid cash consideration to acquire their interests in the Oak Loan."[108]
Decision of the Tribunal	Granted in part. The Tribunal notes the Claimants' undertaking to produce specified documents. The Tribunal further orders the Claimants to produce Suffolk Mauritius's and Mansfield's 2023 "financial statements, as well as any Minutes of the Board of Directors of Suffolk and Mansfield, resolutions, internal correspondence, notes,

[106] *See* Respondent's Request for Bifurcation, para. 24; Respondent's Memorial on Jurisdiction, para. 79.

[107] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**).para. 6.60.

[108] *See* Claimants' Counter-Memorial on Jurisdiction, *fn.* 49.

	memos or other corporate documentation, correspondence exchanged with auditors, and auditor's notes and reports relating to Suffolk's and Mansfield's decisions to rectify their 2022 financial statements (C-0005 and C-0016) in respect of the form of payment for the purported acquisition of interests in the Oak Loan." The remaining requests are denied, as the documents are, *prima facie*, insufficiently relevant and material.

Document Request Number	**11**
Documents or Category of Documents Requested	Contemporaneous notes (before, during, or after) made concerning, or recordings (including audio or video recordings) of, Claimants' board meetings, including but not limited to Suffolk and Mansfield's 23 March 2016 (C-0009 and C-00020) and Silver Point Mauritius' 15 February 2016 (C-0227) Board Meetings at which the decision to acquire interests in the Oak Loan was purportedly made.
Relevance and Materiality according to the Requesting	Respondent has argued that there is no jurisdiction *ratione personae* over Claimants because they are not effectively managed from Mauritius.[109] Claimants argue that the official minutes of certain board meetings are evidence of independent decision-making, and that characterizing them otherwise is "self-evident mischaracterization."[110] The requested categories of documents are relevant and material to Claimants' characterization of these meeting minutes, and therefore to the question of effective management in Mauritius.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent's request covers documents relating to *all* board meetings of the Claimants, without limitation to a specific time period. It therefore fails to identify a "narrow and specific" requested category of Documents, contrary to the requirements of Article 3.3(a)(ii). Second, the Respondent has provided no explanation of how documents relating to Claimants' board meetings since their incorporation, and therefore that pre-date their investments in the Oak Loan (in the case of Suffolk and Mansfield, by many years[111]) are at all relevant, let alone material, within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. Plainly, they are not. In relation to the Respondent's explanation regarding the relevance of the materials it has requested insofar as they relate to the period *after* the Claimants' acquisition

[109] Respondent's Memorial on Jurisdiction, para. 90.

[110] Claimants' Counter-Memorial on Jurisdiction, para. 77.

[111] Suffolk was incorporated on 28 December 2007, and Mansfield on 11 January 2008 (see Memorial on the Merits, paras. 21 and 24). Silver Point Mauritius was incorporated on 28 January 2016 (Memorial on the Merits, para. 28).

	of their investments, it has failed to demonstrate how these documents are relevant, let alone material, within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules. The official minutes (at C-0009, C-0020 and C-0227) speak for themselves and do not require further contextualisation in order to assess "Claimants' characterization" of them (as set out in the Claimants' Counter-Memorial on Jurisdiction, paragraphs 77, 78 and 93). Third, any handwritten "[c]ontemporaneous notes" made concerning Claimants' board meetings, including those (in March and April 2016) at which the decision to acquire interests in the Oak Loan was purportedly made, are highly likely – more than eight years on – to have been loss or destroyed. As a result, the Respondent's request also falls foul of Article 9.2(d) of the IBA Rules.
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, Respondent's request is appropriately "narrow and specific" because there are necessarily a limited number of board meetings to which the request could apply. A request is adequately narrow and specific where "the request is adequate to enable the party on whom the request is served to judge without too much difficulty whether a particular document it has in its possession falls within the category requested or outside of it."[112] Here, the temporal boundaries of the request are necessarily limited to dates following the incorporation of Claimants: 28 December 2007 for Suffolk (Mauritius) Ltd.,[113] 11 January 2008 for Mansfield (Mauritius) Ltd.,[114] and 28 January 2016 for Silver Point Mauritius Ltd.[115] In the interest of further narrowing the request, Respondent agrees to limit the request to documents pre-dating the Request for Arbitration. Second, Claimants' assertion that "the official minutes… speak for themselves and do not require further contextualization" is without basis. To the contrary, there is good reason to doubt that the minutes speak for themselves because, *inter alia*, the minutes of Suffolk's and Mansfield's 23 March 2016 board meeting (C-0009;

[112] *See* R. Mikhailovich Khodykin, C. Mulcahy, N. Fletcher, *6. Commentary on the IBA Rules on Evidence, Article 3 [Documents]*, (**Exhibit RL-0151**).para. 6.60.

[113] *See* Claimants' Memorial on the Merits, para. 21.

[114] *See* Claimants' Memorial on the Merits, para. 24.

[115] *See* Claimants' Memorial on the Merits, para. 28.

