

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. 6

Decision on Additional Requests for Production and Submission of Documents

Members of the Tribunal

Mr. Jeremy K. Sharpe, President of the Tribunal

Prof. Brigitte Stern, Arbitrator

Prof. Dr. Stephan Schill, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

February 7, 2025

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I. PROCEDURAL BACKGROUND

1. In accordance with Procedural Order No. 1 (**PO1**) and its Annex B (Procedural Calendar), the Parties exchanged their Requests for Document Production, as well as objections and observations, from June 25 to August 5, 2024 (the “**Document Production Phase**”).
2. The Tribunal’s decisions on the Parties’ Requests for Document Production are set out in Procedural Order No. 4 (**PO4**) dated August 8, 2024.
3. In a letter to the Tribunal dated December 19, 2024, the Respondent sought an order for the production of certain documents identified in the witness statements of [REDACTED] and [REDACTED] submitted with the Claimants’ Rejoinder on Jurisdiction (“**Respondent’s Additional Requests**”):
 - (i) The “quote from a broker-dealer” referred to in paragraph 33 of [REDACTED] witness statement (“**Respondent’s Additional Request No. 1**”);
 - (ii) The “independent valuation from [REDACTED]” referred to in paragraph 33 of [REDACTED] witness statement (“**Respondent’s Additional Request No. 2**”);
 - (iii) All documents and communications generated in the process by which Silver Point arrived at a valuation of its purported interest in the Oak Loan “based on” the quote from a broker-dealer and independent valuation from [REDACTED] (as described in paragraph 33 of [REDACTED] witness statement) (“**Respondent’s Additional Request No. 3**”);
 - (iv) All documents and communications generated in the process by which Elliott arrived at a valuation of its purported interest in the Oak Loan further to “Elliott’s internal valuation procedures” (as described in paragraph 21 of [REDACTED] witness statement) (“**Respondent’s Additional Request No. 4**”);

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- (v) All documents and communications constituting and recording the “validat[ion] by an independent valuation firm” of “Elliott’s internal valuation procedures” by which it arrived at a valuation of its purported interest in the Oak Loan (as described in paragraph 21 of ██████████ witness statement) (“**Respondent’s Additional Request No. 5**”); and
- (vi) All documents and communications reflecting the communications between ██████████ ██████████ and the Board of Directors of Silver Point Mauritius relating to ██████████ ██████████ ██████████ (“**Respondent’s Additional Request No. 6**”).
4. On December 20, 2024, the Claimants asked to be given until the week of January 6, 2025, to respond to the Respondent’s letter, citing the need to consult with their witnesses, their non-Mauritian parents and affiliates, and external parties.
 5. On the same day, the Tribunal invited the Claimants to respond to the Respondent’s letter by January 6, 2025.
 6. On January 6, 2025, the Claimants submitted their response to the Respondent’s letter of December 19, 2024. The Claimants stated that, after receiving the Respondent’s letter, they requested and obtained from their non-Mauritian parents and affiliates certain documents responsive to the Respondent’s Additional Requests. The Claimants sought permission to place on the record documents responsive to Additional Requests Nos. 1 and 2, as well as two internal valuations and validations falling within the scope of Additional Request No. 5. The Claimants objected to the Respondent’s remaining requests.
 7. On January 7, 2025, the Tribunal invited the Respondent to submit, by January 10, 2025, any comments it may have on the Claimants’ Letter of January 6.
 8. By letter of January 10, 2025, the Respondent maintained its Additional Requests Nos. 3 to 6. The Respondent further requested that the Tribunal order the Claimants to produce:

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- (i) Documentation sufficient to establish that the document produced in response to Additional Request No. 2 is the “independent valuation from [REDACTED] [REDACTED]” referred to in paragraph 33 of [REDACTED] witness statement” (“**Respondent’s Additional Request No. 7**”); and
 - (ii) The document referred to as “Our valuation at December 31, 2014,” in the document produced in response to the Respondent’s Additional Request No. 2 (“**Respondent’s Additional Request No. 8**”).
9. On January 13, 2025, the Tribunal invited the Claimants to submit, by January 15, 2025, any comments they may have on the Respondent’s Additional Requests Nos. 7 and 8.
10. On that same day, the Respondent sought leave to place on the record a declaration from the Commercial Court of Lisbon in respect of BES’s insolvency proceedings (“**Respondent’s Additional Request No. 9**”). The Tribunal invited the Claimants to submit any observations on the Respondent’s request by January 16, 2025 – a deadline later extended, at the Claimants’ request, until January 17, 2025.
11. On January 15, 2025, the Claimants sought leave to place on the record a document falling within the scope of the Respondent’s Additional Request No. 7. In particular, the Claimants requested to submit the cover email transmitting the [REDACTED] valuation (which the Claimants produced on January 6, 2025) as one consolidated Claimants’ fact exhibit **C-0277**. The Claimants objected to the Respondent’s Additional Request No. 8.
12. On January 17, 2025, the Respondent sought leave to place on the record a document from the *Registre de Commerce et des Sociétés* of Luxembourg and a certificate issued by the *Registre de L’insolvabilité* of Luxembourg concerning Oak Finance Luxembourg S.A. (“**Respondent’s Additional Request No. 10**”).
13. On the same date, in accordance with the Tribunal’s communications of January 14 and January 16, 2025, the Claimants submitted observations on the Respondent’s Additional Request No. 9.