	C-0020) are verbatim identical and recorded to have occurred on the same day at the same time.[116] That supports an inference that no genuine deliberation took place at those meetings, a conclusion which Claimants denigrate as a "self-evident mischaracterization."[117] The requested category of documents is relevant and material to demonstrating that Claimants' board meetings are pro forma exercises only, at which genuine deliberation does not occur. Third, the documents in question are reasonably likely to exist because they were created at a time where the Claimants were anticipating litigation, and because there should be a presumption that Claimants maintain corporate records created in the ordinary course of business. Moreover, Claimants' objection cannot and does not apply to more recently created documents, and therefore cannot be a basis to deny the objection as a whole. In any event, Claimants completely fail to support an objection based on IBA Rule 9.2(d) which requires an objecting party to show with "reasonable likelihood" that the loss or destruction of that document has occurred.
Decision of the Tribunal	Granted in part. The Claimants shall produce the 23 March 2016 and 15 February 2016 Board Minutes. The remaining requests are denied, as the documents are, *prima facie*, insufficiently relevant and material.

[116] *See* Respondent's Memorial on Jurisdiction, paras. 96-97.

[117] *See* Claimants' Counter-memorial on Jurisdiction, para. 77.

Document Request Number	**12**
Documents or Category of Documents Requested	Documents delivered to, or communications exchanged with, Claimants' non-Mauritian parents and affiliates between 21 December 2014 and 31 March 2015 relating to the Claimants' non-Mauritian parents' or affiliates' decisions to take direct interests in the Oak Loan through the 2015 Assignment Agreements (C-0063, C-0064 and C-0065) including but not limited to: a. Communications or documents addressing the 22 December 2014 decision of the Bank of Portugal (C-0069) and the Oak Loan; and b. Internal memoranda, investment analysis and proposals, notes, opinions, due diligence reports, communications or any similar documents relating to Claimants' parents' and affiliates' decision to take a direct interest in the Oak Loan.
Relevance and Materiality according to the Requesting Party	Respondent has argued that this Tribunal lacks jurisdiction *ratione materiae* because Claimants' non-Mauritian parents or affiliates allegedly acquired direct interests in the Oak Loan in 2015 for the purpose of bringing claims against Portugal and that, given that Claimants acquired their interests in the Oak Loan following the Bank of Portugal's Decision of 22 December 2014 (C-0069) through a "mere purchase-sale contract" entered into with their respective parents and affiliates in 2016, their purported investments could not amount to anything other than the acquisition of claims against Portugal and therefore do not satisfy, *inter alia*, the requirements of contribution and risk necessary for an investment to qualify as such under Article 1(1) of the Mauritius-Portugal BIT and Article 25 of the ICSID Convention[118]. Documents revealing the grounds, information, and knowledge behind Claimants' non-Mauritius parents or affiliates decision to acquire direct interests in the Oak Loan in 2015 are relevant and material to demonstrating that they and, in turn, Claimants, acquired their respective interests in the Oak Loan with the expectation of pursuing claims against Portugal.

[118] Respondent's Memorial on Jurisdiction, paras. 141, 142, 144, 154 and 172.

	Respondent has also argued that the Tribunal lacks jurisdiction *ratione materiae* because the 2015 Assignment Agreements and, in turn, the 2016 Assignment Agreements (C-0081; C-0085 and C-0086) were illegal in that they violated the Bank of Portugal's Decisions and Portuguese law as such Assignments were made (i) on the premise that an event of default under the Oak Loan had occurred on 29 December 2014 but pursuant to the Bank of Portugal's Decision of 11 August 2014 (R-0003) no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make payments; (ii) on the premise that the borrower under the Facility Agreement (C-0044) was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[119]. Claimants', in contrast, have argued that the Assignment Agreements were not made in violation of Bank of Portugal's Decisions and the Portuguese law as the moratorium enacted by the Bank of Portugal pursuant to such decisions did not preclude the existence of a "contractual event of default itself arising under the Facility Agreement, nor the contractual consequences (as governed by English law) that flowed from such an event" and that "Claimants' affiliates take the view that the Oak Loan was transferred to and remained in Novo Banco, while the Bank of Portugal argues that it was validly transferred back to BES"[120]. Claimants' arguments are not backed by any legal opinions, analysis or due diligence addressing the formalities and procedures required for the entering into of the Assignment Agreements in light of the Bank of Portugal's Decisions and the Facility Agreement. The documents requested are therefore relevant and material to establish the illegality of the 2015 Assignment Agreements and, accordingly, the illegality of Claimants' purported investment. Documents responsive to this request are also relevant to establish that Claimants' non-Mauritian parents or affiliates and, consequently, Claimants, have no title to their alleged investment. Indeed, as Respondent has stated "Claimants do not have title to any interest in the Oak Loan under the Portuguese law because the 2015 and 2016 Assignment Agreements are void and ineffective" [121], as they (i) violate the Bank of Portugal's Decisions and Portuguese law; and (ii) breached the terms of the Facility Agreement, due to fact that no event of default had occurred and no prior consent on the Assignment Agreements was requested and obtained from BES. Claimants, in contrast, argued that they "acquired their investments legally and those lawful assignments conferred title to the Claimants to their interests in the Oak Loan" and that the occurrence of an Event of Default exempted the need of

	prior consent for the Assignment Agreements[122]. The documents sought will establish that the 2015 and 2016 Assignment Agreements were illegal and ineffective and did not transfer title.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent has failed to explain how documents "relating to the Claimants' non-Mauritian parents' or affiliates' decisions to take direct interests in the Oak Loan through the 2015 Assignment Agreements" are sufficiently relevant or material (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules) to the Respondent's *ratione materiae* objection. These documents are plainly of no relevance to the Respondent's *ratione materiae* objection insofar as it relates to the alleged "requirements" of contribution and risk. As the Claimants elaborated in their Counter-Memorial on Jurisdiction, "[p]roperly conceived, the Claimants' investments are in the Oak Loan as originally arranged, and the bundle of rights afforded pursuant to the [Facility Agreement]".[123] Investment jurisprudence and academic commentary confirm that the acquisition of a pre-existing investment does not convert that "investment" into something short of an investment.[124] To borrow the language of the tribunal in *Standard Chartered Bank (Hong*

[119] Respondent's Memorial on Jurisdiction, paras. 192 to 197.

[120] Claimants' Counter-Memorial on Jurisdiction, paras. 199 to 201 and 207.

[121] Respondent's Memorial on Jurisdiction, paras. 216 to 225.

[122] Claimants' Counter-Memorial on Jurisdiction, paras. 225, 228 and 229.

[123] Counter-Memorial on Jurisdiction, para. 120 and Section IV.B(i) more generally.

[124] Counter-Memorial on Jurisdiction, paras. 122-123.

	Kong) v. Tanzania, the underlying investment (i.e., the Oak Loan) did not "cease[] to be an investment merely because the identity of the [l]ender[s] under the Facility Agreement" changed.[125] These documents are also of no relevance to the Respondent's *ratione materiae* objection as it relates to the alleged "illegality" of the Claimants' acquisition of their investments. As the Claimants observed in their Counter-Memorial on Jurisdiction, both Parties agree that "in accordance with law" clauses of BITs exclude from protection only those investments that involve serious or severe breaches of local law.[126] Whether the Claimants acquired their interests in the Oak Loan in serious or severe violation of Portuguese laws and regulations is an objective question of Portuguese law. Accordingly, it is impossible to see how the documents requested could be of any relevance to this objective issue. The requested documents are of no relevance to the Respondent's *ratione materiae* objection as it relates to the Claimants' title over their investments. As the Claimants explained in their Counter-Memorial on Jurisdiction, the question of whether the Claimants validly acquired their interests in the Oak Loan is an objective matter of Portuguese and English law (the latter of which governed the agreements).[127] Accordingly, it is impossible to see how these documents could be of any relevance to this objective issue. Second, the Respondent fails to provide any explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party" – i.e., the Claimants – as opposed to the Claimants' "non-Mauritian parents and affiliates". The decision to take a direct interest in the Oak Loan was made by the Claimants' non-Mauritian parents and affiliates and as such, documents relating to that decision are not within the possession, custody or control of the Claimants. Third, vast swathes of the documents requested are covered by legal privilege, within the meaning of Article 9.2(b) of the IBA Rules, since the documents concerned were created in connection with and for the purpose of providing

[125] Counter-Memorial on Jurisdiction, para. 123 referring to *Standard Chartered Bank (Hong Kong) Limited v. Tanzania, ICSID Case No. Arb/15/41,* Award, 11 October 2019, para. 251, **CL-0155**.

[126] See Counter-Memorial on Jurisdiction, Section IV.E(i).

[127] See Counter-Memorial on Jurisdiction, Section IV.E(iv); *see also* Section IV.E(ii).

	or obtaining legal advice. The combination of this with the Claimants' second objection to this request, set out immediately above, gives rise to a further impediment to the production of many of the documents requested: that the legal privilege is that of a third party to this proceeding.
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, Claimants' first objection based on the relevance and materiality of the requested documents to jurisdiction *ratione materiae*, particularly as it relates to the requirements of contribution and risk, must be rejected because Claimants' objection is wholly dependent on their legal theory regarding contribution and risk and its application to their acquisition of interests in the Oak Loan, which Respondent disputes.[128] It would be inappropriate for the Tribunal to resolve that dispute at this premature stage by granting Claimants' objection. The relevance and materiality of a requested document should be judged by reference to whether the requesting party can use the requested document to present its case[129]. Claimants notably do not dispute the relevance and materiality of the requested documents, insofar as Respondent's approach to contribution and risk is correct for determining jurisdiction *ratione materiae*.