14. On January 19, 2025, the Tribunal issued the following communication to the Parties:

The Tribunal has received and reviewed the Parties' correspondence concerning the requests for production of documents and admission of documents to the record, specifically the Respondent's letter of December 19, 2024; the Claimants' letter of January 6, 2025; the Respondent's letter of January 10, 2025; the Respondent's letter of January 13, 2025; the Claimants' letter of January 15, 2025; and the [Respondent's] letter of January 17, 2025.

Given the impending Hearing on Jurisdiction, which is scheduled to begin tomorrow, January 20, 2025, the Tribunal hereby issues its decision on the Parties' requests, with reasons to follow in a procedural order to be issued in due course.

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

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

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

15. On January 20, 2025, at the Hearing on Jurisdiction, the Tribunal discussed the Respondent's Additional Request No. 10 with the Parties. Later that day, the Claimants provided written comments on that request.
16. On January 21, 2025, at the Hearing on Jurisdiction, the Tribunal informed the Parties that it agreed to admit the documents comprising Respondent's Additional Request No. 10, with reasons to follow in a procedural order.
17. This Procedural Order confirms, and provides reasons for, the Tribunal's decisions of January 19 and 21, 2025.

II. PARTIES' ARGUMENTS AND TRIBUNAL'S ANALYSIS

A. THE RESPONDENT'S ADDITIONAL REQUESTS FOR DOCUMENT PRODUCTION

1) The Claimants' Voluntary Production of Documents Responsive to Additional Requests Nos. 1, 2, and 5

18. In their letter of January 6, 2025, the Claimants informed the Tribunal of their agreement to produce the following documents:

- (i) Factual exhibits **C-0276** and **C-0277**, in response to the Respondent's Additional Requests Nos. 1 and 2; and
- (ii) Factual exhibits **C-0278**, **C-0279**, **C-0280**, and **C-0281**, in response to the Respondent's Additional Request No. 5.¹

19. The Claimants also requested that those six factual exhibits be admitted on the record of the proceeding.

20. In its letter dated January 10, 2025, the Respondent agreed to the Claimants' request regarding factual exhibits **C-0276-0281**.

21. In its decision of January 19, 2025, the Tribunal decided to admit exhibits **C-0276-0281** (including the cover email forming part of **C-0277**) on the record.

2) The Respondent's Additional Requests for the Production of Documents

22. The Respondent requested "production of the Additional Documents, further to the Tribunal's authority under Article 43(a) of the ICSID Convention; ICSID Arbitration Rules 5 and 36(3); and paragraph 16.4 of Procedural Order No. 1."² The Respondent argued that its Additional Requests Nos. 1-5 (i) were responsive to Respondent's Request No. 1 of the Document Production Phase and

¹ Claimants' Letter of January 6, 2025, p. 3.

² Respondent's Letter of December 19, 2024, p. 2.

thus should have been produced in accordance with PO4; (ii) evidently were not privileged, as they were not included in the privilege log previously produced by the Claimants; (iii) were not confidential, as shown by the Claimants' reliance on them in their witness statements; (iv) presumably were in the Claimants' possession, custody or control, given the nature of the documents and reliance placed on them in the Claimants' witness statements, and (v) were not in the Respondent's possession.³ The Respondent further argued that, independent of its prior document requests, the Tribunal should order production of the Additional Requests based on the documents' relevance and materiality, as shown by the Claimants' reliance on the documents and their ability to shed light on investment decisions "at the center of these proceedings."⁴ Regarding Additional Request No. 6, the Respondent argued that the Claimants should have produced the documents previously, given [REDACTED] description of such documents in his witness statement.⁵ Regarding Additional Requests Nos. 7-8, the Respondent argued that the documents were in the Claimants' possession, custody or control; were relevant and material; clarified a document previously produced by the Claimants; and furnished a missing part of the analysis.⁶

23. The Claimants objected to producing documents other than those they had produced voluntarily. The Claimants considered Respondent's Additional Requests Nos. 3-5 overly broad and untimely, and as seeking documents that are not in their possession, custody or control; not relied on in the Claimants' Rejoinder on Jurisdiction; and beyond the scope of the witness statements of [REDACTED] [REDACTED] and [REDACTED], who cannot reasonably be said to have relied on such documents and communications.⁷ Regarding Additional Request No. 6, the Claimants stated that the Tribunal declined to order documents responsive to such requests and, in any event, no responsive documents

³ Respondent's Letter of December 19, 2024, pp. 2-5.