[128] Claimants are requesting the Tribunal to determine, that *"[p]roperly conceived, the Claimants' investments are in the Oak Loan as originally arranged, and the bundle of rights afforded pursuant to the [Facility Agreement]". Investment jurisprudence and academic commentary confirm that the acquisition of a pre-existing investment does not convert that "investment" into something short of an investment. To borrow the language of the tribunal in Standard Chartered Bank (Hong Kong) v. Tanzania, the underlying investment (i.e., the Oak Loan) did not "cease[] to be an investment merely because the identity of the [l]ender[s] under the Facility Agreement" changed*." Respondent disputes this view. It maintains, as explained in the Memorial on Jurisdiction, that, properly conceived Claimants' investments were in the Assignment Agreements only, as claims against the State of Portugal, to which no investment protection is afforded. *See* Respondent's Memorial on Jurisdiction, section 3.2.1 (a) (ii) (a), paras. 142 to 157. In *Standard Chartered*, there was still a clear connection to an economic activity since the investment consisted in the sale of an interest in a lending facility necessary for the continued operation of a power generation facility. Instead, in the present case, any such link has been severed by the time Claimant acquired its investment, which amounted to nothing more than a claim against the state in the context of a bank restructuring. *See* Standard Chartered Bank (Hong Kong) Limited v. Tanzania, ICSID Case No. Arb/15/41, Award, 11 October 2019, (**Exhibit CL-0155**), paras. 232-234.

[129] *See* R. Marghitola, *Chapter 5: Interpretation of the IBA Rules*, (**Exhibit RL-0146**), page 50.

	At this stage of the proceedings, the Tribunal is not in a position to make any final determination regarding the ultimate relevance or materiality of the documents in question to the adjudication of the Parties' claims and defenses in this arbitration. Indeed, were the Tribunal to proceed to rule on Claimants' objection as a substance matter, to assess the relevance and materiality of the documents requested by Respondent, it would need to resolve several factual and legal issues, namely: (i) whether Claimants' purported investments are in the Oak Loan as originally arranged or in a non performing loan constituting claims against Portugal; (ii) whether the interests in the Oak Loan now purportedly held by the Claimants qualify as an investment for the purposes of Article 1(1) of the BIT and Article 25(1) of the ICSID Convention according to current jurisprudence and commentary; and (iii) whether Claimants' acquisition of interests in the Oak Loan qualifies as an investment. Needless to say, it would be inappropriate for the Tribunal to resolve these issues at this premature stage by granting Claimants' objection. Instead, the Tribunal should assess the relevance and materiality of the request hereunder by reference to the Respondent's case. On the Respondent's case, as thoroughly explained by the Respondent in the Memorial on Jurisdiction (i) in order for an investment tribunal to have jurisdiction, Claimants must show that they have an investment within the meaning of Article 1(1) of the BIT and Article 25(1) of the ICSID Convention, which involves demonstration that Claimants themselves made a "contribution" in Portugal's territory and undertook an investment risk[130]; and (ii) Claimants have not shown they contributed to an economic activity in Portugal nor that they undertook an investment risk, because they purportedly acquired claims against Portugal to potentially receive NCWO payments in the liquidation of BES[131]. Further, even if they had contributed to economic activity *(quod non)*, the activity relied upon by Claimants (the Oak Loan) did not amount to a contribution in Portugal's territory[132].

[130] *See* Respondent's Memorial on Jurisdiction, section 3.2.1 (a) (i), particularly paras. 126 to 140; and 3.2.1 (b) (i), particularly paras. 169 to 171.

[131] *See* Respondent's Memorial on Jurisdiction, section 3.2.1 (a) (ii) (a) and (b), particularly paras. 141, 142, 144, 154 and 172.

[132] *See* Respondent's Memorial on Jurisdiction, section 3.2.1, paras. 158 to 167.

	In this context, contrary to what Claimants argue, it is relevant and material for the Respondent's *ratione materiae* objection to ascertain whether Claimants non-Mauritian affiliates took direct interests in the Oak Loan in 2015 for the purposes of bringing claims against Portugal. Indeed, if Claimants non-Mauritian affiliates acquired claims against Portugal, that was all they could pass on to Claimants, and therefore, Claimants purported investment could never amount to an investment under Article 1(1) of the Mauritius-Portugal BIT and Article 25 of the ICSID Convention. Documents "relating to the Claimants' non-Mauritian parents' or affiliates' decisions to take direct interests in the Oak Loan through the 2015 Assignment Agreements" will show the purpose of such decision and therefore whether what was acquired by this entities and, in turn, by Claimants were indeed claims against Portugal in the context of the Resolution of BES. With respect to Claimants' considerations that the Respondent has failed to demonstrate the relevance and materiality of the requested documents for its *ratione materiae* objection insofar as it relates to the illegality and lack of title of Claimants' purported investments, Respondent refers to its considerations in reply to Claimants' objection to request No. 1. Claimants have deliberately and wrongfully mischaracterised Respondent's position on the scope of protection afforded by BITs to investments not acquired "in accordance with the laws and regulations". Indeed, Respondent has consistently maintained that the threshold for the loss of protection encompasses both serious and non-trivial violations of domestic law, as affirmed in several ICSID Tribunal decisions[133]. As such, Claimants' assertion that "both Parties" agree that "only those investments that involve serious or severe breaches of local law" do not warrant protection under the BIT is false. In any case, Respondent has sufficiently elaborated and demonstrated the seriousness and non-triviality of the illegality arising from the enaction of the 2015 Assignment Agreements and, consequently, the 2016 Assignment Agreements, so as to meet even Claimants' standard for illegality. As Respondent carefully explained, the resolution measures enacted by the Bank of Portugal through its decisions of 3 August 2014, 11 August 2014 and

[133] *See* Memorial on Jurisdiction, Section 3.2.2.

	22 December 2014 were intended to secure the inherently public interest of financial market stability by ensuring an orderly resolution of BES and safeguarding the transmission of assets from BES to Novo Banco without the risk of further capital outflows[134]. These decisions were taken both under a special legal framework – the 2014 Banking Law (namely, Article 145-A) – and an authoritative power to issue binding, imperative and self-executing acts which constitute a core expression of the Bank of Portugal's role in resolution procedures[135]. Contravention of these instruments is illegal in Portuguese law[136]. Both the 2015 and 2016 Assignment Agreements clearly breached the Bank of Portugal's Decisions as they were based on false premises aimed at circumventing the effects of those decisions: (i) on the premise that an event of default under the Oak Loan had occurred on 29 December 2014, though, pursuant to the Bank of Portugal's Decision of 11 August 2014 (R-0003), no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make payments; and (ii) on the premise that the borrower under the Facility Agreement was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[137]. The same reasoning applies to the Respondent's *ratione materiae* objection on lack of title[138]. In any event, it should be highlighted that a determination of the relevant threshold for the loss of protection under the BIT and its application to the present proceedings for the purposes of acceptance or dismissal of the Respondent contention is not to be undertaken in the current procedural stage of document production, but rather in the context of the tribunal's decision on jurisdiction. Claimants' assertion that "*the question of whether the Claimants acquired their interests in the Oak Loan in violation (serious or otherwise) of Portuguese laws and regulations is an objective one of Portuguese law*" does not diminish the importance of the Respondent's request for documents. Tribunals consider the intention

[134] *See* Memorial on Jurisdiction, paras. 189 to 190; 203-206.

[135] *See* Memorial on Jurisdiction, paras. 188.

[136] *See* Memorial on Jurisdiction, paras. 198 to 200.

[137] *See* Respondent's Memorial on Jurisdiction, paras. 192 to 197 and 216 to 225.

[138] *See* Respondent's Memorial on Jurisdiction, paras. 216 to 225.

	underlying the investor's conduct in determining whether illegality is grave[139]. The disclosure of said documents is relevant and material for the purpose of establishing Respondent's objections *ratione materiae* illegality and lack of title to jurisdiction and in assisting the Tribunal to determine the illegality of the investments and material to the outcome of the proceedings at their current stage. They will more specifically assist in establishing that the 2015 Assignment Agreements, and consequently the 2016 Assignment Agreements, were in willful disregard for Portuguese laws and regulations or, at the very least, in the absence of necessary diligence. Moreover, even on Claimants' case whereby the transfer of title is a matter to be determined in English law, the validity of such title would be examined by reference to the intention of the parties to the assignment agreements, and whether the parties, by the Assignment Agreements, were attempting to bypass foreign law.[140] Regarding Claimants' second objection that the requested documents are not in their possession, custody, or control, Respondent's reply is provided in paragraphs 31 to 38 above. Finally, regarding Claimants' third objection that "vast swathes of the documents requested are privileged", Respondent refers the Tribunal to its reply in paragraph 30 above, building on paragraph 17. Respondent's request plainly seeks documents that are not covered by privilege, such as internal memoranda, investment analyses, proposals and any similar documents created for the purpose of Claimants' non-Mauritian parents' or affiliates' decisions to take direct interests in the Oak Loan through the 2015 Assignment Agreements, namely for the purpose of internal review and approval processes within the company of such decisions. Moreover, Claimants have failed to demonstrate the necessary requirements for establishing privilege. Reliance on Article 9.2(b) of the IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and providing specific details demonstrating how such

[139] *See* Memorial on Jurisdiction, para. 184, citing *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, (Exhibit RL-0098), para. 156 (Translation provided by counsel: "And the severity will be measured by determining the relevance of the breached regulation and the intention of the investor.) (Spanish original: Y la gravedad se medirá determinando la relevancia de la normativa infringida y la intención del inversor.)

[140] *See e.g.*, *Foster v. Driscoll and Others*, [1929] 1 KB 470, (**Exhibit R-0156**). The rule in such case provides that a contract will be unenforceable in English law where "the parties have entered into their arrangement with the object and intention that an act be undertaken which is illegal in the place in which it is to be performed.".

	documents meets the criteria for legal privilege, such as the nature of the legal advice sought, the context in which the documents were created, and the relationship between the parties involved in the same. Claimants did not do any of this. Instead, Claimants limited this objection to simply stating that "the documents concerned were created in connection with and for the purpose of obtaining legal advice," without even specifying why such legal advice was required and obtained. Therefore, and to the extent that Claimants intend to exclude privileged documents from production, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege.
Decision of the Tribunal	Denied. The request for all documents over the period concerning the Claimants' parents' and affiliates' "decisions" to invest in the Oak Loan is insufficiently narrow and specific.