⁴ Respondent's Letter of December 19, 2024, p. 4.

⁵ Respondent's Letter of December 19, 2024, pp. 4-5.

⁶ Respondent's Letter of January 10, 2025, p. 2.

⁷ Claimants' Letter of January 6, 2025, pp. 2-4.

were found by the Claimants or ██████████.⁸ Regarding Additional Request No. 8 (the December 31, 2014, valuation), the Claimants stated that the document is not referred to in ██████████ witness statement; not relevant to the dispute; not necessary to interpret the December 31, 2015, valuation, which is a standalone document; and beyond the temporal scope of the document request (Respondent's Request No. 1) on which it is based.⁹

24. The Tribunal notes that the Claimants voluntarily produced several documents (albeit some in redacted form) responsive to the Additional Requests. These include documents that the Claimants sought and obtained from their non-Mauritian parents and affiliates.
25. The Tribunal denies the Respondent's remaining Additional Requests, for three reasons.
26. First, the Additional Requests are untimely. The Respondent could and should have made its requests much earlier. The Claimants submitted their Rejoinder on Jurisdiction (and accompanying witness statements) on November 12, 2024. The Respondent submitted its first tranche of Additional Requests nearly six weeks later, on December 21, 2024, just before the holidays and presumably while the Claimants were busy preparing for the Hearing on Jurisdiction. The Respondent failed to adequately justify the delay.
27. Second, the grounds for the Additional Requests are inadequate. The Respondent questions the process by which the Claimants obtained and produced documents from their affiliates, arguing that the "Claimants' affiliates previously withheld responsive documents."¹⁰ The Tribunal sees no evidence, however, that the Claimants themselves failed to comply with the Tribunal's document production directions in PO4.

⁸ Claimants' Letter of January 6, 2025, pp. 3-4.

⁹ Claimants' Letter of January 15, 2025, pp. 2-3.

¹⁰ Respondent's Letter of January 10, 2025, p. 3.

28. Third, the Additional Requests are prejudicial to the Claimants. The Respondent proposed, in connection with its Requests, that the Parties conclude a confidentiality undertaking. It also asked that the Claimants be ordered to remove confidentiality-related redactions from their recent production and not to redact such information from the other documents sought. This process could have required significant time and effort, distracting the Claimants from their Hearing preparation. In addition, the documents sought could have been voluminous and required significant time for review and perhaps redaction, for reasons of privilege or otherwise, further distracting the Claimants from their Hearing preparation.
29. Accordingly, the Tribunal rejects the Respondent's Additional Requests for the production of documents.

B. THE RESPONDENT'S REQUEST FOR SUBMISSION OF ADDITIONAL DOCUMENTS

30. In its Additional Request No. 9, the Respondent sought leave to place on record a declaration of the Commercial Court of Lisbon dated January 13, 2025, which concerns the status and effect of the court's May 3, 2024, Reorganizing Order in the BES insolvency proceedings. The Respondent stated: "In the Counter-Memorial on Jurisdiction, Claimants alleged that they had been recognised as BES's creditors by a decision of the Commercial Court of Lisbon verifying and ranking credits in BES's insolvency proceedings dated 3 May 2024, such that the 2015 and 2016 Assignment agreements are valid and effective."¹¹ The Respondent added: "In their Rejoinder on Jurisdiction, Claimants raised for the first time the argument that the 3 May 2024 decision had *res judicata* and *erga omnes* effects."¹² The Respondent considers the court's declaration of "utmost importance for the preservation of the principles of equality and due process."¹³ The Respondent further argues that such information "could not have been incorporated to Respondent's last written submission (Respondent's Reply on Jurisdiction) as it is new and the circumstances leading to its request are

¹¹ Respondent's Letter of January 13, 2025, p. 1.

¹² Respondent's Letter of January 13, 2025, p. 2.

¹³ Respondent's Letter of January 13, 2025, p. 2.

predicated on Claimants’ Rejoinder on Jurisdiction.”¹⁴ The Respondent therefore considers that its request meets the “special circumstances” requirement for late-filed documents under Section 16.3 of PO1, and thus should be admitted into the record of this proceeding.