Document Request Number	**13**
Documents or Category of Documents Requested	Documents between 21 December 2014 and 31 March 2015 relating to Claimants' non-Mauritian parents' or affiliates' involvement in decisions to issue notices of default to Novo Banco the day after purportedly taking a direct interest in the Oak Loan, including but not limited to legal notes, due diligence reports, correspondence, and information delivered to Claimants and/or Claimants' affiliates or parents.
Relevance and Materiality according to the Requesting Party	Respondent has argued that this Tribunal lacks jurisdiction *ratione materiae* because Claimants' non-Mauritian parents or affiliates acquired direct interests in the Oak Loan in 2015 with the purpose of bringing claims against Portugal. Respondent also argued that since Claimants acquired their interests in the Oak Loan following the Bank of Portugal's Decision of 22 December 2014 through a "mere purchase-sale contract" entered into with their respective parents and affiliates in 2016, their purported investments could not amount to anything other than the acquisition of claims against Portugal. Consequently, the purported investments do not satisfy, *inter alia*, the requirements of risk and contribution necessary for an investment to qualify as such under Article 1(1) of the Mauritius-Portugal BIT and Article 25 of the ICSID Convention[141]. Documents relating to the Claimants' non-Mauritian parents' or affiliates' decision to issue the notices of default to Novo Banco the day after taking a direct interest in the Oak Loan under the concrete terms of the same documents are relevant to demonstrating that Claimants' non-Mauritian parents or affiliates had already disputed the Bank of Portugal's Decisions prior to purportedly acquiring direct interests in the Oak Loan and therefore that they acquired these interests with the purpose of bringing claims in the context of BES Resolution. Respondent has also argued that the Tribunal lacks jurisdiction *ratione materiae* because the 2015 Assignment Agreements (C-0063, C-0064 and C-0065) and, in turn, the 2016 Assignment Agreements (C-0081; C-0085 and C-0086) violated the Bank of Portugal's Decisions and the Portuguese legal framework as such Assignments were made (i) on the premise that an event of default under the Oak Loan had occurred on 29 December 2014 but pursuant to the Bank of Portugal's Decision of 11 August 2014 (R-0003) no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make

[141] Respondent's Memorial on Jurisdiction, paras. 141, 142, 144, 154 and 172.

	payments; (ii) on the premise that the borrower under the Facility Agreement was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[142]. Claimants', in contrast, have argued that the 2015 Assignment Agreements and the 2016 Assignment Agreements were not made in violation of Bank of Portugal's Decisions and the Portuguese legal framework as the moratorium enacted by the Bank of Portugal pursuant to such decisions did not preclude the existence of a "contractual event of default itself arising under the Facility Agreement (C-0044), nor the contractual consequences (as governed by English law) that flowed from such an event" and that "Claimants' affiliates take the view that the Oak Loan was transferred to and remained in Novo Banco, while the Bank of Portugal argues that it was validly transferred back to BES"[143]. However, Claimants arguments are not backed by any legal opinions, analysis, or due diligence. Also, Claimants do not provide for any documental background to shed light on the necessary formalities and procedures adopted for the notices of event of default and for the entering into of the Assignment Agreements in light of the Bank of Portugal's Decisions. Documents responsive to this request are relevant to assess how Claimants' parents and affiliates addressed the Bank of Portugal Decisions and related requirements for the declaration of an event of default and for entering into the 2015 Assignment Agreements and, consequently, to demonstrating the illegality of these Assignments as well as of the 2016 Assignment Agreements. Documents responsive to this request are also relevant to establish that Claimants non-Mauritian parents or affiliates and, consequently, Claimants, have no title to their alleged investment. Indeed, as Respondent has stated, due to fact that no event of default had occurred and no prior consent on the Assignment Agreements had been obtained from BES, "Claimants do not have title to any interest in the Oak Loan under the Portuguese law because the 2015 Assignment Agreements and, in turn, the 2016 Assignment Agreements are void and ineffective"[144]. Claimants, in contrast, based on the same arguments used to sustain the legality of their purported investments, argued that they "acquired their investments legally and those lawful assignments conferred title to the Claimants to their interests in the Oak Loan" and that the occurrence of an Event of Default exempted the need of prior

[142] Respondent's Memorial on Jurisdiction, paras. 192 to 197.

[143] Claimants' Counter-Memorial on Jurisdiction, paras. 199 to 201 and 207.

[144] Respondent's Memorial on Jurisdiction, paras. 216 to 225.

	consent for the Assignment Agreements[145]. Once again, Claimants arguments are not backed by any legal opinions, analysis or due diligence addressing the formalities and procedures required for the entering into of the Assignment Agreements in light of the Bank of Portugal's Decisions and the Facility Agreement.
Objections to Document Request	The Claimants object to the production of the requested documents on the same grounds as it objects to request no. 12: First, the Respondent has failed to explain how documents "relating to Claimants' non-Mauritian parents' or affiliates' involvement in decisions to issue notices of default to Novo Banco the day after purportedly taking a direct interest in the Oak Loan" are sufficiently relevant or material (within the meaning of paragraph 15.2 of PO1 and Article 9.2(a) of the IBA Rules) to the Respondent's *ratione materiae* objection, as it relates to the alleged "requirements" of risk and contribution, the alleged "illegality" of the Claimants' acquisition of their investments, or the Claimants' title to their investments. Second, the Respondent fails to provide any explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party" – i.e., the Claimants – as opposed to the Claimants' "non-Mauritian parents and affiliates". The decision(s) to issue notices of default to Novo Banco was not made by the Claimants, and as such, documents relating to the involvement of Claimants' non-Mauritian parents or affiliates in those decisions are not within the possession, custody or control of the Claimants. Third, vast swathes of the documents requested are covered by legal privilege, within the meaning of Article 9.2(b) of the IBA Rules, since the documents concerned were created in connection with and for the purpose of providing or obtaining legal advice. The combination of this with the Claimants' second objection to this request, set out immediately above, gives rise to a further impediment to the production of many of the documents requested: that the legal privilege is that of a third party to this proceeding.

[145] Claimants' Counter-Memorial on Jurisdiction, paras. 225, 228 and 229.

Reply to Objections to Document Request	Respondent's reply to Claimants objections to this request is provided in Request no. 12 above. Moreover, Respondent elaborates its reply as follows: First, Claimants' objection based on the alleged lack of relevance and materiality to Respondent´s *ratione materiae* objection insofar as it relates to the absence of the contribution and risk requirements must be rejected. Respondent reiterates that its *ratione materiae* objection, insofar as it relates to the requirements of contribution and risk, is based on the premise that Claimants purportedly acquired the interests in the Oak Loan to pursue claims against Portugal[146] and that any Documents showing that Claimants' non-Mauritian affiliates had already disputed the Bank of Portugal's decisions before acquiring direct interests in the Oak Loan will show exactly that. Further, Respondent adds that documents showing the Claimants non-Mauritian affiliates' involvement in the issuance of the notices of default will evidence that they, and in turn Claimants, acquired interests in the Oak Loan with the sole purpose of bringing claims, namely relating to such Decisions, against Portugal. This is so in light of the facts that (i) in Claimants' own words[147], the notices of default referred hereunder were issued by the Bank of New York Mellon, acting as agent under the Facility Agreement, on behalf of Claimants' non-Mauritian affiliates; (ii) these notices were sent on the premise that an event of default under the Oak Loan had occurred on 29 December 2014, disregarding the Bank of Portugal's Decision of 11 August 2014 (R-0003), pursuant to which no event of default could have occurred as BES "was exempted from performing its obligations" under the Oak Loan, including any obligation to make payments; (iii) these notices were sent on the premise that the borrower under

[146] *See* Respondent's Memorial on Jurisdiction, section 3.2.1 (a) (ii) (a) and (b), particularly paras. 141, 142, 144, 154 and 172.

[147] *See* Claimants' Memorial, *fn*. 122 ("On 24 February 2015, on behalf of lenders under the Facility Agreement (including the Elliott International and Silver Point Capital group companies), and in its capacity as Agent under the Facility Agreement, Bank of New York Mellon informed Novo Banco that an Event of Default under the Facility Agreement had occurred on 29 December 2014 (the date of the first Oak Loan instalment payment.").

	the Facility Agreement was Novo Banco, disregarding the Bank of Portugal's Decisions "which confirmed that BES's liability under the Oak Loan had not been transferred to Novo Banco, but remained in BES"[148]. Likewise, with respect to Claimants' considerations that Respondent has failed to demonstrate the relevance and materiality of the requested documents for its *ratione materiae* objection insofar as it relates to the illegality and lack of title of Claimants' purported investments, the relevance and materiality of the requested documents is evident considering Claimants' assertion that the Assignment Agreements were executed that way because the abovementioned Bank of Portugal's decisions did not preclude the declaration of an event of default and their execution without BES's prior consent, nor did it prevent such an event of default from being declared before Novo Banco[149]. The requested documents pertaining to decisions to issue notices of default to Novo Banco could underpin the Respondent's *ratione materiae* illegality and lack of title objections in what regards Claimants' non-Mauritian affiliates intention or lack of due diligence in performing the 2015 Assignment Agreements. Second, with respect to Claimants' arguments that the requested documents are not in their possession, custody, or control, Respondent reiterates, for the reasons provided in paragraphs 27 to 36 above, that the requested documents, insofar as they involve Claimants' non-Mauritian affiliates, should be considered within the possession, custody, and/or control of Claimants for the purposes of this request. Third, Claimants object that the requested documents are privileged. Respondent refers the Tribunal to its reply in paragraph 30 above, building on paragraph 17. Moreover, Respondent's request plainly seeks several documents that are not covered by privilege and that therefore should be disclosed in response to Respondent's request, such as internal correspondence, memoranda, or reports of Claimants' non-Mauritian affiliates and publicly available information or data used to inform the decision-making process relating to the issuance of the notices of default at stake, minutes or notes of internal meetings or discussions held in respect of the issuance of such notices of default,

[148] *See* Respondent's Memorial on Jurisdiction, paras. 192 to 197.