31. The Claimants object to the Respondent’s request, considering it unjustified by any “special circumstances” as well as untimely. The Claimants consider that the Respondent could have submitted with its last written submission information about the status and effect of the court’s Reorganizing Order, which both the Respondent and its legal expert addressed.¹⁵ The Claimants also faulted the Respondent for having waited six months from the court’s issuance of the Reorganizing Order, and two months from the date of the Claimants’ Rejoinder, before submitting its application.¹⁶ If the Tribunal were to accept the Respondent’s request, the Claimants sought reciprocal permission to submit an additional document into the record.
32. The Tribunal does not accept that Additional Request No. 9 falls within the exception provided for in Section 16.3 of PO1. That provision states:

Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission unless the Tribunal determines that special circumstances exist based on a timely and reasoned written application followed by observations from the other party.

33. The Respondent did not identify special circumstances to justify its late filing. The Commercial Court of Lisbon issued its Reorganizing Order on May 3, 2024. The Claimants addressed the Reorganizing Order, and the legal consequences allegedly arising from that order, in their Counter-Memorial on Jurisdiction dated June 11, 2024.¹⁷ The Respondent itself addressed the Reorganizing

¹⁴ Respondent’s Letter of January 13, 2025, p. 2.

¹⁵ Claimants’ Letter of January 17, 2025, p. 2.

¹⁶ Claimants’ Letter of January 17, 2025, p. 3.

¹⁷ Claimants’ Counter-Memorial on Jurisdiction dated June 11, 2024, para. 205. The Claimants introduced the Reorganizing Order with that submission as fact exhibit C-0233.

Order, and its legal consequences, in its Reply on Jurisdiction dated October 1, 2024. The Respondent's legal expert, Professor Carneiro da Fraga, likewise addressed the Reorganizing Order in his report of September 2024.¹⁸ If the Respondent considered it important to submit further information about the status and effect of the Reorganizing Order after receiving the Claimants' Rejoinder on Jurisdiction, it should have done so expeditiously, rather than waiting two months, until the eve of the Hearing on Jurisdiction, to do so. The Tribunal thus rejected Additional Request No. 9 as untimely.

34. In its Additional Request No. 10, the Respondent sought permission to add to the record a document from the *Registre de Commerce et des Sociétés* (Companies Register) of Luxembourg and a certificate issued by the *Registre de L'insolvabilité* (Insolvency Register) of Luxembourg concerning Oak Finance Luxembourg S.A. The Respondent argues that the documents disprove the Claimants' statement that Oak Finance "no longer exists."¹⁹ At the Hearing, the Respondent argued that "special circumstances" exist for admitting the document, given the "great relevance and materiality" of the document to the issue of the alleged illegality of the Claimants' Assignment Agreements.²⁰ The Respondent further stressed the need to admit the document to prevent "misconduct" by the Claimants.²¹
35. The Claimants objected to the Respondent's request as untimely. The Claimants, however, made no "submission on the substance" of the documents.²²

¹⁸ Respondent's Reply on Jurisdiction dated October 1, 2024, paras. 332, 334; Legal Opinion of Prof. Carneiro da Fraga, pp. 48-49.

¹⁹ Respondent's Letter dated January 17, 2025, p. 1.

²⁰ Transcript, Hearing on Jurisdiction, Day 1, p. 12 (Respondent's counsel).

²¹ Transcript, Hearing on Jurisdiction, Day 1, p. 12 (Respondent's counsel).

²² Transcript, Hearing on Jurisdiction, Day 1, p. 13 (Claimants' counsel); Email from Claimants to the Tribunal dated January 20, 2025.

36. At the Hearing on Jurisdiction, the Tribunal decided to admit the Respondent’s Additional Request No. 10.²³ The Tribunal appreciates that the Respondent could and should have submitted the documents earlier, but it recognizes the importance of having documentary evidence in the record on the status of Oak Finance. The Tribunal further notes that the Claimants claim no prejudice from the admission of the document, and their witness was afforded the opportunity to testify about the status of Oak Finance.²⁴

III. ORDER

37. Without prejudice to requests for production or submission of documents in any subsequent phase of the proceeding and expressing no view on the merits of the jurisdictional arguments, the Tribunal confirms its decision to:

- (1) Accept into the record the Claimants’ fact exhibits **C-0276, C-0277, C-0278, C-0279, C-0280, and C-0281;**
- (2) Accept into the record the Respondent’s fact exhibits **R-173 and R-174;** and
- (3) Deny all other requests for the production or submission of documents.

For and on behalf of the Tribunal,

[signature]

_ Jeremy K. Sharpe
President of the Tribunal
Date: February 7, 2025

²³ Transcript, Hearing on Jurisdiction, Day 2, p. 321 (President).

²⁴ See Transcript, Hearing on Jurisdiction, Day 2, p. 345 [REDACTED] (addressing the dissolution of the Oak Finance “structure,” rather than the Oak Finance “entity”).