[149] *See* Claimants' Counter-Memorial on Jurisdiction, paras. 199 to 201 and 207.

	communications exchanged with third parties regarding such notices, including any communications exchanged between Claimants' non-Mauritian affiliates and the Bank of New York Mellon, Novo Banco, and/or any other purported holders of interests in the Oak Loan in respect of the notices of default at stake, as well as drafts or final versions of notices of default. In any event, Claimants have failed to demonstrate the necessary requirements for establishing privilege. Reliance on Article 9.2(b) of the IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and providing specific details demonstrating how such documents meets the criteria for legal privilege, such as the nature of the legal advice sought, the context in which the documents were created, and the relationship between the parties involved in the same. Claimants did not do any of this. Instead, Claimants limited this objection to simply stating that "the documents concerned were created in connection with and for the purpose of obtaining legal advice," without even specifying why such legal advice was required and obtained. Therefore, and to the extent that Claimants intend to withhold any documents responsive to this request on the grounds of privilege, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege.
Decision of the Tribunal	Granted, subject to the provisos in PO4 on (i) privilege and (ii) possession, custody or control.

Document Request Number	**14**
Documents or Category of Documents Requested	Documents from prior to May 2016 relating to Claimants' expectations as to the timing of their NCWO payments, including but not limited to any internal memoranda, business analyses, communications (including emails), and due diligence reporting.
Relevance and Materiality according to the Requesting	Respondent argues that each Claimant's acquisition of interests in the Oak Loan constitutes an abuse of process because at the time of their acquisition, the parties' dispute regarding the timing of the their NCWO payments was foreseeable.[150] Claimants deny this, arguing that, at the time of their investment, the dispute regarding the timing of the payment of their NCWO rights was unforeseeable[151] and that, instead, "a reasonable bystander in 2016 would have expected (as independent Deloitte did) that the liquidation would be largely completed by August 2016 and almost entirely completed by August 2019, with the NCWO payments made soon after"[152]. The documents responsive to this request are relevant to test the veracity of Claimants' claims regarding the foreseeability of when NCWO payments would be made.
Objections to Document Request	The Claimants object to the production of the requested documents on the following grounds: First, the Respondent has failed to provide any explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party" – the Claimants – as opposed to the Claimants' "non-Mauritian parents and affiliates".

[150] Respondent's Memorial on Jurisdiction, para. 241.

[151] Claimants' Counter-Memorial on Jurisdiction, para. 278.

[152] Claimants' Counter-Memorial on Jurisdiction, para. 273

	Second, documents responsive to this request, to the extent that they exist, would be covered by legal privilege, within the meaning of Article 9.2(b) of the IBA Rules, since the documents concerned were created in connection with and for the purpose of providing or obtaining legal advice (as set out in Article 9.4(a)).
Reply to Objections to Document Request	Respondent contests Claimants' objections to the document request. First, with respect to Claimants' argument that "Respondent has failed to provide any explanation, contrary to Article 3.3(c)(ii) of the IBA Rules, of why the Respondent "assumes the Documents requested are in the possession, custody or control of another Party" – the Claimants – as opposed to the Claimants' "non-Mauritian parents and affiliates," Respondent's reply is provided in paragraphs 31 to 38 above. In any event, the requested documents are those "relating to Claimants' expectations" and thus are likely to be documents authored by Claimants, or at the very least in their possession, custody, or control. However, Respondent is not in a position to know how files are kept and held as between Claimants, their parent companies, and affiliate companies, given the extent of integration, overlap and control. As Claimants have recognized in paragraph 25(a), some documents are held by Claimants, others by Claimants' parents and affiliates, and other by both. This objection is therefore unfounded. Second, Claimants object on the basis that the "documents responsive to this request, to the extent that they exist, would be covered by legal privilege." Respondent refers the Tribunal to its reply in paragraph 30 above, building on paragraph 17. Moreover, this claim is doubtful because the requested documents are likely to be of a business nature as to Claimants' expectations as to the return on their investment, documents which are typically not privileged. Claimants have failed to demonstrate the necessary requirements for establishing privilege. Reliance on Article 9.2(b) of the IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and providing specific details demonstrating how such documents meets the criteria for legal privilege, such as the nature of the legal advice sought, the context in which the documents were created, and the relationship between the parties involved in the same.

	Claimants did not do any of this. Instead, Claimants limited this objection to simply stating that "the documents concerned were created in connection with and for the purpose of obtaining legal advice," without even specifying why such legal advice was required and obtained. Therefore, and to the extent that Claimants intend to withhold any documents responsive to this request on the grounds of privilege, Respondent respectfully requests the Tribunal to order Claimants to identify such documents and provide sufficient detail for Respondent and the Tribunal to assess whether the exemption is justified. For this purpose, Respondent requests the Tribunal to order Claimants to prepare a privilege log, in a format to be determined by the Tribunal and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Respondent for the purpose of evaluating the claim of privilege.
Decision of the Tribunal	Granted, subject to the provisos in PO4 on (i) privilege and (ii) possession, custody or control.